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Tuesday
March 7, 1989

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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

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WHEN: April 11, at 9:00 a.m.
WHERE: Office of the Federal Register, 1100 L Street NW., Washington, EC
RESERVATIONS: 202-523-5240

SALT LAKE CITY, UT

WHEN: April 12, at 9:00 a.m.
WHERE: State Office Building Auditorium, Capital Hill, Salt Lake City, UT
RESERVATIONS: Call the Utah Department of Administrative Services, 801-548-3010

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Presidential Documents

Title 3—

The President

Presidential Determination No. 89-11 of February 28, 1989

Certifications for Narcotics Source and Transit Countries

Memorandum for the Secretary of State

By virtue of the authority vested in me by Section 481(h)(2)(A)(i) of the Foreign Assistance Act of 1961, as amended by the Anti-Drug Abuse Act of 1986 (P.L. 99-570), and the Anti-Drug Abuse Act of 1988 (P.L. 100-690), I hereby determine and certify that the following major narcotics producing and/or major narcotics transit countries have cooperated fully with the United States, or taken adequate steps on their own, to control narcotics production, trafficking and money laundering:

The Bahamas, Belize, Bolivia, Brazil, Colombia, Ecuador, Hong Kong, India, Jamaica, Malaysia, Mexico, Morocco, Nigeria, Pakistan, Paraguay, Peru and Thailand.

By virtue of the authority vested in me by Section 481(h)(2)(A)(ii) of the Act, I hereby determine that it is in the vital national interests of the United States to certify the following country:

Lebanon.

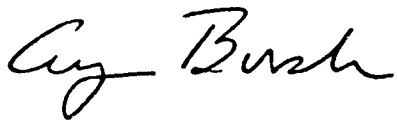
Information for these countries as required under Section 481(h)(2)(B) of the Act is enclosed.

I have determined that the following major producing and/or major transit countries do not meet the standards set forth in Section 481(h)(2)(A):

Afghanistan, Burma, Iran, Laos, Panama and Syria.

In making these determinations, I have considered the factors set forth in Section 481(h)(3) of the Act, based on the information in the International Narcotics Control Strategy Report of 1988.

You are hereby authorized and directed to report this determination to the Congress immediately and to publish it in the **Federal Register.**



THE WHITE HOUSE,
Washington, February 28, 1989.

[FR Doc. 89-5314
Filed 3-3-89; 1:13 pm]
Billing code 3195-01-M

Rules and Regulations

Federal Register
Vol. 54, No. 43
Tuesday, March 7, 1989

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Docket No. FV-88-135FR]

Raisins Produced From Grapes Grown in California; Final Redemption Date for Raisin Diversion Program Certificates

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This action changes the administrative rules and regulations of the California raisin marketing order regarding the final redemption date for Raisin Diversion Program (RDP) certificates from January 15 to December 15. December 15 would remain the final redemption date thereafter. This action was unanimously recommended by the Raisin Administrative Committee (Committee), the agency responsible for local administration of the order. This change is intended to improve the efficiency of the program.

EFFECTIVE DATE: April 6, 1989.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 447-5120.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 989 (7 CFR Part 989), both as amended, regulating the handling of raisins produced from grapes grown in California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This rule has been reviewed under Executive Order 12291 and Departmental Regulation No. 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 this action on small entities.

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 23 handlers of raisins who are subject to regulation under the raisin marketing order, and approximately 5,000 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having gross annual 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 raisins may be classified as small entities.

This final rule changes administrative rules and regulations of the raisin marketing order. This action was unanimously recommended by the Committee. The change will revise the redemption date for RDP certificates from January 15 to December 15 of each crop year if a RDP were established for the prior crop year.

The RDP gives producers the means of voluntary reducing the quantity of grapes grown for drying into raisins. Producers wishing to participate in the RDP divert their grape crop from production. In return, the producer receives the equivalent quantity of raisins from the previous year's reserve pool, which is represented by a diversion certificate, to sell to handlers as though the raisins were produced in the current crop year. The producer is then paid by a handler the established field price minus the harvest costs determined for that year. Current rules and regulations require handlers to redeem diversion certificates with the Committee by January 15.

When RDP certificates are redeemed, the handler receives a quantity of reserve pool raisins equal to the amount of diverted raisins represented on the diversion certificate. Prompt redemption of diversion certificates will allow equity holders in the reserve pool to receive payments as early as possible for those reserve pool raisins utilized to redeem diversion certificates. This action will also tend to decrease storage and insurance costs related to reserve pool raisins because those raisins would be stored in the reserve pool for a reduced period of time.

The information collection requirements contained in the section of the regulations to be amended have been previously approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB No. 0581-0093.

Based on available information, the Administrator of the AMS has determined that the issuance of this final rule will not have a significant economic impact on a substantial number of small entities.

This action was proposed in the January 11, 1989, issue of the Federal Register (54 FR 987). Comments on the proposed rule were invited from interested persons until February 10, 1989. No comments were received.

After consideration of all relevant matter presented, the information and recommendation submitted by the Committee and other available information, it is found that this final rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 989

California, Grapes, Marketing agreements and order, Raisins.

For the reasons set forth in the preamble, 7 CFR Part 989 is amended as follows.

Note.—This section will appear in the annual Code of Federal Regulations

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 989 continues to read as follows:

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

Subpart—Administrative Rules and Regulations

2. Section 989.156 is amended by revising the last sentence of paragraph (k) to read as follows:

§ 989.156 Raisin diversion program.

* * * * *

(k) * * * Diversion certificates will only be valid and honored if presented to the Committee for redemption on or before December 15 of the crop year for which they were issued.

* * * * *

Dated: March 2, 1989.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 89-5230 Filed 3-6-89; 8:45 am]

BILLING CODE 3410-02-M

FEDERAL RESERVE SYSTEM

12 CFR Part 202

[Reg. B; EC-1]

Equal Credit Opportunity; Update to Official Staff Commentary

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final official staff interpretation.

SUMMARY: The Board is publishing in final form an addition to the official staff commentary to Regulation B (Equal Credit Opportunity). The commentary applies and interprets the requirements of Regulation B and is a substitute for individual staff interpretations of the regulation. The addition addresses a recent Board preemption determination regarding a provision of New York law.

EFFECTIVE DATE: March 7, 1989.

FOR FURTHER INFORMATION CONTACT: Linda Vespereny, Staff Attorney, Division of Consumer and Community Affairs, at (202) 452-2412; for the hearing impaired only, contact Earnestine Hill or Dorothea Thompson, Telecommunications Device for the Deaf, at (202) 452-3544, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

(1) General

The Equal Credit Opportunity Act (ECOA) (15 U.S.C. 1691 *et seq.*) makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or the exercise of rights under the Consumer Credit Protection Act. This statute is implemented by the Board's Regulation B (12 CFR Part 202).

The Board also publishes an official staff commentary (EC-1, Supp. 1 to 12 CFR Part 202) to interpret the regulation. The commentary provides guidance to creditors in applying the regulation to specific transactions, and is updated periodically to address significant questions that arise. This notice contains the third update, and codifies a preexemption determination that took effect on November 11, 1988 (53 FR 45756).

(2) Revision

The following is a brief description of the revision to the commentary:

Section 202.11—Relation to State Law.

Paragraph 11(a) is added to the commentary in light of the Board's recent determination that a provision of New York law on credit discrimination is inconsistent with federal law, and that it is preempted by the ECOA and Regulation B to the extent of the inconsistency. Thus, the state of New York may not prohibit special-purpose credit programs or related inquiries that are permissible under federal law.

(3) Text of Revision

Pursuant to authority granted in section 703 of the Equal Credit Opportunity Act (15 U.S.C. 1691b), the Board amends the official staff commentary to Regulation B (12 CFR 202 Supp. I) as follows:

PART 202—[AMENDED]

1. The authority citation for Part 202 continues to read:

Authority: 15 U.S.C. 1691 et seq.

Supplement I—[Amended]

2. The addition amends the commentary (12 CFR Part 202, Supp. I) by adding comment 11(a) to read as follows:

* * * * *

Section 202.11—Relation to State Law.

11(a) *Inconsistent state laws.*

1. *Preemption determination—New York.* Effective November 11, 1988, the Board has determined that the following provisions in the state law of New York are preempted by the federal law:

- Article 15, section 296a(1)(b)—Unlawful discriminatory practices in relation to credit on the basis of race, creed, color, national origin, age, sex, marital status, or disability. This provision is preempted to the extent that it bars taking a prohibited basis into account when establishing eligibility for certain special-purpose credit programs.
- Article 15, section 296a(1)(c)—Unlawful discriminatory practice to make any record or inquiry based on race, creed, color, national origin, age, sex, marital status, or disability. This provision is preempted to the extent that it bars a creditor from requesting and considering information regarding the particular characteristics (for example, race, national origin, or sex) required for eligibility for special-purpose credit programs.

* * * * *

Board of Governors of the Federal Reserve System, March 1, 1989.

William W. Wiles,

Secretary of the Board

[FR Doc. 89-5160 Filed 3-6-89; 8:45 am]

BILLING CODE 6210-01-M

12 CFR Part 205

[Reg. E; EFT-2]

Electronic Fund Transfers; Update to Official Staff Commentary

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final official staff interpretation.

SUMMARY: The Board is publishing in final form revisions to the official staff commentary to Regulation E (Electronic Fund Transfers). The commentary applies and interprets the requirements of Regulation E and is a substitute for individual staff interpretations of the regulation. The revisions address questions that have arisen about the disclosure requirements of the regulation.

EFFECTIVE DATE: April 1, 1989.

FOR FURTHER INFORMATION: Contact Sharon T. Bowman or Thomas J. Noto, Staff Attorneys, Division of Consumer Affairs, at (202) 452-3667. For the hearing-impaired *only*, Earnestine Hall or Dorothea Thompson, Telecommunications Device for the Deaf, at (202) 452-3544, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

(1) General.

The Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) governs any transfer of funds that is electronically initiated and that debits or credits a consumer's account. This statute is implemented by the Board's Regulation E (12 CFR Part 205).

The Board has published an official staff commentary (Supp. II to 12 CFR Part 205) to interpret the regulation. The commentary is designed to provide guidance to financial institutions and others in applying the regulation to specific situations. The commentary is updated periodically to address significant questions that arise. This notice contains the seventh update,

which was proposed for comment on December 1, 1988. The revisions are effective April 1, 1989.

(2) Description of Revisions

Following is a brief description of the revisions of the commentary:

Section 205.7 Initial Disclosure of Terms and Conditions

Question 7-1. Question 7-1 addresses the situation where a financial institution provides EFT disclosures when a consumer opens an account. The question is revised to clarify that the regulation does not impose a time limit by which a consumer must sign up for an EFT service with a third party in order for the disclosures originally provided by the account holding institution to satisfy the regulation's requirements.

Question 7-2. Question 7-2 is revised to clarify that, in cases where a financial institution does not receive notice that a consumer has signed up for direct deposit of Social Security or other government payments (because there has been no prenotification and because no Form 1199A or other written agreement has been completed by the consumer and the financial institution), the financial institution must provide the necessary disclosures as soon as possible after the first electronic fund transfer has been made. In response to concerns raised by some commenters, the Board has revised its proposed language to read "as soon as reasonably possible."

In cases where the financial institution does receive prior notice of the consumer's enrollment in the direct deposit program, the financial institution must provide disclosures before the first EFT occurs. The institution has the option, of course, of providing disclosures to customers when an account is opened, as described in question 7-1.

List of Subjects in 12 CFR Part 205

Banks, banking, Consumer protection, Electronic fund transfers, Federal Reserve System, Penalties.

(3) Text of Revisions

Pursuant to authority granted in section 904 of the Electronic Fund Transfer Act, 15 U.S.C. 1693b, the Board amends the official staff commentary to Regulation E (12 CFR Part 205, Supp. II) as follows:

PART 205—[AMENDED]

1. The authority citation for Part 205 continues to read:

Authority: Pub. L. 95-630, 92 Stat. 3730 (15 U.S.C. 1693b).

2. The official staff commentary to Regulation E, Supp. II to 12 CFR Part 205, is amended by revising questions 7-1 and 7-2 for § 205.7 to read as follows:

Supplement II—Official Staff Interpretations

* * * * *

Section 205.7 Initial Disclosure of Terms and Conditions.

7-1 Q: Timing of disclosures—early disclosure. An institution is required to give initial disclosure either (1) when the consumer contracts for an EFT service or (2) before the first electronic fund transfer to or from the consumer's account. If an institution provides initial disclosures when a consumer opens a checking account and the consumer does not sign up for an EFT service until a later time, has the institution satisfied the disclosure requirements?

A: Yes, if the EFT contract is between the consumer and a third party for preauthorized electronic transfers to be initiated by the third party to or from the consumer's account. In this case, the financial institution need not repeat disclosures previously given unless the terms and conditions required to be disclosed are different from those that were given.

If, on the other hand, the EFT contract is directly between the consumer and the financial institution—for the issuance of an access device, or for a telephone bill-payment plan, for example—the institution should provide the disclosures at the time of contracting. Disclosures given before the time of contracting will satisfy the regulation only if they occurred in close proximity thereto. (§ 205.7(a))

7-2 Q: Timing of disclosures—Social Security and other government direct deposits. In the case of direct deposits by a government agency—Social Security payments, for example—how can the financial institution comply with the disclosure requirements absent prenotification, such as in cases where the government agency no longer uses Form 1199A?

A: Before direct deposit of payments such as Social Security takes place, usually the consumer and the institution both must complete a Form 1199A, and the institution can make disclosures at that time. However, if a Form 1199A (or a comparable form providing notice to the institution) is not used and there is no prenotification, the institution should provide the required disclosures as soon as reasonably possible after the first direct deposit is received, unless the institution has previously given the disclosures (see question 7-1). (§ 205.7(a))

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Board of Governors of the Federal Reserve System, March 1, 1989.

William W. Wiles,

Secretary of the Board.

[FR Doc. 89-5159 Filed 3-6-89; 8:45 am]

BILLING CODE 6210-01-M

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12 CFR Part 226

[Reg. Z; TIL-1]

Truth in Lending; Update to Official Staff Commentary

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Official staff interpretation.

SUMMARY: The Board is publishing revisions to the official staff commentary to Regulation Z (Truth in Lending). The commentary applies and interprets the requirements of Regulation Z and is a substitute for individual staff interpretations of the regulation. The revisions address a variety of questions that have arisen about the regulation, and include new material and changes in existing material. The comments address, for example, disclosure questions raised by the emergence of reverse mortgage products, questions concerning the amendments to Regulation Z affecting disclosures for adjustable-rate mortgages, and questions concerning when a third party fee may be a finance charge in a credit transaction.

DATES: Effective February 28, 1989, but compliance optional until October 1, 1989.

FOR FURTHER INFORMATION CONTACT: The following attorneys in the Division of Consumer and Community Affairs, at (202) 452-3667 or (202) 452-2412: Sharon Bowman, Michael Bylsma, Leonard Chanin, Adrienne Hurt, Thomas Noto, or Linda Vespereny.

For the hearing impaired *only*, Telecommunications Device for the Deaf (TDD), Earnestine Hill or Dorothea Thompson, at (202) 452-3544, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: (1) *General.* The Truth in Lending Act (15 U.S.C. 1601 *et seq.*) governs consumer credit transactions and is implemented by the Board's Regulation Z (12 CFR Part 226). Effective October 13, 1981, an official staff commentary (TIL-1, Supp. I to 12 CFR Part 226) was published to interpret the regulation. The commentary is designed to provide

guidance to creditors in applying the regulation to specific transactions and is updated periodically to address significant questions that arise. There have been seven general updates and one limited update so far. This notice contains the eighth general update. This update reflects material that was published in two proposed updates in 1988—a special update regarding disclosures for adjustable-rate mortgages published at 53 FR 38018 (September 29, 1988) and the proposed general update published at 53 FR 48925 (December 5, 1988). Creditors are free to rely on the revised commentary as of February 28, 1989, although they need not follow the revisions until October 1, 1989.

(2) *Revisions.* The following is a brief description of the revisions to the commentary:

Subpart A—General

Section 226.2—Definitions and Rules of Construction

2(a) Definitions

2(a)(25) "Security Interest". In the original proposal, comment 23(b)–3 would have been revised to clarify that multiple security interests in the same property need not be disclosed on rescission notices. The comment, for example, would have clarified that the disclosure that an interest is retained, as in form H–9, is adequate in a refinancing where a new mortgage is filed and a new advance is made. Several commenters suggested that the commentary also provide guidance on the specificity required of the security interest disclosure under §§ 226.6, 226.15, and 226.18. In order to clarify that the same principle holds true in other required disclosures of security interests, the substance of the proposed comment has been incorporated in new comment 2(a)(25)–6, instead of in comment 23(b)–3.

Section 226.4—Finance Charge

4(a) Definition

Comment 4(a)–3 is revised to clarify that charges imposed on the consumer by someone other than the creditor are finance charges if the creditor requires the services of the third party. For example, if a consumer cannot obtain the same credit terms from the creditor without using a loan broker, a fee imposed by the broker is a finance charge. The revised comment does not affect existing rules regarding charges which are excluded from the finance charge.

4(b) Examples of Finance Charges

Paragraphs 4(b) (7) and (8). Comment 4(b) (7) and (8)–2 is revised to clarify that insurance "written in connection with a credit transaction" does not include insurance written during an open-end credit plan if the insurance is written because of the consumer's default or because the consumer requests voluntary insurance after the opening of the plan. If insurance written during the term of the open-end plan is required by the creditor not as a result of the consumer's default, however, the insurance is written in connection with the plan. The final comment, which differs from the proposed comment, will provide identical rules for insurance written after consummation of a closed-end transaction and insurance written during the life of an open-end plan.

Subpart C—Closed-End Credit

Section 226.17—General Disclosure Requirements

17(a) Form of Disclosures

Paragraph 17(a)(1). Comment 17(a)(1)–5 is revised to provide that creditors with variable-rate transactions subject to § 226.18(f)(2) may also provide the information set forth in § 226.18(f)(1) as information directly related to the required disclosures.

17(c) Basis of Disclosures and Use of Estimates

Paragraph 17(c)(1). Comment 17(c)(1)–8 is revised to clarify the basis of disclosure for variable-rate transactions with no initial discounted or premium rate. The comment explains that creditors should base their disclosures only on the initial rate and not on any potential rate increases. The comment also has been been reorganized for clarity, but is not different in substance from the proposal.

Comments 17(c)(1)–14 and 17(c)(1)–15 are renumbered as 17(c)(1)–15 and 17(c)(1)–16, respectively. New comment 17(c)(1)–14 is added to clarify how lenders should provide disclosures for reverse mortgages. These mortgages, also known as reverse annuity or home equity conversion mortgages, typically involve the disbursement of monthly or other periodic advances to the consumer for a fixed period or until the occurrence of an event such as the sale of the house by the consumer or the consumer's death. Repayment of the loan may be required at the end of the disbursement period or at a later time; both accrued interest and principal generally are payable in one payment.

Some reverse "term" mortgages have a fixed term for the disbursement of funds to the consumer, but provide that the loan does not have to be repaid until a later time, such as when the consumer dies. The comment provides that the creditor should assume repayment will occur at the time disbursements are scheduled to end (or during a period following the date of the final disbursement which is not longer than the regular interval between disbursements). For example, in a transaction with monthly disbursements scheduled for ten years, the creditor may assume that repayment will be made in the 120th or 121st month.

The new comment also provides guidance on how creditors should make disclosures when both the period for disbursements and the date for repayment are determined solely by reference to future events, including the consumer's death. In such cases, the creditor may assume that disbursements will end upon the consumer's death (by using actuarial tables, for example). Alternatively, the creditor may assume that disbursements end upon the occurrence of the event that the creditor estimates will be most likely to occur first. If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures on the event estimated to be most likely to occur first. The creditor must assume repayment will occur at the same time the disbursements end (or during a period following the final disbursement which is not longer than the regular interval between disbursements).

The comment also provides that, in making disclosures, creditors would assume that all disbursements and accrued interest must be paid by the consumer. Thus, if a reverse mortgage has a "nonrecourse" provision providing that the consumer is not obligated for an amount greater than the value of the house, the comment explains that the disclosures must assume that the full amount disbursed will be repaid, although the creditor is permitted to explain that the consumer's contract may limit the amount that must be repaid.

Finally, the comment addresses the disclosure of shared-appreciation features associated with reverse mortgages. The commentary provides that the appreciation feature should be disclosed in accordance with either § 226.18(f)(1) or § 226.19(b), as appropriate.

Section 226.18—Content of Disclosures

18(f) Variable Rate

Paragraph 18(f)(2). Comment 18(f)(2)–1 is revised by adding a cross-reference to the commentary to § 226.17(a)(1) regarding the disclosure of additional variable-rate information as directly related information.

Section 226.19—Certain Residential Mortgage Transactions

19(b) Certain Variable-Rate Transactions

Comment 19(b)–1 is revised to clarify the disclosure of variable-rate construction loans that may be permanently financed. Under the current rules in § 226.17(c)(6), a creditor may disclose the construction and permanent financing arrangements, under § 226.18, as a single combined transaction or as separate transactions. Under revised comment 19(b)–1, a creditor is permitted to apply a similar analysis in determining the applicability of the variable-rate disclosure requirements of § 226.19(b). Thus, the creditor may treat the construction phase as a separate transaction and, if the term is one year or less, disclosures under § 226.19(b) are not required for the construction phase. The comment also makes clear that a creditor may treat the construction and permanent phases as separate and distinct transactions for purposes of determining coverage under § 226.19(b), yet still provide a single § 226.18 disclosure in accordance with the rules in § 226.17(c)(6). If the construction and permanent phases are treated as a single combined transaction with a term greater than one year, disclosures under § 226.18(f)(2) would be required. As provided in comment 17(a)(1)–5, however, the creditor may describe the variable-rate features of the combined transaction pursuant to § 226.18(f)(1).

Comment 19(b)–1 also is revised to address the disclosure requirements in assumptions of variable-rate transactions secured by the consumer's principal dwelling with a term longer than one year. The comment explains that disclosures need not be provided under § 226.18(f)(2)(ii) or 226.19(b). References to applicable sections and to particular parties are deleted as unnecessary and in order to make the comment more concise.

Paragraph 19(b)(2). Comment 19(b)(b)–1 is revised to omit references to the form of disclosures for ARM programs. New comment 19(b)(2)–3 has been added to describe the manner in which creditors may make the disclosures for each ARM program they offer.

Comment 19(b)(2)–1 also is revised to clarify the timing requirements for disclosures provided in response to a subsequent expression of interest by the consumer. Editorial changes have been made to the original proposal. The final comment makes clear that if a consumer expresses an interest in a different program, or it the consumer and creditor decide on a program different than that set forth in the disclosures that were first provided, disclosures for the new program must be provided as soon as reasonably possible.

In addressing the proposed revision to comment 19(b)(2)–1, several commenters also requested clarification of the timing requirements in situations, such as private banking arrangements, where loan terms that are not generally offered to the public are individually negotiated with a consumer. Commenters indicated that in these instances, creditors do not know the loan program terms in advance and therefore cannot prepare program disclosures until after they conclude their negotiations with the consumer. They also expressed concern that "customized" program disclosures might be needed to disclose each individually negotiated program. Accordingly, an additional sentence has been added to comment 19(b)(2)–1 to make clear that, in such cases, creditors may provide appropriate program disclosures as soon as reasonably possible after the terms have been decided upon, but in no event later than the time a non-refundable fee is paid. Furthermore, with the flexibility provided in this commentary concerning disclosure of variations in loan maturities, rate caps and frequencies of adjustments, the potential that "customized" disclosures will need to be developed for each private banking customer is significantly limited.

Comment 19(b)(2)–2 has been revised to clarify that the term to maturity of an ARM loan does not constitute a program variation. This revision corresponds to the guidance provided in new comments 19(b)(2)(viii)–5 and 19(b)(2)(x)–2 on the terms to maturity which may be used in calculating and disclosing the historical example and the initial and maximum rates and payments.

Comments 19(b)(2)–3 and –4 have been renumbered as comments 19(b)(2)–4 and –5, respectively. Based upon public comment and to permit greater flexibility for compliance with the requirements, new comment 19(b)(2)–3 has been added to describe the form for disclosures required under § 226.19(b)(2). The Comment incorporates material previously contained in comment 19(b)(2)–1 and includes new material which explains that a creditor may use either a separate disclosure form to describe each ARM program it offers or a disclosure form which describes more than one available ARM program. The comment explains that the multiple program form must disclose if any program features are available only in conjunction with certain other features. Finally, the new comment explains that multiple terms to maturity or multiple payment amortizations may be illustrated in any program disclosure form whether the form describes separate or multiple programs.

Paragraph 19(b)(2)(iii). Comment 19(b)(2)(iii)–1 differs from the proposal in two respects. The use of the term "balloon payment" has been replaced by a more specific reference to the type of transactions subject to the disclosure provisions. The comment is revised to clarify that, in transactions where paying the periodic payments will not fully amortize the loan at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor must disclose that such a payment will be required. The creditor, however, need not reflect any irregular final payment in the historical example or in the disclosure of the initial and maximum rates and payments. (The exception for all irregular final payments is an expansion of the proposed comment, and would include final payments that differ in amount due to the effect of rate changes.)

Paragraph 19(b)(2)(v). Comment 19(b)(2)(v)–1 is revised to clarify that consumer buydowns and third-party buydowns reflected in the consumer's credit obligation should be disclosed in accordance with the rules for discounted variable-rate transactions. The revised comment also makes clear that no additional disclosures relating to the buydown need be provided on the program disclosure.

Paragraph 19(b)(2)(vi). Comment 19(b)(2)(vi)–1 is revised to address the disclosures for transactions in which the interval between consummation or closing and the initial adjustment is not known—for example, when ARM loans are grouped together for sale to a secondary mortgage market purchaser. In such cases, the comment explains that lenders may disclose the timing for the first adjustment as a range of the minimum and maximum length of time from consummation or closing until the first adjustment.

Paragraph 19(b)(2)(vii). Comment 19(b)(2)(vii)–1 is revised to address the disclosures for transactions in which the

overall limitations on rate increases (and decreases) vary—for example, based on the loan features the consumer chooses or upon fluctuations in the pricing of the loan. The final comment extends the alternative disclosure rule to periodic limitations in addition to overall rate limitations. In such cases, the comment explains that the creditor may disclose the range of the lowest and highest periodic and overall rate limitations that may be applicable to the creditor's ARM transactions, and must include a statement that the consumer ask about the rate limitations that are currently applicable.

Paragraph 19(b)(2)(viii). Comment 19(b)(2)(viii)–1 is revised to clarify that, in transactions that end before the last year in the historical example, the example must illustrate all significant loan program terms such as rate limitations that would have affected the interest rate for the remaining years shown in the example.

Comment 19(b)(2)(viii)–5 is added to describe the terms to maturity or payment amortizations which may be used as a basis for the disclosures in ARM transactions. Based upon public comment and further consideration, the proposed comment has been revised. Under the final comment, creditors will be permitted to base the disclosures required under § 226.19(b)(2)(viii) and (x) for ARM loans within certain ranges upon only three maturities—five, fifteen and thirty years. Thus, a creditor who offers ARM loans for any term over one year would be permitted to make the disclosures required under these sections based on five-, fifteen- and thirty-year terms, and need not illustrate every other maturity that is offered. The comment also permits creditors to use five-, fifteen- and thirty-year term assumptions for disclosing payments based on amortizations different than the actual loan term. (Disclosures based on fifteen- and thirty-year maturities should provide payments that fairly approximate the payments for long-term ARMs. Disclosures based on a five-year maturity should provide payments that fairly approximate the payments for most short-term ARMs. Finally, the comment explains that the creditor would be required to state the term (or amortization) used in making the disclosures when using the three terms specified in the comment.)

Comment 19(b)(2)(viii)–6 is added to explain that a creditor following the alternative rule for disclosing periodic and overall rate limitations described in revised comment 19(b)(2)(vii)–1 must base the historical example upon the highest rate limitation disclosed under § 226.19(b)(2)(vii). In addition, such creditors must state the periodic or overall limitation used in the historical example.

Comment 19(b)(2)(viii)–7 also is added to explain the assumptions that can be made by a creditor following the alternative rule for disclosing the frequency of rate and payment adjustments described in revised comment 19(b)(2)(vi)–1. The comment explains that, in disclosing the historical example, the creditor may assume that the first adjustment occurred at the end of the first year in which the adjustment could occur.

Paragraph 19(b)(2)(ix). Comment 19(b)(2)(ix)–1 states that a creditor should base the example of how a consumer may calculate their actual payments on the latest payment shown in the historical example. The comment is revised to clarify that, in transactions where the latest payment shown in the historical example is not for the latest year of index values shown, a creditor may include additional examples that are based on the initial or maximum payments disclosed under § 226.19(b)(2)(x). This revision differs from the proposal in that it provides that creditors may provide the extra examples in addition to, but not as alternatives for, the example based on the last payment shown in the historical table.

Paragraph 19(b)(2)(x). Comment 19(b)(2)(x)–2 is added to allow creditors to base their calculations of the initial and maximum rates and payments upon the terms to maturity stated in new comment 19(b)(2)(viii)–5. The comment explains that the term used for making disclosures under § 226.19(b)(2)(viii) also must be used in disclosing the initial and maximum interest rates and payments.

Comment 19(b)(2)(x)–3 is added to describe how a creditor following the alternative rule for disclosing periodic and overall rate limitations described in revised comment 19(b)(2)(vii)–1 would calculate the maximum interest rate and payment. In such cases, the comment explains that the creditor must base the disclosure of the maximum rate and payment upon the highest periodic and overall rate limitation disclosed under § 226.19(b)(2)(vii). The creditor would be further required to state the periodic and overall rate limitations used in calculating the maximum rate and payment.

Comment 19(b)(2)(x)–4 also is added to explain how to calculate the initial and maximum rates and payments if a creditor follows the alternative rule for disclosing the timing of the first rate and payment adjustment described in revised comment 19(b)(2)(vi)–1. The comment explains that the creditor must assume that the first adjustment occurs at the earliest time disclosed under § 226.19(b)(2)(vi).

Section 226.20—Subsequent Disclosure Requirements

20(b) Assumptions

The proposed amendment to comment 20(b)–6 to add a cross reference to § 226.19(b) is deleted as unnecessary.

20(c) Variable-Rate Adjustments

Paragraph 20(c)(4). Comment 20(c)(4)–1 differs from the proposal in that it replaces the term "balloon payment" with a more specific reference to the type of transactions covered by the disclosure provisions. The comment is revised to clarify that the provisions of this paragraph apply to transactions in which paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance. The comment explains that the creditor should disclose any change in such a payment that results from an interest rate adjustment.

Paragraph 20(c)(5). Comment 20(c)(5)–1 is revised to clarify that the provisions of this paragraph apply only when negative amortization occurs in a transaction, and not merely because a payment is a non-amortizing or partially amortizing payment.

Section 226.24—Advertising

24(b) Advertisement of Rate of Finance Charge

Although not reprinted in this notice, comment 24(b)–5 is revised to change the references to comment 18(f)–8 to be comment 17(c)(1)–10. No substantive change is intended.

Subpart D—Miscellaneous

Section 226.25—Record Retention

25(a) General Rule

Comment 25(a)–3 is added to address the record retention requirements for variable-rate transactions that are subject to the disclosure requirements of § 226.19(b). The comment explains that maintaining written procedures for compliance with the disclosure provisions as well as retaining a sample disclosure form for each loan program will be adequate evidence of compliance. The comment also states that creditors may rely on the methods for reconstructing the required

disclosures provided for under comment 25(a)–2.

Section 226.30—Limitation on Rates

Comment 30–8 is revised to clarify that this paragraph applies to the manner of stating the maximum interest rate in the credit contract only. This paragraph does not govern how interest rate ceilings should be stated in Truth in Lending disclosures. The disclosures are governed by provisions found elsewhere in the regulation and commentary.

Comment 30–13, concerning footnote 50, is revised to clarify the requirements of the regulation after October 1, 1988. For purposes of § 226.30, the rate must be stated in the credit contract as prescribed in comment 30–8. The disclosure requirements for limitations on rate increases are described elsewhere in the regulation and commentary.

Appendix D—Multiple-Advance Construction Loans

Although not reprinted in this notice, the first sentence of comment app. D–2 is revised to delete the word "most" and to change the reference to § 226.18(f)(4) to be § 226.18(f)(1)(iv). No substantive change is intended by either revision.

List of Subjects in 12 CFR Part 226

Advertising, Banks, Banking, Consumer protection, Credit, Federal Reserve System, Finance, Penalties, Rate limitations, Truth in lending.

Text of Revisions

Pursuant to authority granted in section 105 of the Truth in Lending Act (15 U.S.C. 1604 as amended) and section 1204 of the Competitive Equality Banking Act, Pub. L. 100–86, 101 Stat. 552, the Board amends the official staff commentary to Regulation Z (12 CFR Part 226 Supp. I) as follows:

PART 266—[AMENDED]

1. The authority citation for Part 226 continues to read:

Authority: Sec. 105, Truth in Lending Act, as amended by sec. 605, Pub. L. 96–221, 94 Stat. 170 (15 U.S.C. 1604 *et seq.*); sec. 1204(c), Competitive Equality Banking Act, Pub. L. 100–86, 101 Stat. 552.

2. The revisions amend the commentary (TIL–1, 12 CFR Part 226 Supp. I) by adding comment 2(a)(25)–6; adding a sentence and a bullet at the end of comment 4(a)–3; revising the heading and text of comment 4(b) (7) and (8)–2; adding a bullet at the end of comment 17(a)(1)–5; adding two sentences after the first sentence, and revising the second and third sentences and the parenthetical material in comment 17(c)(1)–8; redesignating comments 17(c)(1)–14 and –15 to be comments 17(c)(1)–15 and –16, respectively; adding comment 17(c)(1)–14; adding parenthetical material at the end of comment 18(f)(2)–1; adding three sentences at the end of comment 19(b)–1; revising the first, third and fourth sentences, adding a sentence after the third sentence, and removing the last three sentences of comment 19(b)(2)–1; revising the third sentence and the opening clause of the second and fifth sentences of comment 19(b)(2)–2 redesignating comments 19(b)(2)–3 and –4 to be comments 19(b)(2)–4 and –5, respectively; adding comment 19(b)(2)–3; adding three sentences after the second sentence in comment 19(b)(2)(iii)–1; adding a new sentence before the parenthetical material at the end of comment 19(b)(2)(v)–1; adding four sentences and parenthetical material at the end of comment 19(b)(2)(vi)–1; adding five sentences and parenthetical material at the end of comment 19(b)(2)(vii)–1; revising the third sentence in the parenthetical material after the first sentence in comment 19(b)(2)(viii)–1; adding comments 19(b)(2)(viii)–5, –6 and –7; adding a sentence after the second sentence in comment 19(b)(2)(ix)–1; adding comments 19(b)(2)(x)–2, –3 and –4; adding a sentence after the second sentence in comment 20(c)(4)–1; revising comment 20(c)(5)–1; changing the references to "comment 18(f)–8" in the first sentence and in the first bullet of comment 24(b)–5 to be "comment 17(c)(1)–10"; adding comment 25(a)–3; revising the first sentence of comment 30–8; revising the last sentence in comment 30–13; removing the word "most" and changing the reference to "§ 226.18(f)(4)" in comment app. D–2 to be "§ 226.18(f)(1)(iv)" to read as follows:

* * * * *

Supplement 1—[Amended]

Subpart A—General

* * * * *

Section 226.2—Definitions and Rules of Construction

2(a) Definitions.

* * * * *

2(a)(25) "Security Interest".

* * * * *

6. *Specificity of disclosure.* A creditor need not separately disclose multiple security interests that it may hold in the same collateral. The creditor need only disclose that the transaction is secured by the collateral, even when security interests from prior transactions remain of record and a new security interest is taken in connection with the transaction.

* * * * *

Section 226.4—Finance Charge

4(a) *Definition.*

* * * * *

3. *Charges by third parties.* * * *

In contrast, charges imposed on the consumer by someone other than the creditor are finance charges (unless otherwise excluded) if the creditor requires the services of the third party. For example:

• A fee charged by a loan broker if the consumer cannot obtain the same credit terms from the creditor without using a broker.

* * * * *

4(b) *Example of Finance Charges.*

* * * * *

Paragraphs 4(b) (7) and (8)

* * * * *

2. *Insurance written in connection with a transaction.* Insurance sold after consummation in closed-end credit transactions or after the opening of a plan in open-end credit transactions is not "written in connection with" the credit transaction if the insurance is written because of the consumer's default (for example, by failing to obtain or maintain required property insurance) or because the consumer requests insurance after consummation or the opening of a plan (although credit sale disclosures may be required for the insurance sold after consummation if it is financed).

* * * * *

Subpart C—Closed End Credit

Section 226.17—General Disclosure Requirements

17(a) *Form of Disclosures*

Paragraph 17(a)(1)

* * * * *

5. *Directly related.* * * *

• The disclosures set forth under section 226.18(f)(1) for variable-rate transactions subject to section 226.18(f)(2).

17(c) *Basis of Disclosures and Use of Estimates. Paragraph 17(c)(1)*

* * * * *

8. *Basis of disclosures in variable-rate transactions.* * * * Creditors should base the disclosures only on the initial rate and should not assume that this rate will increase. For example, in a loan with an initial rate of 10 percent and a 5 percentage points rate cap, creditors should base the disclosures on the initial rate and should not assume that this rate will increase 5 percentage points. However, in a variable-rate transaction with a seller buydown that is reflected in the credit contract, a consumer buydown, or a discounted or preminum rate, disclosures should not be based solely on the initial terms. In those transactions, the disclosed annual percentage rate should be a composite rate based on the rate in effect during the initial period and the rate that is the basis of the variable-rate feature for the remainder of the term. (See the commentary to § 226.17(c)

for a discussion of buydown, discounted, and premium transactions and the commentary to section 226.19(a)(2) for a discussion of the redisclosure in certain residential mortgage transactions with a variable-rate feature).

* * * * *

14. *Reverse mortgages.* Reverse mortgages, also known as reverse annuity or home equity conversion mortgages, tpyically involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the loan (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these transactions, creditors must apply the following rules, as applicable:

• If the reverse mortgage has a specified period for disbursements but repayment is due only upon the occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end. In such cases, the creditor may include a statement such as "The disclosures assume that you will repay the loan at the time our payments to you end. As provided in your agreement, your repayment may be required at a different time."

• If the reverse mortgage has neither a specified period for disbursements nor a specified repayment date and these terms will be determined solely by reference to future events including the consumer's death, the creditor may assume that the disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurence of the event estimated to be most likely to occur first.)

• In making the disclosures, the creditor must assume that all disbursements and accrued interest will be paid by the consumer. For example, if the the note has a nonrecourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be disbursed will be repaid. In this case, however, the creditor may include a statement such as "The disclosures assume full repayment of the amount advanced plus accured interest, although the amount you may be required to pay is limited by your agreement."

• Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. Such loans are considered variable-rate mortgages, as described in comment 17(c)(1)–11, and the appreciation feature must be disclosed in accordance with § 226.18(f)(1). If the reverse mortgage has a variable interest rate, is written for a term greater than one year, and is secured by the consumer's principal dwelling, the shared appreciation feature must be described under § 226.19(b)(2)(vii).

* * * * *

Section 226.18—Content of Disclosures

* * * * *

18(f) Variable Rate

* * * * *

Paragraph 18(f)(2)

1. *Disclosure required.* * * * (See the commentary to § 226.17(a)(1) regarding the disclosure of certain directly related information in addition to the variable-rate disclosures required under § 226.18(f)(2).)

* * * * *

Section 226.19—Certain Residential Mortgage Transactions

* * * * *

19(b) Certain Variable-Rate Transactions

1. *Coverage.* * * * In determining whether a construction loan that may be permanently financed by the same creditor is covered under this section, the creditor may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or as a single combined transaction. For purposes of the disclosures required under section 226.18, the creditor may nevertheless treat the two phases either as separate transactions or as a single combined transaction in accordance with section 226.17(c)(6). Finally, in any assumption of a variable-rate transaction secured by the consumer's principal dwelling with a term greater than one year, disclosures need not be provided under sections 226.18(f)(2)(ii) or 226.19(b).

* * * * *

Paragraph 19(b)(2)

1. *Disclosure for each variable-rate program.* A creditor must provide disclosures to the consumer that fully describe each of the creditor's variable-rate loan programs in which the consumer expresses an interest. * * * Disclosures must be given at the time an application form is provided or before the consumer pays a nonrefundable fee, whichever is earlier. If program disclosures cannot be provided because a consumer expresses an interest in individually negotiating loan terms that are not generally offered, disclosures reflecting those terms may be provided as soon as reasonably possible after the terms have been decided upon, but not later than the time a non-refundable fee is paid. If a consumer who has received program disclosures subsequently expresses an interest in other available variable-rate programs subject to 226.19(b)(2), or the creditor and consumer decide on a program for which the consumer has not received disclosures, the creditor must provide appropriate disclosures as soon as reasonably possible. * * *

2. *Variable-rate loan program defined.* * * * For example, separate loan programs would exist based on differences in any of the following loan features: * * * In addition, if a loan feature must be taken into account in preparing the disclosures required by § 226.19(b)(2)(viii) and (x), variable-rate loans that differ as to that feature constitute separate programs under § 226.19(b)(2). * * * For example, separate programs would not exist based on differences in the following loan features: * * *

3. *Form of program disclosures.* A creditor may provide separate program disclosure forms for each ARM program it offers or a single disclosure form that describes multiple programs. A disclosure form may consist of more than one page. For example, a creditor may attach a separate page containing the historical payment example for a particular program. A disclosure form describing more than one program need not repeat information applicable to each program that is described. For example, a form describing multiple programs may disclose the information applicable to all of the programs in one place with the various program features (such as options permitting conversion to a fixed rate) disclosed separately. The form, however, must state if any program feature that is described is available only in conjunction with certain other program features. Both the separate and multiple program disclosures may illustrate more than one loan maturity or payment amortization—for example, by including multiple payment and loan balance columns in the historical payment example. Disclosures may be inserted or printed in the *Consumer Handbook* (or a suitable substitute) as long as they are identified as the creditor's loan program disclosures.

* * * * *

Paragraph 19(b)(2)(iii)

1. *Determination of interest rate and payment.* * * * In transactions where paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor must disclose this fact. For example, the disclosure might read, "Your periodic payments will not fully amortize your loan and you will be required to make a single payment of the periodic payment plus the remaining unpaid balance at the end of the loan term." The creditor, however, need not reflect any irregular final payment in the historical example or in the disclosure of the initial and maximum rates and payments. * * *

* * * * *

Paragraph 19(b)(2)(v)

1. *Discounted and premium interest rate.* * * * In a transaction with a consumer buydown or with a third-party buydown that will be incorporated in the legal obligation, the creditor should disclose the program as a discounted variable-rate transaction, but need not disclose additional information

regarding the buydown in its program disclosures. * * *

Paragraph 19(b)(2)(vi)

1. *Frequency.* * * * In certain ARM transactions, the interval between loan closing and the initial adjustment is not known and may be different from the regular interval for adjustments. In such cases, the creditor may disclose the initial adjustment period as a range of the minimum and maximum amount of time from consummation or closing. For example, the creditor might state: "The first adjustment to your interest rate and payment will occur no sooner than 6 months and no later than 18 months after closing. Subsequent adjustments may occur once each year after the first adjustment." (See comments 19(b)(2)(viii)–7 and 19(b)(2)(x)–4 for guidance on other disclosures when this alternative disclosure rule is used.)

Paragraph 19(b)(2)(vii)

1. *Rate and payment caps.* * * * The creditor need not disclose each periodic or overall rate limitation that is currently available. As an alternative, the creditor may disclose the range of the lowest and highest periodic and overall rate limitations that may be applicable to the creditor's ARM transactions. For example, the creditor might state: "The limitation on increases to your interest rate at each adjustment will be set at an amount in the following range: Between 1 and 2 percentage points at each adjustment. The limitation on increases to your interest rate over the term of the loan will be set at an amount in the following range: Between 4 and 7 percentage points above the initial interest rate." A creditor using this alternative rule must include a statement in its program disclosures suggesting that the consumer ask about the overall rate limitations currently offered for the creditor's ARM programs. (See comments 19(b)(2)(viii)–6 and 19(b)(2)(x)–3 for an explanation of the additional requirements for a creditor using this alternative rule for disclosure of periodic and overall rate limitations.) * * *

Paragraph 19(b)(2)(viii)

1. *Index movement.* * * * For the remaining ten years, 1982–1991, the creditor need only show the remaining index values, margin and interest rate and must continue to reflect all significant loan program terms such as rate limitations affecting them.) * * *

* * * * *

5. *Term of the loan.* In calculating the payments and loan balances in the historical example, a creditor need not base the disclosures on each term to maturity or payment amortization that it offers. Instead, disclosures for ARMs may be based upon terms to maturity or payment amortizations of 5, 15 and 30 years, as follows: ARMs with terms or amortizations from over 1 year to 10 years may be based on a 5-year term or amortization; ARMs with terms or amortizations from over 10 years to 20 years may be based on a 15-year term or amortization; and ARMs with terms or amortizations over 20 years may be based on a 30-year term or amortization. Thus, disclosures for ARMs offered with any term from over 1 year to 40 years may be based solely on terms of 5, 15 and 30 years. Of course, a creditor may always base the disclosures on the actual terms or amortizations offered. If the creditor bases the disclosures on 5-, 15- or 30-year terms or payment amortization as provided above, the term or payment amortization used in making the disclosure must be stated.

6. *Rate caps.* A creditor using the alternative rule described in comment 19(b)(2)(vii)–1 for disclosure of rate limitations must base the historical example upon the highest periodic and overall rate limitations disclosure under section 226.19(b)(2)vii). In addition, the creditor must state the limitations used in the historical example. (See comment 19(b)(2)(x)–3 for an explanation of the use of the highest rate limitation in other disclosures.)

7. *Frequency of adjustments.* In certain transactions, creditors may use the alternative rule described in comment 19(b)(2)(vi)–1 for disclosure of the frequency of rate and payment adjustments. In such cases, the creditor may assume for purposes of the historical example that the first adjustment occurred at the end of the first full year in which the adjustment could occur. For example, in an ARM in which the first adjustment may occur between 6 and 18 months after closing and annually thereafter, the creditor may assume that the first adjustment occurred at the end of the first year in the historical example. (See comment 19(b)(2)(x)–4 for an explanation of how to compute the maximum interest rate and payment when the initial adjustment period is now known.)

Paragraph 19(b)(2)(ix)

1. *Calculation of payments.* * * * However, in transactions in which the latest payment shown in the historical example is not for the latest year of index values shown (such as in a five-year loan), a creditor may provide additional examples based on the initial and maximum payments disclosed under § 226.19(b)(x). * * *

Paragraph 19(b)(2)(x)

* * * * *

2. *Term of the loan.* In calculating the initial and maximum payments the creditor need not base the disclosures on each term to maturity or payment amortization offered under the program. Instead, the creditor may follow the rules set out in comment 19(b)(2)(viii)–5. In calculating the initial and maximum payment, the terms to maturity or payment amortizations selected for the purpose of making disclosures under § 226.19(b)(2)(viii) must be used. In addition, creditors must state the term or payment amortization used in making the disclosures under this section.

3. *Rate caps.* A creditor using the alternative rule for disclosure of interest rate limitations described in comment 19(b)(2)(vii)–1 must calculate the maximum interest rate and payment based upon the highest periodic and overall rate limitations disclosed under § 226.19(b)(2)(vii). In addition, the creditor must state the rate limitations used in calculating the maximum interest rate and payment. (See comment 19(b)(2)(viii)–6 for an explanation of the use of the highest rate limitation in other disclosures.)

4. *Frequency of adjustments.* In certain transactions, a creditor may use the alternative rule for disclosure of the frequency of rate and payment adjustments described in comment 19(b)(2)(vi)–1. In such cases, the creditor must base the calculations of the initial and maximum rates and payment upon the earliest possible first adjustment disclosed under § 226.19(b)(2)(vi). (See comment 19(b)(2)(viii)–7 for an explanation of how to disclose the historical example when the initial adjustment period is not known.)

* * * * *

Section 226.20—Subsequent Disclosure Requirements

* * * * *

20(c) Variable-Rate Adjustments

* * * * *

Paragraph 20(c)(4).

1. *Contractual effects of the adjustment.* * * * In transactions where paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the amount of the adjusted payment must be disclosed if such payment has changed as a result of the rate adjustment. * * *

Paragraph 20(c)(5).

1. *Fully-amortizing payment.* This paragraph requires a disclosure only when negative amortization occurs as a result of the adjustment. A disclosure is not required simply because a loan calls for non-amortizing or partially amortizing payments. For example, in a transaction with a five-year term and payments based on a longer amortization schedule, and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor would not have to disclose the payment necessary to fully amortize the loan in the remainder of the five-year term. A disclosure is required, however, if the payment disclosed under § 226.20(c)(4) is not sufficient to prevent negative amortization in the loan. The adjustment notice must state the payment required to prevent negative amortization. (This paragraph does not apply if the payment disclosed in § 226.20(c)(4) is sufficient to prevent negative amortization in the loan but the final payment will be a different amount due to rounding.)

* * * * *

Subpart D—Miscellaneous

* * * * *

Section 226.25—Record Retention

25(a) General Rule

* * * * *

3. *Certain variable-rate transactions.* In variable-rate transactions that are subject to the disclosure requirements of § 226.19(b), written procedures for compliance with those requirements as well as a sample disclosure

form for each loan program represent adequate evidence of compliance. (See comment 25(a)-2 pertaining to permissible methods of retaining the required disclosures.)

* * * * *

Section 226.30—Limitation on Rates

* * * * *

8. *Manner of stating the maximum interest rate.* The maximum interest rate must be stated in the credit contract either as a specific amount or in any other manner that would allow the consumer to easily ascertain, at the time of entering into the obligation, what the rate ceiling will be over the term of the obligation. * * *

* * * * *

13. *Transition rules.* * * * On or after that date, creditors must have the maximum rate set forth in their credit contracts and, where applicable, as part of their truth in lending disclosures in the manner prescribed in the applicable sections of the regulation.

Board of Governors of the Federal Reserve System, February 28, 1989.

William W. Wiles,

Secretary of the Board.

[FR Doc. 89-5161 Filed 3-6-89; 8:45 am]

BILLING CODE 6210-01-M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Rev. 7; Amdt. 4]

Business Loans

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: This rule implements section 113 of Pub. L. 100-590 (approved November 3, 1988) which authorizes the issuance by SBA of trust certificates representing ownership of all or a fractional part of the SBA-guaranteed portions of financings made to State and local development companies under Title V of the Small Business Investment Act, 15 U.S.C. 695, *et seq.*, by amending 13 CFR 120.709. The amendment removes the exclusion of Title V (section 502) loans from eligibility for pool formation and requires that such trust certificates be separately issued.

EFFECTIVE DATE: March 7, 1989.

ADDRESS: For further information contact Allan Mandel, Assistant Deputy Associate Administrator for Financial Assistance, Small Business Administration, 1441 L Street NW., Room 804, Washington, DC 20416. Telephone (202) 653-6696.

SUPPLEMENTARY INFORMATION: Prior to the amendment by section 113 of Pub. L. 100-590, the guaranteed portions of loans made pursuant to section 7(a)(13) of the Small Business Act (15 U.S.C. 636(a)(13), *i.e.*, Title V of the Small Business Investment Act, 15 U.S.C. 695 *et seq.*) were excluded from the authority given to SBA to issue trust certificates against pools of SBA-guaranteed loan portions [section 5(g), 15 U.S.C. 634(g)]. The cited statutory amendment now extends such pooling authority to pools formed with loans made under said Title V, which includes loans made pursuant to section 502 of that title, 15 U.S.C. 696. Accordingly, it became necessary to amend 13 CFR 120.709 to strike the parenthetical exclusion of Title V loans from pool eligibility, and replace it with a clause authorizing separate trust certificates issued against pools of loans guaranteed by SBA pursuant to section 502 of the Small Business Investment Act.

Pursuant to 5 U.S.C. 553(d), publication for public comment of the amendment here set forth is unnecessary for the following reasons:

(1) The amendment does no more than implement without change a statutorily mandated authority; and

(2) Immediate notification to the public of the new limit is essential and in the public interest. Since no notice of proposed rulemaking is required by section 553, no regulatory flexibility analysis is required under the Regulatory Flexibility Act, specifically 5 U.S.C. 603.

SBA certifies that this rule does not have federalism implications warranting the preparation of a Federal Assessment in accordance with Executive Order 12612.

For purposes of Executive Order 12291, SBA has determined that the rule is not a major rule. The new pooling authority will neither increase nor decrease SBA's authorized loan volume; it will merely facilitate the sale of these guaranteed loans to investors. In this regard, we estimate that the pricing advantage will be less than $5 million annually. Therefore, the annual economic effect on the national economy will not exceed $100 million. SBA is also certain that this rule will not cause an increase in costs for consumers, individual industries, Federal, State or local government agencies or geographic regions, or have adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based businesses to compete with foreign-based businesses in domestic or export markets.

There are no additional reporting or recordkeeping or other compliance requirements inherent in this final rule which would be subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35. There are no Federal rules which duplicate, overlap or conflict with this final rule. There are no alternative means to accomplish the objectives of this final rule.

List of Subjects in 13 CFR Part 120

Loan programs/business, Small business.

Accordingly, pursuant to the authority contained in sections 5(b)(6) and 5(g)(1) of the Small Business Act [15 U.S.C. 634(b)(6) and 634(g)(1)], SBA hereby amends Part 120, Chapter I, Title 13, Code of Federal Regulations, as follows:

PART 120—BUSINESS LOAN POLICY

1. The authority citation for Part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6) and 636 (a) and (h).

2. Section 120.709 is amended by revising paragraph (a)(2) to read as follows:

§ 120.709 Eligible loans for pools.

(a) * * *

(2) Be guaranteed under the Small Business Act, as amended, except that loans guaranteed under section 502 of the Small Business Investment Act, 15 U.S.C. section 696 (relating to development companies), shall be pooled separately from other pools and separate trust certificates issued therefor);

* * * * *

(Catalogue of Federal Domestic Assistance Programs, No. 59.012, Small Business Loans and 59.013 State and Local Development Company Loans.)

Dated: January 30, 1989.

James Abdnor,

Administrator.

[FR Doc. 89-5119 Filed 3-6-89; 8:45 am]

BILLING CODE 8025-01-M

13 CFR Part 129

Management Assistance; International Trade

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: In compliance with the Small Business International Trade and Competitiveness Act, Pub. L. No. 100-418, SBA is amending its regulations on international trade to reflect changes made to SBA's Office of International Trade. The rule sets forth the services the Office of International Trade will provide to assist small businesses

increase their ability to compete in international markets.

EFFECTIVE DATE: March 7, 1989.

FOR FURTHER INFORMATION CONTACT: Julius Toma (202) 653-7794.

SUPPLEMENTARY INFORMATION: On December 9, 1988, SBA published the proposed rule with a 30 day comment period. (53 FR 49675) One comment was received. That comment stated a concern that the proposed rule created programs which were duplicative of services currently available from other Federal agencies. Further, the comment stated a belief that the states were in a better position to understand and service the needs of small businesses involved in exporting, and that any federal program should therefore contain sufficient flexibility to allow the states to identify priority areas in the promotion of international trade. These comments were taken into consideration in formulation of the final rule but were not adopted because SBA is statutorily obligated to provide the services contained in the rule.

This rule incorporates into existing regulations changes made to the SBA Office of International Trade by the provisions of the Small Business International Trade and Competitiveness Act Pub. L. 100-418 (1988).

Section 129.100 of the rule reflects Congressional policy on small business international trade and competitiveness. That policy requires SBA to cooperate with the Department of Commerce and other relevant Federal and State agencies to aid and assist small businesses to increase their competitive abilities in international markets. In carrying out its decisions and actions, the Office of International Trade will be guided by principles enumerated in the statute and restated in the rule, § 129.100(a) through (f).

Section 129.200 of the rule reflects greater statutory specification of the Office's activities. Information on existing trade promotion, trade finance, trade adjustment, trade remedy assistance and trade data collection programs will be disseminated and marketed through a distribution network composed of SBA and Department of Commerce regional and local offices and Small Business Development Centers (SBDCs).

Small businesses interested in market research, identifying areas of demand in foreign markets, or sub-sectors of the small business community with strong export potential will be encouraged to use SBA's Export Information System (XIS) Data Reports, available through SBA regional, local or SBDC offices. Small businesses will also be advised as to the many sources of market research available through the Department of Commerce, such as International Market Research studies or Country Market Surveys.

Small businesses considering the formation of international joint ventures will be advised as to the resources available to identify potentially compatible firms, including the Department of Commerce's Export Mailing List Service and Trade Opportunities Program.

The Office, through the distribution network, will also make available to small business exporters information on existing domestic and foreign credit checking agencies that screen foreign and domestic firms for commercial and credit purposes.

Information on the availability of existing translation services will be identified and promoted through the distribution network, other Federal agencies, and relevant state and local export promotion programs.

Information and assistance in the formation and utilization of export trading companies, export management companies and research and development pools will be provided in cooperation with the Department of Commerce's Office of Export Trading Company Affairs.

Small businesses interested in obtaining counseling with respect to initiating and participating in any procedures relating to the administration of the United States trade laws will be advised of services provided by the Trade Remedy Assistance Office of the International Trade Commission or referred to the national coordinator of the Export Legal Assistance Network (ELAN). ELAN is a nationwide network of attorneys knowledgeable in export-related matters who have agreed to provide free initial consultations to small businesses new to the export market. The network includes a number of attorneys with expertise in trade remedy proceedings who will participate under the same agreement.

Section 129.300 of the rule relates to small business access to export financing programs. The Office will facilitate the access of small businesses to relevant export and pre-export financing programs of the Export-Import Bank, SBA and the private sector. This will be carried out by marketing existing Federal programs to financial institutions and the small business community. Additional training will also be provided to appropriate SBA personnel on export finance programs of SBA and the Export-Import Bank. A series of export finance briefings and education programs will be used to encourage financial intermediaries, such as lending institutions, to utilize existing Federal and State export financing programs.

Section 129.400 provides that the Office will work with experts in relevant fields to develop recommendations for policies and programs that will actively assist small businesses in the export process. The recommendations will be developed at a seminar to be held within one year from the date of enactment of the statute. The seminar will also be used to make recommendations on the utility of a subsequent international conference on small business and trade.

Compliance With Executive Orders 12291 and 12612, the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., and the Paperwork Reduction Act 44 U.S.C. Chapter 35

Executive Order 12291

For purposes of E.O. 12291, SBA has determined that this rule is not a major rule, because it will not have an economic impact of over $100 million annually. The total Office budget does not exceed $1.5 million and the primary effect of the rule is to modify program office operations. The rule will not increase costs to consumers, individual industries, Federal and State government agencies or geographic regions, nor can it have an adverse effect on competition, employment investment, productivity, innovation or the ability of U.S. based businesses in domestic or export markets.

Regulatory Flexibility Act

For purposes of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, SBA certifies that this rule will not have a significant economic impact on a substantial number of small entities because the primary effect will be to modify program office operations.

Paperwork Reduction Act

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA certifies that this rule would not impose any additional reporting or record-keeping requirements.

Executive Order 12612

This rule will not have federalism implications warranting the preparation of a Federalism Asssessment in accordance with E.O. 12612.

List of Subjects in 13 CFR Part 129

Management assistance programs, International Trade.

For the reasons set forth above, Part 129 of Title 13, Code of Federal Regulations, is amended as follows:

PART 129—[AMENDED]

1. The authority citation for Part 129 is revised to read as follows:

Authority: Title VIII of Pub. L. 100-418, Secs. 2 and 8, Small Business Act, as amended (15 U.S.C. 631, 637(b); secs. 7(i) and 7(j) of the Small Business Act, as amended (15 U.S.C. 636 (i) and (j); sec. 302(c)(2), Domestic Volunteer Service Act, Pub. L. 93-113, 87 Stat. 404; E.O. 11871, dated July 18, 1975.

§§ 129.1 through 129.4 [Designated as Subpart A]

§ 129.5 [Removed]

§§ 129.6 through 129.9 [Redesignated as §§ 129.5 through § 129.8]

2. Sections 129.1 through 129.4 are designed as "Subpart A—General," § 129.5 is removed, §§ 129.6 through 129.9 are redesignated as §§ 129.5 through 129.8 and are designated as "Subpart B—Service Corps of Retired Executives (SCORE) and Active Corps of Executives (ACE)—Payment of Out-of-Pocket Expenses to Volunteers," and a new Subpart C is added and reserved.

3. A new Subpart D consisting of §§ 129.100 through 120.400, is added to read as follows:

Subpart D—Office of International Trade

129.100 Policy.
129.200 Export assistance.
129.300 Access to export financing programs.
129.400 Stimulating small business exports.

Subpart D—Office of International Trade

§ 129.100 Policy.

It is the declared policy of Congress that the Small Business Administration, acting in cooperation with the Department of Commerce and other relevant Federal and State agencies, should aid and assist small businesses to increase their ability to compete in international markets by:

(a) Enhancing their ability to export;

(b) Facilitating technology transfers;

(c) Enhancing their ability to compete effectively and efficiently against imports;

(d) Increasing the access of small businesses to long-term capital for the purchase of new plant and equipment used in the production of goods and services involved in international trade;

(e) Disseminating information concerning State, Federal, and private programs and initiatives to enhance the ability of small businesses to compete in international markets; and

(f) Ensuring that the interests of small businesses are adequately represented in bilateral and multilateral trade negotations.

§ 129.200 Export assistance.

SBA's Office of International Trade offers several services to assist small businesses increase their competitive abilities in international markets.

(a) The Office works in close cooperation with the Department of Commerce and other Federal agencies, Small Business Development Centers (SBDCs) engaged in export promotion efforts, regional and local SBA offices, the small business community, and relevant state and local export promotion programs to provide information to small businesses on:

(1) Existing trade promotion, trade finance, trade adjustment, trade remedy assistance and trade data collection programs through use of the SBA's regional, district and branch offices and the SBDC network;

(2) Marketing, including computerized marketing data and marketing leads;

(3) The formation of joint ventures;

(4) Existing programs which prescreen foreign buyers for commercial and credit purposes;

(5) Existing translation services, including those available through colleges and universities participating in the SBDC program; and

(6) Conferences on exporting and international trade sponsored by the public and private sector.

(b) In addition, the Office of International Trade works with the Department of Commerce, the International Trade Commission, and other Federal agencies, Small Business Development Centers (SBDCs) engaged in export promotion efforts, regional and local SBA offices, the small business community, and relevant state and local export promotion programs to:

(1) Identify sub-sectors of the small business community with strong export potential;

(2) Identify areas of demand in foreign markets;

(3) Assist in increasing international marketing by developing a mechanism to link potential sellers and buyers;

(4) Assist small businesses in the formation and utilization of export trading companies, export management companies and research and development pools authorized under section 9 of the Small Business Act, 15 U.S.C. 631, *et seq.*; and

(5) Assist small businesses in obtaining counseling with respect to initiating and participating in any proceedings relating to the administration of the United States trade laws.

§ 129.300 Access to export financing programs.

The Office of International Trade works in cooperation with the Export-Import Bank of the United States, the Department of Commerce, other relevant Federal agencies, and the States to develop programs through which export specialists in SBA's regional offices, regional, district and branch loan officers, and SBDC personnel can facilitate the access of small businesses to relevant export and pre-export financing programs available from the Export-Import Bank, the SBA and the private sector. Such programs include:

(a) Providing information to small businesses on financing available under various Export-Import Bank programs;

(b) Assisting in the development of financial intermediaries and facilitating the access of those intermediaries to existing financing programs; and

(c) Promoting greater participation by private financial institutions in export finance, particularly those institutions already participating in loan programs under the Small Business Act, 15 U.S.C. 631 *et seq.*

§ 129.400 Stimulating small business exports.

The Office of International Trade works with experts in the fields of international trade and small business development and representatives of small businesses, associations, the labor community, academic institutions, and Federal, State and local governments to develop recommendations designed to stimulate exports from small businesses.

Date: February 9, 1989.

James Abdnor,

Administrator.

[FR Doc. 89-5120 Filed 3-6-89; 8:45 am]

BILLING CODE 8025-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1260

Changes to NASA Grant and Cooperative Agreement Handbook

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This rule eliminates unnecessary administrative burdens on sponsored research by applying the most successful subset of the Florida

Demonstration Project procedures to all NASA research grants.

EFFECTIVE DATE: March 14, 1989.

FOR FURTHER INFORMATION CONTACT: W.A. Greene, Chief, Regulations Development Branch, Procurement Policy Division (Code HP), Office of Procurement, NASA, Washington, DC 20546, Telephone: (202) 453-8923.

SUPPLEMENTARY INFORMATION:

Background

By memorandum of May 18, 1988, to the heads of executive departments and establishments, Mr. Joseph R. Wright, Jr., Deputy Director, Office of Management and Budget, provided guidance to reduce unnecessary administrative burdens on sponsored research projects and authorized the agencies to make routine use, as appropriate, of the most successful subset of procedures developed during the "Florida Demonstration Project."

NASA implemented the OMB guidance in an interim rule with request for comments, published in the **Federal Register** of August 4, 1988 (53 FR 29328). Responses were received from a total of nine individual universities, university systems, and university associations. While all respondents were supportive of the rule, a number of suggestions for improvement were made, resulting in the following actions:

1. The general foreign travel approval requirement has been eliminated. Further approval is no longer required for certain types of travel if described in the proposal.

2. Prior approval requirements for most subcontracting and purchase of nontechnical property have been reduced. Treatment of items described as "of a nontechnical nature" is clarified. The $5,000 approval requirement for items not in the proposal is retained, pending further Federal Demonstration Project experiences.

3. These changed requirements (February 1989) may be applied to grants bearing the version (July 1988) contained in the interim rule. Such application is at the grantee's option and requires no additional paperwork.

These changes will be included in the next modification to the NASA Grant and Cooperative Agreement Handbook (NHB 5800.1). The Handbook, a loose-leaf version of 14 CFR Part 1260, is available to the public by subscription from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. It is not available in whole or in part directly from NASA.

Impact

This rule has been reviewed by the Office of Management and Budget (OMB) under the provisions of Executive Order 12291. NASA certifies that this rule will not have a significant economic affect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*. This rule does not significantly alter any reporting or recordkeeping requirements currently approved under OMB Control Numbers 2700-0045, 2700-0047, 2700-0048, and 2700-0049.

List of Subjects in 14 CFR Part 1260

Grants.

S.J. Evans

Assistant Administrator for Procurement.

PART 1260—[AMENDED]

1. The authority citation for 14 CFR Part 1260 continues to read as follows:

Authority: Pub. L. 97-258, 31 U.S.C. 6301 *et seq.*

Subpart 4—Research Grant and Cooperative Agreement Provisions

2. Section 1260.420(f) is revised and adopted as final, to read as follows:

§ 1260.420 Special conditions.

* * * * *

(f)(1) The following provision shall be appended to all grants and cooperative agreements as a Special Condition.

(2) The grants officer is authorized to, and shall, upon request of an awardee institution, issue a letter agreement making the special condition immediately applicable to all current grants and cooperative agreements at that institution.

(3) Grantees are hereby offered the opportunity to substitute the final (February 1989) version of the Special Condition "Elimination of Unnecessary Administrative Burden" in all grants for which the interim (July 1988) version is in effect. The first grantee action in accordance with the final version will constitute grantee acceptance of the final version.

(4) Paragraphs (f) (1) and (2) of this section are valid only through December 31, 1989, and the procedures therein shall not be used after that time.

Elimination of Unnecessary Administrative Burden (February 1989)

The following special terms take precedence over NASA Form 1463A, Provisions for Research Grants and Cooperative Agreements and any other requirements in the Grant and Cooperative Agreement Handbook, NHB 5800.1 (14 CFR Part 1260).

(a) *Prior approvals*

(1) General

Cost related and administrative "prior approvals" required by OMB Circulars A-110 and A-21 are hereby waived, except for change in scope or objective and change in principal investigator. Subcontracting approvals are waived except for subcontracting or transferring substantive aspects of the research, if not provided for in the proposal. Other approvals and terms specifically required by the grant still apply, unless waived or modified elsewhere in this Special Condition. The grantee may maintain such internal prior approval systems as it considers necessary.

(2) Travel

The prior authorization requirement in NASA Form 1463A regarding domestic travel expenditures is waived. The costs of foreign travel are allowable charges to the grant provided that the travel is clearly essential to the research effort. Foreign travel to communist areas, foreign travel involving studies of foreign countries, per se, or foreign travel requiring special permits or licenses still requires prior approval by the NASA Grants Officer, unless the travel has been described in an accepted proposal.

(3) Equipment and Other Property

The prior approval requirement for acquiring property not included in the proposed budget is raised to $5,000. For approval purposes, an item of a "nontechnical nature" may be regarded as "technical property " if it is primarily used in and is essential to the actual conduct of the research.

(b) *Preaward costs.* Grantees may approve preaward costs of up to ninety (90) days prior to the effective date of a new award, provided the costs are necessary for the effective and economical conduct of the project and they are otherwise allowable under the terms of the grant. Any preaward expenditures are made at the grantee's risk. Approval by the grantee does not impose any obligations on NASA in the absence of appropriations, if an award is not subsequently made, or if an award is made for a lesser amount than the grantee anticipated.

(c) *No cost extensions.* Grantees may extend the expiration date of a grant or a supplement thereto if additional time beyond the established expiration date is required to assure adequate completion of the original scope of work within the funds already made available. A single extension, which shall not exceed twelve (12) months, may be made for this purpose, and must be made prior to the expiration date. The grantee must notify the grants officer in writing within 10 days of the extension. Absent timely notification, the prior approval requirement (Form 1463A) shall apply.

(d) *Unobligated balances.* Any unobligated balance of funds which remains at the end of any funding period, except the final funding period of the project, shall be carried over to the next funding period, and may be used to defray costs of any funding period of the project. If uncommitted carryover funds are likely to be substantial, the estimated amount

shall be included in any continuation proposal.

[FR Doc. 89-5141 Filed 3-6-89; 8:45 am]

BILLING CODE 7510-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket No. C-2990 and C-3216]

Liquid Air Corporation of North America et al. and L'Air Liquide Societe Anonyme et al.; Prohibited Trade Practices and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Modifying orders.

SUMMARY: This order modifies the Commission's consent orders issued on September 5, 1979, and on July 15, 1987, by deleting the requirement that respondents obtain prior Commission approval as to internal reorganization activities.

DATES: Consent Orders issued September 5, 1979 and July 15, 1987. Modifying Orders issued October 17, 1988.

FOR FURTHER INFORMATION CONTACT: Joseph Eckhaus, FTC/S-2115, Washington, DC 20580. (202) 326-2687.

SUPPLEMENTARY INFORMATION: In the Matter of Liquid Air Corporation of North America, et al. and L'Air Liquide Societe Anonyme Pour L'Etude Et L'Exploitation Des Procedes Georges Claude, et al. The prohibited trade practices and/or corrective actions, as set forth at 44 FR 58905 and 52 FR 36235, remain unchanged.

List of Subjects in 16 CFR Part 13

Industrial gases, Liquid gases, Trade practices.

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

Order Reopening and Modifying Orders Issued on September 5, 1979, Against Liquid Air Corporation of North America And on July 15, 1987, Against L'Air Liquide Societe Anonyme Pour L'Etude et L'Exploitation Des Procedes Georges Claude

Before Commissioners:
Daniel Oliver, Chairman
Terry Calvani
Mary L. Azcuenaga
Andrew J. Strenio, Jr.

On June 20, 1988, Liquid Air Corporation (formerly known as Liquid Air Corporation of North America) ("LAC") and its parent, L'Air Liquide Societe Anonyme Pour L'Etude Et L'Exploitation Des Procedes Georges Claude ("L'Air Liquide"), filed a "Request To Reopen Proceeding And Modify Orders In Docket No. C-2990 And In Docket No. C-3216" ("Request"). The Request was filed pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and § 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. The Request asked the Commission to reopen the proceedings in Docket No. C-2990 and Docket No. C-3216 and modify the consent orders issued by the Commission on September 5, 1979, and July 15, 1987, in these respective matters. The respondents' Request was placed on the public record for thirty days, pursuant to § 2.51 of the Commission's Rules. One comment was received.

The complaint in Docket No. C-2990 was issued under section 7 of the Clayton Act, 15 U.S.C. 18, and section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and alleged anticompetitive effects arising from LAC's acquisition of the Industrial Gases Division of Chemetron Corporation ("Chemetron"), a wholly-owned subsidiary of Allegheny Ludlum Industries, Inc. ("Allegheny").[1] The order in Docket No. C-2990, which was issued by the Commission on September 5, 1979, 94 F.T.C. 390 (1979), among other things, prohibits the respondents in that matter, including LAC, for a ten-year period ending on September 20, 1989, from acquiring without the prior approval of the Commission any United States air separation gases producer. The order defines "air separation gases producer" to mean "a person who is engaged in both (1) the production, and (2) the distribution and sale of two or more of the air separation gases.[2] 94 F.T.C. at 396. The order's prior approval provision thus applies to, among other things, intra-entity transactions involving LAC's possible acquisition of air separation gases producers which are owned and controlled by LAC or its parent.[3]

The complaint in Docket No. C-3216 was also issued under section 7 of the Clayton Act, 15 U.S.C. 18, and section 5 of the F.T.C. Act, 15 U.S.C. 45, and alleged anticompetitive effects arising from L'Air Liquide's acquisition of the outstanding voting securities of Big Three Industries, Inc. ("Big Three"). The order in Docket No. C-3216, which was issued by the Commission on July 15, 1987, among other things, prohibits L'Air Liquide, for a ten-year period ending on July 20, 1997, from acquiring without the prior approval of the Commission any United States merchant air separation gases producer. Paragraph I.(7.) of the order defines "merchant air separation gases producer" to mean "any person that is engaged in all of the following: (i) production, (ii) distribution, and (iii) sale of two or more merchant air separation gases."[4] The order's prior approval requirement in Docket No. C-3216 thus also applies to, among other things, intra-entity transactions involving L'Air Liquide's possible acquisition of merchant air separation gases producers which are owned and controlled by L'Air Liquide and/or LAC.[5] However, the order also provides that "nothing in this Order or in the Commission's order entered in Docket No. C-2990 shall require L'Air Liquide to obtain prior Commission approval if L'Air Liquide increases its ownership in [LAC] or causes Big Three to acquire [LAC]." *See* Paragraph VII, *L'Air Liquide* order. Both LAC and L'Air Liquide, under the orders in Dockets No. C-2990 and C-3216, respectively, are required to obtain the prior approval of the Commission for transaction in which L'Air Liquide causes LAC to acquire all or any part of Big Three.

Section 5(b) of the Federal Trade Commission Act provides that the Commission may modify an order when the Commission determines that the public interest so requires. Therefore, the Commission has invited respondents to show in petitions to reopen how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to

[1] Allegheny and Chemetron are also named respondents under the order in Docket No. C-2990. Neither, however, has asked the Commission to modify the order in this matter. This order modifying the order issued on September 5, 1979, in Docket No. C-2990 applies only to respondent LAC.

[2] "Air separation gases" is defined in the order to mean "oxygen, nitrogen and argon in gaseous or liquid form, or both." 94 F.T.C. at 396.

[3] The order in Docket No. C-2990 applies only to LAC "and all subsidiaries which it controls." 94 F.T.C. at 396. LAC's parent, L'Air Liquide, is thus not covered by the order.

[4] "Merchant air separation gases" is defined in Paragraph I.(6.) of the order to mean "oxygen, nitrogen and argon sold in liquid form or packaged in cylinders."

[5] The order in Docket No. C-3216 applies to L'Air Liquide and "all subsidiaries it controls." *See* Paragraph I.(1.).

effective competition that may result from the order." *Damon Corp.*, 101 F.T.C. 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

After reviewing the respondents' Request, the Commission has determined that it is in the public interest to reopen the proceedings and modify the orders in Dockets No. C-2990 and C-3216. The respondents have shown that the prior approval requirements of the orders impose substantial compliance costs on the respondents because they require the respondents to obtain the prior approval of the Commission in connection with the respondents' wholly internal activities. Such internal activities would raise no competitive questions and would not warrant prior approval review.

The orders' prior approval provisions are also inconsistent with the principle that the coordinated activity of a parent and its wholly-owned subsidiaries must be viewed as that of a single enterprise for Federal antitrust law purposes. *See Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). Any internal corporate restructuring by L'Air Liquide is not likely to raise significant competitive consequences, and the Commission's orders in Docket Nos. C-3216 and C-2990 afford the Commission the opportunity to monitor the respondents' covered inter-entity merger activities.

Accordingly, it is ordered that these matters be, and they are hereby, reopened and that the opening subparagraph (j) of the order in Docket No. C-2990 and Paragraph I.7. of the order in Docket No. C-3216 be, and they are hereby, modified as follows:

Docket No. C-2990

(j) "Air separation gases producer" shall mean a person who is engaged in both (1) the production, and (2) the distribution and sale of two or more of the air separation gases, excluding, as to respondent Liquid Air Corporation, any individual, partnership, firm, corporation, association, or any other business or legal entity, controlled by L'Air Liquide Societe Anonyme Pour L'Etude Et L'Exploitation Des Procedes Georges Claude. "Control" shall mean either (i) holding 50 percent or more of the outstanding voting securities of an issuer or (ii) in the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity, or (iii) having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

Docket No. C-3216

I.7. "Merchant air separation gases producer" means any person that is engaged in all of the following: (i) production, (ii) distribution, and (iii) sale of two or more merchant air separation gases, excluding any individual, partnership, firm, corporation, association, or any other business or legal entity, controlled by L'Air Liquide. "Control" shall mean either (i) holding 50 percent or more of the outstanding voting securities of an issuer or (ii) in the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity, or (iii) having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

By the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 89-5210 Filed 3-6-89; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Ch. I

Harmonized System of Tariff Classification Extension of Time for Comments

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of time for comments.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the implementation of the Harmonized System (HS) of Tariff Classification by the United States. A notice inviting the public to comment on the adoption of the HS was published in the **Federal Register** on December 21, 1988 (53 FR 51244), and comments were to have been received on or before February 21, 1989. A request has been received to extend the period of time for comments for an additional 30 days. In view of the complexity of issues and subjects involved, the request is granted.

This extension of time to file comments will not affect the implementation of any local operational procedures and practices which were either permitted or scheduled to become effective in the interests of accomplishing the transition to the HS.

DATE: Comments will now be accepted if received on or before march 21, 1989.

ADDRESS: Comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Hubbard L. Volenick, International Nomenclature Staff (202-566-8530).

Dated: March 1, 1989.

Harvey B. Fox,

Director, Office of Regulations and Rulings.

[FR Doc. 89-5180 Filed 3-6-89; 8:45 am]

BILLING CODE 4820-02-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs For Use In Animal Feeds; Narasin and Nicarbazin; Correction

AGENCY: Food and Drug Administration.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a document which amended the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Elanco Products Co. (54 FR 1927; January 18, 1989). The NADA provides for the use of a combination Type A medicated article containing narasin and granular nicarbazin to manufacture a Type C medicated feed for the prevention of coccidiosis in broiler chickens. However, the document inadvertently added narasin and nicarbazin (granular) as separate chemical entities. This document corrects that error.

EFFECTIVE DATE: March 7, 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 January 18, 1989 (54

FR 1927), FDA published a document which amended the animal drug regulations to reflect approval of NADA 138-952 filed by Elanco Products Co. The NADA provides for the use of a combination Type A medicated article containing narasin and granular nicarbazin to manufacture a Type C medicated feed for the prevention of coccidiosis in broiler chickens.

The document amended § 558.4 *Medicated feed applications* (21 CFR 558.4) with the intention of adding the combination to the Category II table. However, the document inadvertently added narasin and nicarbazin (granular) as separate chemical entities. Accordingly, the Category II table is being amended to correctly reflect the combination.

The approval is limited to a Type A medicated article manufactured by combining narasin with Elanco Products Co.'s granular form of nicarbazin. Accordingly, § 558.363 *Narasin* (21 CFR 558.363) is amended to explicitly add this limitation to paragraph (c)(1)(iii)(B) which reflects approval of the combination.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

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 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

1. The authority citation for 21 CFR Part 558 continues to read as follows:

Authority: Sec. 512, 82 Stat. 343-351 (21 U.S.C. 360b); 21 CFR 5.10 and 5.83.

2. Section 558.4 is amended in paragraph (d) in the table entitled "Category II" by removing the "Narasin" entry from its current position and adding it indented between the entries for "Nicarbazin (granular)" and "Nicarbazin (powder)", to read as follows:

§ 558.4 Medicated feed applications.

* * * * *

(d) * * *

CATEGORY II

Drug	Assay limits percent [1] type A	Type B maximum (100x)	Assay limits percent [1] type B/C [2]
* * *	*	* * *	*
Nicarbazin (granular)	90-110	5.675 g/lb (1.25%)	85-115/75-125
Narasin	90-110	5.675 g/lb (1.25%)	85-115/75-125
Nicarbazin (powder)	98-106	5.675 g/lb (1.25%)	85-115/80-120
* * *	*	* * *	*

[1] Percent of labeled amount.
[2] Values given represent ranges for either Type B or Type C medicated feeds. For those drugs that have two range limits, the first set is for a Type B medicated feed and the second set is for a Type C medicated feed. These values (ranges) have been assigned in order to provide for the possibility of dilution of a Type B medicated feed with lower assay limits to make a Type C medicated feed.

* * * * *

§ 558.363 [Amended]

3. Section 558.363 *Narasin* is amended at the end of paragraph (c)(1)(iii)(B) by adding the sentence "only granular nicarbazin as provided by No. 000986 in § 510.600(c) of this chapter may be used in the combination."

Dated: February 24, 1989.

Robert C. Livingston,

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

[FR Doc. 89-5181 Filed 3-6-89; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF JUSTICE

Office of The Attorney General

28 CFR Part 60

[Order No. 1327-89]

Authorization of Federal Law Enforcement Officers to Request The Issuance of a Search Warrant

AGENCY: U.S. Department of Justice.

ACTION: Final rule.

SUMMARY: Rule 41(h) of the Federal Rules of Criminal Procedure authorizes the Attorney General to designate categories of federal law enforcement officers who may request issuance of search warrants. Previous authorizations were made by Order No. 510-73 (38 FR 7244, March 19, 1973), as amended by Order No. 521-73 (38 FR 18389, July 10, 1973), Order No. 826-79 (44 FR 21785, April 12, 1979), Order No. 844-79 (44 FR 46459, August 8, 1979), Order No. 960-81 (46 FR 52360, October 27, 1981), Order No. 1026-83 (48 FR 37377, August 18, 1983), Order No. 1137-86 (51 FR 22282, June 19, 1986), Order No. 1143-86 (51 FR 26878, July 28 1986), and Order No. 1188-87 (52 FR 19138, May 21, 1987). This Order amends 28 CFR Part 60 by adding special agents of the Office of Investigations of the Office of Inspector General, General Services Administration, and special agents of the Offices of Inspector General of the Department of Housing and Urban Development, the Department of the Interior and the Veterans Administration to the list of federal law enforcement officers who are authorized to request the issuance of search warrants under Rule 41, Federal Rules of Criminal Procedure.

EFFECTIVE DATE: February 24, 1989.

FOR FURTHER INFORMATION CONTACT: Roger B. Cubbage, Deputy Chief, Martin C. Carlson, Senior Legal Advisor, or Ronald B. Nicholson, Attorney, General Litigation and Legal Advice Section, Criminal Division, Department of Justice, Washington, DC 20530 (202-786-4827).

SUPPLEMENTARY INFORMATION:

This Order adds a new § 60.2(l) to 28 CFR Part 60 to add special agents of the Office of Investigations of the Office of Inspector General, General Services Administration; a new § 60.2(m) to add special agents of the Office of Inspector General, Department of Housing and Urban Development; a new § 60.2(n) to add special agents of the Office of Inspector General, Department of the Interior; and a new § 60.2(o) to add special agents of the Office of Inspector General, Veterans Administration. It adds the Office of Investigations of the Office of the Inspector General, General Services Administration, as § 60.3(a)(13); the Office of Inspector General, Department of Housing and Urban Development, as § 60.3(a)(14); the Office of Inspector General, Department of the Interior, as § 60.3(a)(15); and the

Office of Inspector General, Veterans Administration, as § 60.3(a)(16). Because the material contained herein is a matter of Department of Justice practice and procedure, the provision of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date is inapplicable.

The Department of Justice has determined that this Order is not a major rule for purposes of either Executive Order 12291, or the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

List of Subjects in 28 CFR Part 60

Search warrants.

By virtue of the authority vested in me by Rule 41(h) of the Federal Rules of Criminal Procedure, Part 60 of Chapter I of Title 28, Code of Federal Regulations, is hereby amended as follows:

PART 60—[AMENDED]

1. The authority for Part 60 continues to read as follows:

Authority: Rule 41(h), Fed.R.Crim.P.

§ 60.2 [Amended]

2. Section 60.2 is amended by adding a new paragraph (l), to read as follows:

* * * * *

(l) Any special agent of the Office of Investigations of the Office of Inspector General, General Services Administration.

3. Section 60.2 is amended by adding a new paragraph (m), to read as follows:

* * * * *

(m) Any special agent of the Office of Inspector General, Department of Housing and Urban Development.

4. Section 60.2 is amended by adding a new paragraph (n), to read as follows:

(n) Any special agent of the Office of Inspector General, Department of Interior.

5. Section 60.2 is amended by adding a new paragraph (o), to read as follows:

* * * * *

(o) Any special agent of the Office of Inspector General, Veterans Administration.

§ 60.3 [Amended]

6. Section 60.3(a) is amended by adding a new paragraph (13) to read as follows:

(a) * * *

(13) General Services Administration: Office of Inspector General

* * * * *

7. Section 60.3(a) is amended by adding a new paragraph (14) to read as follows:

(14) Department of Housing and Urban Development: Office of Inspector General

* * * * *

8. Section 60.3(a) is amended by adding a new paragraph (15) to read as follows:

(a) * * *

(15) Department of the Interior: Office of Inspector General

* * * * *

9. Section 60.3(a) is amended by adding a new paragraph (16) to read as follows:

(a) * * *

(16) Veterans Administration: Office of Inspector General

Date: February 24, 1989.

Dick Thornburgh,

Attorney General.

[FR Doc. 89-5173 Filed 3-6-89; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 515

Removal from List of Specially Designated Nationals (Cuba)

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Notice of removal from the list of Specially Designated Nationals (Cuba).

SUMMARY: This notice provides the name of a firm which has been removed from the list of Specially Designated Nationals under the Treasury Department's Cuban Assets Control Regulations (31 CFR 515).

EFFECTIVE DATE: March 2, 1989.

ADDRESS: Copies of the list of Specially Designated Nationals are available upon request at the following location: Office of Foreign Assets Control, Department of the Treasury, 1331 G Street, NW., Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Richard J. Hollas, Chief, Enforcement Division, Office of Foreign Assets Control, Tel: (202) 376-0400.

SUPPLEMENTARY INFORMATION: The Mexican airline, Aerocozumel, of Cozumel, Quintana Roo, Mexico, was listed in the **Federal Register** as a Specially Designated National (Cuba) on December 10, 1986 (51 FR 44459), pursuant to the Cuban Assets Control Regulations (31 CFR 515). It has been determined that Aerocozumel is no longer a Specially Designated National of Cuba; and, therefore, it is removed from the list of Specially Designated Nationals.

Specially Designated Nationals of Cuba, Removal

The list of Specially Designated Nationals, December 10, 1986 (51 FR 44459), as amended on November 3, 1988 (53 FR 44397) and on January 24, 1989 (54 FR 3446), is amended by removing the name:

Aero Cozumel, Cozumel, Mexico (address unknown).

Dated: February 28, 1989.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: March 2, 1989.

Salvatore R. Martoche,

Assistant Secretary (Enforcement).

Filed: March 3, 1989.

Publication date: March 7, 1989.

[FR Doc. 89-5432 Filed 3-3-89; 4:59 pm]

BILLING CODE 4840-25-M

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. 81024-9018]

Revision of Patent and Trademark Fees; Correction

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule; correction.

SUMMARY: This document corrects a final rule on the revision of patent fees that appears at pages 6893-6910 in the **Federal Register** of Wednesday, February 15, 1989 (54 FR 6893). This action is necessary to correct typographical errors.

Another document with additional corrections appeared in the **Federal Register** of Friday, February 24, 1989 at page 8053.

EFFECTIVE DATE: April 17, 1989.

FOR FURTHER INFORMATION CONTACT: Frances Michalkewicz by telephone at (703) 557-1610 or by mail marked to her attention and addressed to the Commissioner of Patents and Trademarks, Washington, DC 20231.

The following corrections are made to FR Doc. 89-3486 appearing on 6893-6910 in the issue of February 15, 1989.

§ 1.17 [Corrected]

1. On page 6901, in the first column, in § 1.17(g), in the third line, "Interferences in appeal" should read "Interferences in an appeal."

2. On page 6901, in the second column, in § 1.17(h), in the sub-section listing §§ 5.12, 5.13, & 5.14, in the second line, "handling of foreign filing" should read "handling of a foreign filing."

3. On page 6901, in the second column, in § 1.17(l)(1), in the first line, "revival of an abandoned application" should read "revival of an unavoidably abandoned application".

4. On page 6901, in the second column, in § 1.17(m), "By a small entity (§ 1.19(f))" should read "By a small entity (§ 1.9(f))."

§ 1.19 [Corrected]

5. On pages 6901, in the third column, in § 1.19(a)(1), in the fifth line, "plant or color" should read "plant patent or color."

§ 1.21 [Corrected]

6. On page 6902, in the third column, in § 1.21(e), in the fifth and sixth lines, "in an national patent" should read "in a national patent."

§ 1.55 [Corrected]

7. On page 6903, in the first column, in § 1.55(a), in the twelfth line, "in the proceding sentence" should read "in the preceding sentence."

§ 1.171 [Corrected]

8. On page 6903, in the first column, in the twelfth line, "set further in" should read "set forth in."

§ 1.177 [Corrected]

9. On page 6903, in the second column, in the eleventh and twelfth lines, "such part of parts" should read "such part or parts."

§ 1.313 [Corrected]

10. On page 6903, in the second column, in § 1,313(a), in the tenth and eleventh lines, "set further in" should read "set forth in."

§ 1.445 [Corrected]

11. On page 6903, in the third column, the section heading, "international application filing and processing fees" should read "International application filing, processing and search fees."

12. On page 6903, in the third column, in § 1.445(a), in the first and second lines, "fees and charges are established" should read "fees and charges for international applications are established."

13. On page 6903, in the third column, paragraph (a)(2) (iii) is correctly designated as (a)(3) and the words in the second line "required per additional" should read "required, per additional."

Date: February 24, 1989.

Bradford R. Huther,

Assistant Commissioner for Finance and Planning.

[FR Doc. 89-5157 Filed 3-6-89; 8:45 am]

BILLING CODE 3510-16-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3532-8]

Approval and Promulgation of Implementation Plans; Michigan

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Final rulemaking.

SUMMARY: USEPA is approving a revision to the Michigan SIP that amends a portion of the State's definition for Rule 336.1122, as it relates to volatile organic compounds (VOC) emissions. The amendment exempts methyl chloroform emissions with respect to surface coating operations from the State's control technology requirements on the limitation of VOC emissions, if certain conditions are met. This revision is being approved because methyl chloroform has been identified by USEPA as an exempt compound.

DATES: This action is effective May 8, 1989, unless notice is received by April 6, 1989 that someone wishes to submit comments.

ADDRESSES: Copies of the SIP revision are available at the following addresses for review: (It is recommended that you telephone Ms. Toni Lesser, at (312) 886-6037, before visiting the Region V office.)

U.S. Environmental Protection Agency, Region V, Air and Radiation (5AR-26), 230 South Dearborn Street, Chicago, Illinois 60604.

Michigan Department of Natural Resources, Air Quality Division, Stevens T. Mason Building, 530 West Allegan, Lansing, Michigan 48909.

U.S. Environmental Protection Agency, Public Information Reference Unit, 401 M Street SW., Washington, DC 20460.

Comments on these proposed rules should be addressed to: (Please submit an original and three copies, if possible.)

Gary Gulezian, Chief, Regulatory Analysis Section, U.S. Environmental Protection Agency, Air and Radiation Branch (5AR-26), 230 South Dearborn Street, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Ms. Toni Lesser, Michigan Regulatory Specialist, (312) 886-6037.

SUPPLEMENTARY INFORMATION: On May 25, 1988, the State of Michigan submitted an SIP revision in the form of an addendum to the State's Rule 336.1122, effective at the State level on May 20, 1988. The amendment will allow coating companies to exclude methyl chloroform from the VOC emission calculation when compliance with applicable limits is otherwise technically or economically reasonable. This exemption would apply to only the surface coating operations that are subject to Part 6 (Emission Limitations and Prohibitions—Existing Sources of VOC Emissions) or Part 7 (Emission Limitations and Prohibitions—New Sources of VOC Emissions) of the State's regulations. However, Rule 336.1122 requires implementation of all reasonable measures to reduce the emission of all organic solvents including commercial grade methyl chloroform, from the surface coating or coating line to the lowest reasonable level. An allowable annual ambient air concentration of 0.00041 parts per million for 1,2-butylene oxide has been added to Rule 336.1122. In addition, the amended rule also specifies that a permit evaluation is required before methyl chloroform emissions from a coating operation would be exempt.

USEPA is today approving the State of Michigan's addendum to Rule 336.1122 as a revision to the SIP. USEPA is approving this revision because methyl chloroform has been identified as an exempt compound, because it has been determined to be negligibly photochemically reactive (June 4, 1979, 44 FR 32042 and May 16, 1980, 45 FR 32424).

USEPA believes today's action to be noncontroversial and routine. Therefore it is being approved without prior proposal. This action will become effective May 8, 1989. However, if we receive notice by April 6, 1989, that someone wishes to submit comments, then USEPA will publish: (1) A notice that withdraws the action, and (2) a notice that begins a new rulemaking by proposing the action and establishing a comment period.

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

Under 5 U.S.C. 605(b), I certify that this SIP approval action will not have a significant economic impact on a substantial number of small entities.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 8, 1989. This action may

not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Intergovernmental relations.

Note.—Incorporation by reference of the State Implementation Plan for the State of Michigan was approved by the Director of the Federal Register on July 1, 1982.

Date: February 28, 1989.

William K. Reilly,

Administrator.

Title 40 of the Code of Federal Regulations, Chapter I, Part 52, is amended as follows:

PART 52—[AMENDED]

Subpart X—Michigan

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. Section 52.1170 is amended by adding paragraph (c)(86) to read as follows:

§ 52.1170 Identification of plan.

* * * * *

(c) * * *

(86) On May 25, 1988, the State of Michigan submitted an SIP revision in the form of an addendum to the State's Rule 336.1122, effective at the State level on May 20, 1988. The amendment will allow coating companies to exclude methyl chloroform from the VOC emission calculation when it is not technically or economically reasonable. This exemption applies only to the surface coating operations that are subject to Part 6 (Emission Limitations and Prohibitions—Existing Sources of VOC Emissions) or Part 7 (Emission Limitations and Prohibitions—New Sources of VOC Emissions) of the State's regulations.

(i) Incorporation by reference.

(A) R336.1122, Methyl Chloroform; effective at the State level on May 20, 1988.

[FR Doc. 89–5089 Filed 3–6–89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 52

[FRL-3532-7; NC-032]

Approval and Promulgation of Implementation Plans; North Carolina Stack Height Review

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA today approves a declaration by North Carolina that recent revisions to EPA's stack height regulations do not necessitate source-specific revisions to the State Implementation Plan (SIP) in this State. The State was required to review its SIP for consistency within nine months of final promulgation of the stack height regulations. The intended effect of this action is to formally document that North Carolina has satisfied its obligations under section 406 of the Clean Air Act Amendments of 1977 to review its SIP with respect to EPA's revised stack height regulations. No emission limitations were affected by stack height credit above GEP or any other dispersion technique.

DATES: This action will be effective on May 8, 1989 unless notice is received by April 6, 1989 that someone wishes to submit adverse or critical comments.

ADDRESSES: Copies of the materials submitted by North Carolina may be examined during normal business hours at the following locations:

Air Programs Branch, Region IV, Environmental Protection Agency, 345 Courtland Street NE., Atlanta, Georgia 30365.

Public Information Reference Unit, Library Systems Branch, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

North Carolina Department of Natural Resources and Community Development, Air Quality Section, Division of Environmental Management, Raleigh, North Carolina 27611.

FOR FURTHER INFORMATION CONTACT: Beverly T. Hudson, EPA Region IV Air Programs Branch, at the above listed address, telephone (404) 347–2864 or FTS 257–2864.

SUPPLEMENTARY INFORMATION: On February 8, 1982 (47 FR 5864), EPA promulgated final regulations limiting stack height credit and other dispersion techniques as required by section 123 of the Clean Air Act (the Act). These regulations were challenged in the U.S. Court of Appeals for the DC Circuit by the Sierra Club Legal Defense Fund, Inc., the Natural Resources Defense Council, Inc., and the Commonwealth of Pennsylvania in *Sierra Club v. EPA*, 719 F.2d 436. On October 11, 1983, the court issued its decision ordering EPA to reconsider portions of the stack height regulations, reversing certain portions and upholding other portions.

On February 28, 1984, the electric power industry filed a petition for a writ of certiorari with the U.S. Supreme Court. On July 2, 1984, the Supreme Court denied the petition (104 s. CT. 3571), and on July 18, 1984, the Court of Appeals formally issued a mandate implementing its decision and requiring EPA to promulgate revisions to the stack height regulations within six months. The promulgation deadline was ultimately extended to June 27, 1985.

Revisions to the stack height regulations were proposed on November 9, 1984 (49 FR 44878), and finalized on July 8, 1985 (50 FR 27892). The revisions redefine a number of specific terms, including "excessive concentration," "dispersion techniques," "nearby," and other important concepts, and modify some of the bases for determining good engineering practice (GEP) stack height.

Pursuant to section 406(d)(2) of Pub. L. 95–95, all states were required to (1) review and revise, as necessary, their state implementation plans (SIPs) to include provisions that limit stack height credit and dispersion techniques in accordance with the revised regulations and (2) review all existing emission limitations to determine whether any of these limitations have been affected by stack height credit above GEP or any other dispersion techniques. For any limitations so affected, states were to prepare revised limitations consistent with their revised SIPs. All SIP revisions and revised emission limits were to be submitted to EPA within 9 months of promulgation, as required by statute.

Subsequently, EPA issued detailed guidance on carrying out the necessary reviews. For the review of emission limitations, states were to prepare inventories of stacks greater than 65 m in height and sources with emissions of sulfur dioxide (SO_2) in excess of 5,000 tons per year. These limits correspond to the *de minimis* GEP stack height and the *de minimis* SO_2 emission exemption from prohibited dispersion techniques. The sources were screened for further review on the basis of the grandfathering clause (in existence before December 31, 1970), their stack height being less than *de minimis* stack height (65 m) and/or the actual height being less than the calculated Good Engineering Practice (GEP) stack height. The remaining sources were then subjected to detailed review for conformance with the revised regulations. State submissions were to contain an evaluation of each stack and source in the inventory. All potentially affected sources having stacks greater than 65 meters and total SO_2 allowable emissions greater than 5,000 tons per year were inventoried and summarized in the Technical Support Document, with documentation to support the analysis for each stack. North Carolina has indicated that the documentation is

available for review at the State Office (listed above). A summary of the State's findings is provided below.

North Carolina inventoried 103 stacks. Only five stacks exceeded their formula for Good Engineering Practice (GEP) stack height. These five sources were evaluated to determine if the ambient standards are protected when only the GEP stack height is used. The modeling techniques used in the demonstration supporting this revision are, for the most part based on modeling guidance in place at the time that the analysis was performed, i.e., the EPA "Guideline on Air Quality Models" (1978). Since that time, revisions to modeling guidance have been promulgated by EPA (53 FR 392, January 6, 1988). Because the modeling analysis was underway prior to publication of the revised guidance, EPA accepts the analysis. The modeling for these sources shows that the ambient air quality standards for particulate and sulfur dioxide are not exceeded when only GEP stack height is considered.

No stacks received credit for prohibited dispersion techniques. Five of the nongrandfathered stacks that are less than 65 meters high have allowable emissions of sulfur dioxide greater than 5,000 tons per year or merged or combined flows. These merged and combined flows are not considered to be a dispersion technique under the stack height regulation. Therefore, no further analysis is needed.

EPA is not acting on two sources (identified in table form or by an asterisk) because they currently receive credit under one of the provisions remanded to the EPA in *NRDC* v. *Thomas*, 838 F.2d 1224 (DC Cir 1988). North Carolina and EPA will review these sources for compliance with any revised requirements when EPA completes rulemaking to respond to the *NRDC* remand.

EPA Review.

EPA has reviewed North Carolina's submittal and concurs with the conclusion that no revisions to North Carolina's existing source emission limitations are necessary as a result of EPA's revised stack height regulations. North Carolina has therefore met its obligations under section 406 of Pub. L. 95-95 for existing source emission limitations.

Today's action does not certify that North Carolina has complied with obligations under section 406 Pub. L. 95-95, for new sources, as required in 40 CFR 51.164 and 51.118. Those Federal provisions contain the stack height requirements for all sources that were or are constructed, reconstructed or modified subsequent to December 31, 1970. EPA is acting on North Carolina submittals to comply with these requirements in a separate **Federal Register** notice.

The technical support submitted by the State is available for public inspection at the EPA Regional Office listed in the ADDRESSES section of this notice. By publishing this approval of the submittal and soliciting public comment, EPA is ensuring the opportunity for public participation in this process.

Final Action

EPA approves the declaration by North Carolina that recent revisions to EPA's stack height regulations do not necessitate SIP revisions for specific sources in this State. This action is taken without prior proposal because the issues are straightforward and no adverse comment is anticipated. The public should be advised that this action will be effective 60 days from the date of this **Federal Register** notice. However, if notice is received within 30 days that someone wishes to submit adverse or critical comments, this action will be withdrawn and two subsequent notices will be published before the effective date. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 8, 1989. This action may not be challenged later in proceedings to enforce its requirements. (See Section 307(b)(2).)

Under 5 U.S.C. 605(b), I certify that this SIP action will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709).

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

List of Subjects in 40 CFR Part 52

Air Pollution Control, Intergovernmental relations, Particulate matter, Sulfur oxides.

Dated: February 28, 1989.

William K. Reilly,

Administrator.

Part 52 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

PART 52—[AMENDED]

Subpart II—North Carolina

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

2. Section 52.1781 is amended by designating the existing text as paragraph (a) and by adding paragraph (b) to read as follows:

§ 52.1781 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(b) In letters dated February 4, 1987, and June 15, 1987, the North Carolina Department of Natural Resources and Community Development certified that no emission limits in the State's plan are based on dispersion techniques not permitted by EPA's stack height rules.

[FR Doc. 89-5090 Filed 3-6-89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 52

[Region II Docket No. 83; FRL-3532-6]

Approval and Promulgation of Implementation Plans; Revision to the State of New York Implementation Plan

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This notice announces final action by the Environmental Protection Agency (EPA) on parts of a New York request to revise its State Implementation Plan (SIP) for ozone. EPA is approving modifications made by New York to one of its volatile organic compound (VOC) air pollution control regulations, Part 200, General Provisions. EPA is also approving Part 229, Petroleum Liquid Storage Facilities, and Part 230, Gasoline Dispensing Sites and Transport Vehicles, with the exception of their variance provisions. In addition, EPA has found that the State fulfilled two control strategy implementation commitments that it made in its SIP.

EPA is deferring action on two other VOC control regulations, Part 228, Surface Coating Processes, and Part 234, Graphic Arts, because the State has informed us that it is now revising those regulations.

EPA is accepting the State's certification that a regulation is not needed for controls on the manufacture of high-density polyethylene, polypropylene, and polystyrene resins, a

Control Techniques Guideline source category.

EFFECTIVE DATE: This action is effective on April 6, 1989.

ADDRESSES: Copies of the SIP revision are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region II Office, Air Programs Branch, Room 1005, 26 Federal Plaza, New York, New York 10278.

Environmental Protection Agency, Public Information Reference Unit, 401 M Street SW., Washington, DC 20460.

New York State Department of Environmental Conservation, Division of Air Resources, 50 Wolf Road, Albany, New York 12233.

FOR FURTHER INFORMATION CONTACT: William S. Baker, Chief, Air Programs Branch, Environmental Protection Agency, Room 1005, 26 Federal Plaza, New York, New York 10278, (212) 264-2517.

SUPPLEMENTARY INFORMATION:

Background

For areas designated under section 107(d) of the Clean Air Act as not attaining the national ambient air quality standard for ozone, the Environmental Protection Agency (EPA) requires that State Implementation Plans (SIPs) contain regulations providing for the application of reasonably available control technology (RACT) to specific sources of volatile organic compound (VOC) emissions (44 FR 20372, April 4, 1979). Such sources are those which fall into categories for which EPA has published a Control Techniques Guideline (CTG) document. Today's action concerns regulations that were adopted by New York State to control VOCs from two CTG categories and a finding by the State concerning the need for the regulation in New York of a third CTG category. It also deals with two of the commitments made by New York in its 1982 ozone and carbon monoxide SIP to adopt other control measures, specifically, a "Reevaluation of RACT" and "Controls at Major Facilities." The reader is referred to EPA's June 13, 1986 notice of proposed rulemaking (51 FR 21577) for a detailed description of the regulations and the two control measures which are the subject of today's notice.

State Submittal

On March 15, 1985 the State of New York sent to the EPA a request to revise its SIP. The New York submittal consisted of revisions that were adopted by the State to regulations already contained in the New York SIP. These revisions to Title 6 of the New York Code of Rules and Regulations (6 NYCRR) affect the following Parts of the Code:

- Part 200—"General Provisions," effective April 11, 1985
- Part 228—"Surface Coating Processes," effective April 11, 1985,
- Part 229 (old)—"Petroleum Liquids Storage and Transfer," effective June 21, 1980 and repealed.
- Part 229 (new)—"Petroleum Liquid Storage Facilities," effective April 11, 1985,
- Part 230 (new)—"Gasoline Dispensing Sites and Transport Vehicles," effective April 11, 1985, and
- Part 234—"Graphic Arts," effective April 11, 1985.

This action also involves State certifications, dated November 2, 1984 and April 3, 1987, that there are no sources in New York which manufacture high-density polyethylene, polypropylene, and polystyrene resins, and a December 31, 1984 State submittal of Air Guide 20, "Variances from RACT Regulations for VOC Emitting Sources."

Public Comment

No comments were received by EPA during the comment period established by its June 13, 1986 proposal.

Findings

EPA's findings concerning the revisions to New York's SIP are divided as follows into two main groups, full approval actions and partial approval actions. The partial approval actions are further subdivided as to the nature of the partial approval.

I. Full Approval Actions

—Part 200—"General Provisions,"
—Certification regarding manufacturer of high-density polyethylene, polypropylene, and polystyrene resins,
—"Reevaluation of RACT" SIP commitment, and
—"Controls at Major Facilities" SIP commitment.

II. Partial Approval Actions

A. Provisions requiring deferred action:
—Part 228—"Surface Coating Processes" and
—Part 234—"Graphic Arts."

B. Provisions requiring submittal of source-specific SIP submittals:
—Variances—§§ 229.10 and 230.7.
—A correction is also being made to the portion of the CFR covering §§ 228.3(d) and 234.3(c).

C. Provisions receiving approval (the remaining provisions of):
—Part 229—"Petroleum Liquid Storage Facilities" and
—Part 230—"Gasoline Dispensing Sites and Transport Vehicles."

I. Full Approval Actions

- Part 200—"General Provisions"

Part 200 effective April 11, 1985, as submitted by the State is being fully approved by today's action because it is consistent with EPA policy and guidance.

- Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins

In a letter dated November 2, 1984, New York certified to EPA that there are no manufacturers of high-density polyethylene, polypropylene or polystyrene resins in the State. However, later investigation revealed sources that appeared to be covered by the CTG document for such manufacturers, and which would have required control. In a letter dated April 3, 1987, the State verified that the sources in question were not subject to this CTG and therefore that its original certification was correct. EPA is accepting New York's certification. Consequently, the State does not need to adopt a regulation for such sources, since none exist in the nonattainment area.

- Reevaluation of RACT

"Reevaluation of RACT" is intended to make more restrictive the criteria under which a source emitting VOCs may apply for and be granted a variance from State requirements to apply RACT to its operations. The State committed to this measure in its SIP and, by submitting Air Guide 20 which identifies the criteria that must be used has met its commitment.

- Controls at Major Facilities

"Controls at Major Facilities" is intended to limit the types of sources which can be included in a "facility-wide emission reduction plan" or bubble. The State committed to this measure in its SIP. Through revision to its Parts 228 and 234 New York now limits "facility-wide emission reduction plans" in the New York City metropolitan area to only those sources regulated by either Part 228 or Part 234.

II. Partial Approval Actions

A. Provisions Requiring Deferred Action

EPA is deferring action on Parts 228 and 234 because both regulations are currently being revised. The State has informed EPA that the revised regulations are due to be adopted during 1988, making the current version outdated. Besides including new emission limitations these revised

regulations will include changes which will clarify and eliminate provisions where EPA has concerns with the current version. A SIP revision containing these revised regulations is expected soon after the State adopts them. Therefore, EPA is deferring action on Parts 228 and 234 because they will soon be outdated. A separate, new rulemaking action on the revised regulations will be initiated by EPA upon their submittal.

B. Provisions Requiring Submittal of Source-Specific SIP Submittals

Parts 228, 229, 230 and 234 include provisions that authorize the State to permit "a lesser degree of control" than necessary to achieve the explicit emission limitations in the SIP. These provisions, at §§ 228.3(d), 229.10, 230.7 and 234.3(c), would permit the State to revise explicit emission limitations to allow greater emissions than those allowed by the applicable SIP. Such variances from SIP emission limitations must be approved by EPA as SIP revisions under Section 110(a)(3) of the Clean Air Act.

While EPA is deferring action on Parts 228 and 234, the earlier versions of these regulations also contained these variance provisions. At the time of their approval (See 49 FR 3436, January 26, 1984), EPA stated that these variances or alternate requirements would not be recognized until they were submitted and approved by EPA, but a note to this effect was not included in the Code of Federal Regulations. In order to eliminate any confusion concerning the status of variance provisions, a note is now being included in the table in 40 CFR, Section 52.1679 under "Comments" for Parts 228, 229, 230 and 234. Under the Clean Air Act, variances issued by a state under provisions such as those addressed here cannot be recognized by EPA until they are submitted by the State and approved as revisions to the New York SIP.

C. Provisions Receiving Approval

Except for those sections identified earlier in Sections II. A and B of today's notice, Parts 229 and 230 are being approved by today's action.

Conclusion

EPA is approving the revisions made to Parts 200, 229 and 230 as part of the New York SIP. EPA is including a clarifying note with respect to the requirements for SIP revisions for any variance that the State may decide to authorize under §§ 229.10 and 230.7 as well as similar variance provisions in previously approved Parts 228 and 234.

EPA is deferring action on Parts 228 and 234 (except for a correction to the CFR).

EPA is accepting the State's certification of no sources subject to the CTG for the control of VOC emissions from the manufacture of high-density polyethylene, polypropylene, and polystyrene resins.

EPA has also determined that the State has met two commitments made in its 1982 ozone and carbon monoxide SIP concerning the VOC control measures "Reevalaution of RACT" and "Controls at Major Facilities."

This notice is issued as required by Section 110 of the Clean Air Act as amended. The Administrator's decision regarding the approval of this plan revision is based on its meeting the requirements of Section 110 of the Clean Air Act and 40 CFR Part 51.

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit within May 8, 1989. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Air pollution control ozone, Incorporation by reference.

Note.—Incorporation by reference of the State Implementation Plan for the State of New York was approved by the Director of the **Federal Register** on July 1, 1982.

Date: February 27, 1989.

William K. Reilly,

Administrator.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Title 40, Chapter I, Subchapter C, Part 52, Code of Federal Regulations is amended as follows:

Subpart HH—New York

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. Section 52.1670 is amended by adding paragraph (c)(77) to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(c) * * *

(77) Revisions to the State Implementation Plan submitted by New York State Department of Environmental Conservation for controlling volatile organic compounds.

(i) Incorporation by reference. Adopted regulations Parts 200, 229, and 230, submitted on March 15, 1985.

(ii) *Additional material.* (A) Letters dated December 31, 1984 and March 15, 1985 concerning SIP commitments for "Reevaluation of RACT," and "Controls at Major Facilities," respectively.

(B) Letters dated November 2, 1984 and April 3, 1987 concerning the manufacture of high-density polyethylene, polypropylene, and polystrene resins.

3. Section 52.1679 is amended by revising the entries for Parts 200, 228, 229, and 234 and adding a new entry for Part 230 to the Table in numerical order to read as follows:

§ 52.1679 EPA—approved New York State regulations.

New York State regulation	State effective date	Latest EPA approval date	Comments
Part 200, General Provisions	4/11/85	[Date & Citation of this notice]	The maximum operating heat input (200.1(gg)) will be as specified on a permit to construct or certificate to operate as per letter of Apr. 27, 1983 from H. Hovey, NYSDEC. Redesignation of nonattainment areas to attainment areas (200.1(kk)) does not relieve a source from compliance with previously applicable requirements as per letter of Nov. 13, 1981 from H. Hovey, NYSDEC.

—Continued

New York State regulation	State effective date	Latest EPA approval date	Comments
* * *	*	* *	* *
Part 228, Surface Coating Processes:			
228.1, Applicability and Compliance.	8/23/79	11/10/80, 45 FR 74472	Group I CTG sources are subject to final compliance dates as they appear in Section 228.1, effective Aug. 23, 1979.
228.1-228.8	8/11/83	1/26/84, 49 FR 3439	Variances adopted by the State pursuant to Section 228.3(d) become applicable only if approved by EPA as SIP revisions.
Part 229, Petroleum Liquid Storage Facilities.	4/11/85	[Date & Citation of this notice]	Variances adopted by the State pursuant to Section 229.10 become applicable only if approved by EPA as SIP revisions.
Part 230, Gasoline Dispensing Sites and Transport Vehicles.	4/11/85	...do	Variances adopted by the State pursuant to Section 230.7 become applicable only if approved by EPA as SIP revisions.
* * *	*	* *	* *
Part 234, Graphic Arts	4/7/83	1/26/84, 49 FR 3439	Variances adopted by the State pursuant to Section 234.3(c) become applicable only if approved by EPA as SIP revisions.

4 Section 52.1683 is amended by adding new paragraph (c) as follows:

§ 52.1683

9Control stragety: Ozone.

* * * * *

(c) Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins.

[FR Doc. 89-4990 Filed 3-6-89; 8:45 am]

BILLING CODE 6560-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 88-147; RM-5952]

Radio Broadcasting Services; Los Banos, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots FM Channel 295A to Los Banos, California, as requested by Ethnic Radio of Los Banos, Inc., thereby providing that community with its second local FM broadcast service. Reference coordinates for Channel 295A at Los Banos are 37-03-48 and 120-50-54. With this action, the proceeding is terminated.

DATES: Effective March 31, 1989. The window period for filing applications on Channel 295A at Los Banos, California, will open on April 3, 1989, and close on May 3, 1989.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530, concerning the allotment. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 88-147, adopted January 31, 1989, and released March 1, 1989. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments for California, is amended by adding Channel 295A under the entry for Los Banos.

Federal Communications Commission

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-5128 Filed 3-6-89; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-253; RM-6162]

Radio Broadcasting Services; Avon, CO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 276C2 for Channel 276A at Avon, Colorado, and modifies the Class A license of Rocky Mountain Wireless, Inc., for Station KZYR(FM), as requested, to specify operation on the higher class channel. This will provide Avon with its first wide coverage area FM service. Reference coordinates for Channel 276C2 at Avon are 39-36-58 and 106-26-57. With this action, the proceeding is terminated.

EFFECTIVE DATE: March 31, 1989.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 88-253, adopted January 26, 1989, and released March 1, 1989. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments for Colorado, is amended by removing Channel 276A and adding Channel 276C2 under the entry for Avon.

Federal Communications Commission
Steve Kaminer,
Deputy Chief, Policy and Rules Division, Mass Media Bureau.
[FR Doc. 89-5129 Filed 3-6-89; 8:45 am]
BILLING CODE 6712-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 60224-9045]

Regulations Governing the Importation of Tuna Taken in Association With Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Interim final rule with request for comments.

SUMMARY: NMFS issues this interim final rule in response to amendments to the Marine Mammal Protection Act (MMPA) in 1984 and 1988. The rule amends marine mammal regulations regarding the importation of yellowfin tuna from nations with purse seine vessels fishing in the eastern tropical Pacific Ocean (ETP) and for the first time covers intermediary nations, which are nations that may or may not fish in the ETP but import yellowfin tuna and subsequently offer tuna or tuna products for importation into the United States.

Under this rule, any nation that has purse seine vessels in the ETP and that wishes to have yellowfin tuna it harvests imported into the United States must satisfy two categories of requirements by providing documentary evidence that: (1) The nation has adopted a regulatory program governing the incidental taking of marine mammals in the fishery that is comparable to the program of the United States, and (2) the average rate of incidental mortality of marine mammals in the fishery by its vessels is comparable to the rate of incidental mortality of marine mammals from fishing by the U.S. fleet as specified in the 1988 amendments. The rule also generally requires that any intermediary nation which wants to export yellowfin tuna and tuna products to the United States must ban the importation of yellowfin tuna and tuna products from any nation that is prohibited from exporting directly to the United States.

DATES: This rule is effective March 7, 1989. Comments on this rule must be received by May 8, 1989.

ADDRESS: Comments may be mailed to E. Charles Fullerton, Regional Director, Southwest Region, National Marine Fisheries Service, NOAA, 300 South Ferry Street, Terminal Island, CA 90731. A copy of this rule and the Environmental Assssment/Regulatory Impact Review may be obtained from this same address.

FOR FURTHER INFORMATION CONTACT: E.C. Fullerton (Director, Southwest Region, NMFS), 213-514-6196.

SUPPLEMENTARY INFORMATION:

Background

NMFS issued an interim final rule on March 18, 1988 (53 FR 8911), amending 50 CFR 216.24 to modify the importation requirements for yellowfin tuna caught in association with marine mammals by foreign purse seine vessels in the ETP. As a result of comments received on the interim final rule, modifications and clarifications have been made to the rule. In addition, on November 23, 1988, the President signed into law the Marine Mammal Protection Act Amendments of 1988 (Pub. L. 100-711) which contains several specific instructions relating to regulation of tuna imports. This amendment broadened considerably the scope of persons affected by the import rule. Particularly, persons in nations that are defined as "intermediary nations" in this rule were not as significantly affected by the interim final rule published in March 1988. In order to provide an opportunity to comment on these regulations, this interim final rule has a 60-day comment period.

Additional background information is available in the preamble to the interim final regulations published in the **Federal Register** on March 18, 1988.

MMPA Amendments of 1988

Many of the changes made by the 1988 amendments directly address requirements for nations wishing to have yellowfin tuna or tuna products imported into the United States. Other changes are directed toward the domestic tuna purse seine fishing industry and affect this import rule because foreign harvesting nations must have marine mammal protection measures that are comparable to those of the United States.

These regulations require, implementing the 1988 amendments, that by the beginning of the 1990 fishing season, a harvesting nation must have the same prohibitions on purse seine sets on pure schools of species of marine mammals, conducting sundown sets, and on other activities that are made applicable to U.S.-flag vessels by the 1988 amendments in order to have a program comparable to the United States. The sundown set prohibition must provide that sets must be completed through backdown to rolling the net to sack-up within one-half hour after sundown (an operator who consistently has had and continues to have an average mortality rate in observed sundown sets that is no greater than the average of the fleet in daylight sets may be exempted from this prohibition.) Two other new marine mammal protection measures and prohibitions a foreign nation must adopt for the purposes of comparability by the beginning of 1990 are: (1) A prohibition on the use of explosives, other than explosives equivalent to U.S. Department of Transportation rated Class C agricultural pest control devices; and (2) a system to identify, provide remedial training, and remove from the fishery operators whose mortality rate is consistently and substantially above the majority of the fleet.

In regard to observer coverage, these regulations require that fishing by the nation's tuna fishing fleet of purse seine vessels of greater than 400 tons carrying capacity, including all certified charter vessels operating under its laws, must be monitored by observers of the Inter-American Tropical Tuna Commission (IATTC) or another international observer program in which the United States participates. The sampling level achieved by that observer program must be equal to that achieved for the U.S. fleet for the same period, unless the Secretary of Commerce finds that an alternative observer program will provide a reliable estimate of the mortality rate of the nation's fleet. Further, a harvesting nation's fleet incidental mammal mortality rate to be comparable must not exceed twice that of the U.S. fleet for the same period by the end of 1989 and must not exceed 1.25 times that of the U.S. fleet for the same period by the end of 1990 and for subsequent years. In addition, the number of eastern spinner dolphin (*Stenella longirostris*) and coastal spotted dolphin (*Stenella attenuata*) incidentally killed by the nation's fleet cannot exceed 15 percent and 2 percent, respectively, of the nation's total marine mammal mortality during 1989 and for any subsequent fishing year.

To provide a reasonable time period for a nation to respond to future changes in the U.S. program, these regulations provide that any new prohibitions or marine mammal protection measures adopted in the future by the United States for its vessels must be substantially adopted and implemented

within six months of the U.S. implementation to avoid a finding that a program is no longer comparable to that of the United States. Failure of a harvesting nation to satisfy any of these conditions will result in a negative finding and a ban on the importation of its yellowfin tuna into the United States.

A substantial change from the interim final rule published in March 1988 is that these regulations apply to intermediary nations as mandated by the 1988 amendments. Except as noted below, any nation from which yellowfin tuna or tuna products will be imported into the United States must certify that it has acted to ban importation of yellowfin tuna and tuna products from any nation which is banned from directly importing them into the United States. The intermediary nation must implement its ban no later than 60 days after the United States bans such imports. These regulations provide that failure of an intermediary nation to certify within 90 days of the U.S. ban that it has implemented its ban will result in the United States prohibiting entry of all yellowfin tuna and tuna products from the intermediary nation. However, a nation which the Secretary determines does not obtain any part of its tuna supply from embargoed nations, will not be required to certify that it has banned imports from the embargoed nation or nations.

Another substantial change required by the 1988 amendments is that should a ban on imports of yellowfin tuna and tuna products from either a harvesting or intermediary nation under these regulations persist for six months, NOAA must certify that fact to the President. That certification will be deemed to be a certification under section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)). The ultimate effect of such a certification could be a ban on importation of all fish products from the subject nation into the United States. The ban would remain in effect so long as the ban on yellowfin tuna and tuna products persists under these regulations.

Comments on the Original Interim Final Rule and Responses

Seven comments were received on the original interim final rule. Letters were received from conservation organizations, a segment of the tuna fishing industry, the Inter-American Tropical Tuna Commission, and the Marine Mammal Commission. A summary of the comments received and the NMFS responses to these comments are as follows.

1. Comment: Several commenters expressed concern that the phase-in period in the regulations was longer than necessary and should be reduced to require that the kill rates of other nations be immediately comparable with the U.S. rate.

Response: The MMPA Amendments of 1988 established specific standards of mortality rate comparability. By the end of 1989, nations must have an average annual mortality rate no greater than twice that of the U.S. fleet average for the same period and by the end of 1990, their mortality rates can be no greater than 1.25 times that of the U.S. fleet for the same period. This rule implements those standards.

2. Comment: Several commenters indicated that the collection of kill and serious injury data and data on other forms of incidental take, including harassment and encirclement, should be required for individual species.

Response: The NMFS has modified the regulations to require the collection of kill and serious injury data for individual stocks but decided not to include harassment and encirclement data. As noted in the responses to comments in the March 1988 interim final regulations and in the response to comment 4 here, NMFS has chosen the rate of kill as the standard for the rate comparison test, and not other types of "takings" like chase, encirclement, or capture because "kill" is the most meaningful standard established by regulations that can be monitored and measured with the greatest accuracy. Marine mammal mortality is the "take" standard by which the U.S. tuna fleet is regulated under the quota system in effect under the MMPA.

3. *Comment:* Several comments were received indicating that the observer sample size should be greater than the 33 percent required.

Response: The MMPA amendments of 1988 require that the foreign harvesting nations' marine mammal mortality be monitored by observers from the IATTC or another international program in which the United States participates. That observer program must achieve a sample rate equal to that achieved by the United States for the same period, unless the Secretary of Commerce determines that an alternate observer program will provide a sufficiently reliable estimate of the nation's mortality rate. That determination must be published in the **Federal Register** no less than sixty days before an alternate observer program can be accepted as meeting this requirement.

4. *Comment:* Two commenters indicated that kill-per-set should be used as a performance standard.

Response: The NMFS still finds that kill-per-ton is the best single rate to use in the comparability test implemented in these regulations. Of the three performance standards evaluated by NMFS, kill-per-day, kill-per-ton, and kill-per-set, kill-per-set is the most variable because of the way occasional problem sets (kill-per-set > 15 animals) affect the estimate of variance.

5. *Comment:* Two commenters recommended that participation in the IATTC observer program should be mandatory.

Response: The NMFS continues to support the IATTC observer program as it is the only international porpoise research and observer program at the present time. This does not preclude, however, recognition of an alternate program proposed by any nation or regional body which will meet the requirements under the MMPA as amended in 1988. The Assistant Administrator will review any proposed alternate observer program to ascertain whether the observer training qualifications and requirements, methods of assigning observers to vessels, and the statistical reliability and accuracy of the data collected can serve as an acceptable basis for making mortality estimates. This review also could include an on-site review of the nation's porpoise protection program. The Assistant Administrator's proposed determination will be published in the **Federal Register** at least 60 days before implementation.

6. *Comment:* One commenter requested that the terms "consistently" and "drastically" should be defined in relation to comparability of achieving 33 percent coverage in foreign observer programs.

Response: The MMPA Amendments of 1988 have resulted in a modification of this portion of the rule. The basic observer coverage required is at least the same as achieved by the United States for the same period. Any exception from this requirement will require notice in the **Federal Register** at least 60 days before final action is taken, as explained in response five.

7. *Comment:* Two commenters questioned the basis for allowing the foreign kill rates to be 25 percent and 75 percent higher than the United States.

Response: This provision was eliminated to comply with the MMPA Amendments of 1988. Accordingly, all nations will be required to maintain a kill-per-ton rate within 25 percent of the U.S. rate by the end of 1990, regardless

of the number of vessels in their fishing fleet.

8. *Comment:* One commenter requested that nations be required to submit data for all years from 1986–1991 and subsequent years and that these data be made publicly available.

Response: The NMFS has clarified the language to require nations to submit data for each year any of their vessels fished in the ETP beginning in 1986. Summary data for individual nations will be publicly available at the time a finding is made if three or more vessels participated in that nation's fishery. In accordance with NOAA's standard confidentiality procedures, confidential business information from nations with fewer than three vessels in this fishery will not be released to the public. However, the overall kill rate for even the nations with fewer than three vessels will be made available.

9. *Comment:* One commenter indicated that a finding should be terminated if a nation does not submit the required documentation by August 16, 1988, or fails to submit a complete annual report by July 31.

Response: The NMFS agrees and has modified the language in the regulations (see modification 10 on page 19) to clarify this point.

10. *Comment:* two commenters suggested that an overall ceiling be placed on the foreign kill rate and also that quotas be established for individual stocks and the aggregate kill of porpoise using current kill rates and annual net recruitment rates.

Response: The NMFS review of the 1984 and 1988 amendments to the MMPA and their legislative histories finds explicit instructions on various aspects of comparability, including establishment of a kill rate standard. There is not any indication that foreign quotas are contemplated. These regulations establish the kill rate standards and the species/stock limitations required by the 1988 amendments.

As required by the 1988 amendments, this rule limits the percentage of eastern spinner dolphin and coastal spotted dolphin that can be killed by each nation to 15 percent and 2 percent, respectively, of that nation's total annual mortality starting in 1989.

11. *Comment:* One commenter pointed out that there did not appear to be a specific requirement for fish being imported to have been caught while a finding of comparability was in effect, and that such a requirement should be explicitly included in the regulations.

Response: Neither the 1984 nor the 1988 amendments provide for such a treatment of tuna offered for importation. In order for a nation to receive an affirmative finding, the nations must demonstrate that it has in place a mammal protection program comparable to that of the United States and that its purse seine vessels have achieved a mortality rate comparable to that of the U.S. fleet over the same time period. NMFS believes that tuna caught during the period when the nation's fleet performance warranted a finding of comparability should be allowed entry into the United States.

12. *Comment:* Two commenters requested that the Certificate of Origin be modified to indicate the country that actually caught the canned tuna being imported and the dates that the fish were caught in order to prevent the importation of tuna taken when findings were not valid.

Response: The NMFS has modified the Certificate of Origin form to require nations exporting yellowfin tuna, both canned and non-canned, to the United States to provide the trip dates for the catch included in the shipment. This information will allow the U.S. Government to determine the identity of harvesting nations for tuna that is imported into the United States from an intermediary nation.

13. *Comment:* One commenter requested that the declaration statement on the Certificate of Origin form be changed to use language contained in 28 U.S.C. 1746(1) for unsworn declarations executed outside the United States.

Response: The NMFS reviewed the declaration statement and has decided not to modify the language which is patterned after the language used by the U.S. Customs Service in its declaration statement on documents accompanying the Certificate of Origin.

14. *Comment:* One commenter requested clarification on the scope of an embargo on nations without findings.

Response: The MMPA Amendments of 1988 modified the scope of the import ban envisioned in the original interim final rule. Consequently, the rule now provides that a nation purse seining for yellowfin tuna in the ETP (i.e. harvesting nation) without a finding cannot export any yellowfin tuna or tuna products to the United States regardless of the ocean area where the tuna were caught. Further, if the import ban remains in effect for six months, the ban may be broadened to include all fishery products from the harvesting nation. Intermediary nations with a history of importing eastern tropical Pacific yellowfin tuna, that desire to export yellowfin tuna or tuna products to the United States must certify to the U.S. Government that they have acted within 60 days of the effective date of the U.S. embargo of the harvesting nation to ban imports of yellowfin tuna and tuna products from that nation otherwise their yellowfin tuna and tuna products will also become subject to an import ban.

15. *Comment:* Two commenters indicated that a program should be established to verify foreign documentation and that comparable enforcement methods, effectiveness, and levels of penalties should be required.

Response: The NMFS will review all documentation and other available sources to verify the enactment of marine mammal laws, regulations, and guidelines and to assess the implementation of effective enforcement programs. An affirmative finding will not be granted unless all of these program areas, including enforcement, are comparable to the United States. However, the specific elements of enforcement programs are not required to be identical to those of the United States.

16. *Comment:* One commenter suggested an environmental impact statement should be prepared for the regulations.

Response: The NMFS has prepared an environmental assessment for the regulations which is available to the public. The Assistant Administrator has determined that no significant impact on the human environment, other than economic impacts, will occur as a result of these regulations and that no environmental impact statement will be required. Due to the potential for economic impacts, a Regulatory Impact Analysis will be prepared when a final rule is prepared to supersede this interim rule.

17. *Comment:* One commenter indicated that all required documents should be submitted in English, unless there is in-house translating capability.

Response: The NMFS has concluded that this additional burden on foreign countries is not warranted. The NMFS prefers receiving original language documents and obtaining its own translations, which it is committed to complete in a timely manner.

Modifications to the Original Interim Final Rule

This interim rule makes the following changes from the original interim rule:

1. Modifies the definition of "ETP Fishing Area 1" in § 216.3 to include an eastward boundary of 86° W. longitude which more accurately defines the region of differential mortality rate identified by IATTC. Other definitions added by the March 18, 1988 interim rule continue to apply unchanged. For ease

of reference, those definitions that are not changed from the previous interim rule are as follow:

"ETP" means the eastern tropical Pacific Ocean which includes the Pacific Ocean area bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude and the coastlines of North, Central and South America. "ETP Fishing Area 2" means the offshore area south of 14° N. latitude, north of 6° N. latitude, east of 150° W. longitude, and west of 123° W. longitude. "ETP Fishing Area 3" means all other areas within the ETP not included in Fishing Areas 1 and 2. "Harvesting nation" means the country under whose flag one or more fishing vessels are documented, or which has by formal declaration agreed to assert jurisdiction over one or more certified charter vessels, from which vessel(s) fish are caught that are a part of any cargo or shipment of fish to be imported into the United States, regardless of any intervening transshipment. "Kill-per-ton" means the number of small, toothed-cetaceans (marine mammals) killed-per-short ton of yellowfin tuna caught in sets made on marine mammals. "Purse seine set on common dolphins" means a purse seine set in which more than 50 percent of the marine mammals captured are common dolphins.

2. Adds the definition of "Intermediary nation" in § 216.3 to identify nations that are now required to ban importation of yellowfin tuna from nations that are prohibited from importing yellowfin tuna directly into the United States.

3. Modifies the language in paragraph (e)(3)(i) to reflect the addition of requirements for intermediary nations to qualify for importing tuna into the United States.

4. Revises paragraph (e)(3)(ii) to adopt the new U.S. Harmonized Tariff Codes.

5. Modifies the Yellowfin Tuna Certificate of Origin in paragraph (e)(3)(ii) to require that "the nation under whose laws the vessel operated" be identified instead of the country of registry for the harvesting vessel. This provides for the proper treatment of certified charter fishing vessels. NMFS added questions about the location of the harvest and the vessel trip dates for the tuna included in the shipment. These modifications were necessary to improve the monitoring of tuna shipments that may be submitted for importation into the United States from embargoed nations. The language in the declaration statement in the Certificate of Origin in sub-paragraph (e)(3)(ii)(G) was modified to conform with the language used by the U.S. Customs in its documentation accompanying the Certificate of Origin, and adds a cannery representative as a person who can sign the certificate. In the case of canned tuna offered for importation into the United States, a representative of the foreign cannery which processed the tuna is the person who has access to the information needed to accurately complete the Yellowfin Certificate of Origin because one shipment of canned tuna may contain the catch from several vessels.

6. Modifies paragraph (e)(5)(ii)(A) to reflect the 1988 MMPA amendments which require that mortality rate data be collected by the IATTC or equivalent international observer program in which the United States participates and to focus attention on the new measures that must be included in a harvesting nation's program for that program to remain comparable.

7. Clarifies the language in paragraph (e)(5)(ii)(C) to require nations to submit data for any vessel that fished in the ETP any time during a calendar year; and requires the inclusion of data on the number of marine mammals observed to be seriously injured, the number of trips, and on the number of purse seine sets by fishing area.

8. Adds a new paragraph (e)(5)(ii)(D) to require the submission of data for the individual species and stocks currently identified in the IATTC observer program plus coastal spotted dolphins. These species and stocks are northern and southern offshore spotted dolphin, eastern spinner dolphin, northern and southern whitebelly spinner dolphin, northern, southern and central common dolphin and other dolphins.

9. Modifies paragraph (e)(5)(ii)(E) to comply with the 1988 amendments to the MMPA. This paragraph now requires the data reported to the United States to be collected by the IATTC or other international observer program in which the United States participates. It also requires that the Assistant Administrator issue a negative finding to a nation whose observer coverage for any year falls below the level of observer coverage achieved by the U.S. program for the same period, unless the Assistant Administrator determines that the level of coverage achieved by the harvesting nation provides a sufficiently reliable estimate of the average mortality rate for that nation's fleet.

10. Clarifies the language in paragraph (e)(5)(iii) to explain that a finding may be terminated before the end of the next calendar year if the subsequent annual report is not submitted by July 31 (for nations participating in the IATTC observer program, within 14 days after the date the IATTC releases data on porpoise mortality), or if that report indicates the nation's program or mortality rate are no longer comparable to the United States.

11. Adds to paragraph (e)(5)(v) a new paragraph (B) requiring harvesting nations to adopt substantially the same restrictions for their vessels within 180 days of the date such restrictions are applied to U.S. vessels, unless other timing is specifically required in the statute.

12. Adds a new paragraph (e)(5)(v)(D) to reflect the 1988 MMPA amendment requirement for the harvesting nations to maintain observer coverage equal to that achieved by the United States, unless the Assistant Administrator determines a lesser level of coverage provides a sufficiently accurate sample of the nation's fleet mortality rate;

13. Redesignates paragraph (e)(5)(v)(A)(*4*) as (e)(5)(v)(E) and modifies the language to establish that, by the end of the 1990 fishing year, the average kill-per-ton rate for any nation, regardless of its fleet size, can be no more than 25 percent greater than the U.S. average for the same time period rather than the 25/75 percent standard previously adopted. This subparagraph also incorporates a provision for weighing a nation's observed mortality before comparing it to the U.S. rate to account for dissimilar fishing activity between the two nations' fleets in the three designated ETP areas. The weighing provision was contained in paragraph (e)(5)(v)(D) of the original interim rule.

14. Adds a new paragraph (e)(5)(v)(F) which reflects the mortality rate comparison standards contained in the MMPA amendments. For data collected through 1989, a nation's mortality rate must be no greater than twice the U.S. rate for the same period.

15. Adds a new paragraph (e)(5)(v)(G) which establishes that harvesting nations must limit the kill of eastern spinner dolphin and coastal spotted dolphin to 15 percent and 2 percent, respectively, of the nation's total annual dolphin mortality for 1989 and subsequent fishing years.

16. Adds a new paragraph (e)(5)(v)(H) which requires the Assistant Administrator to consider the harvesting nation's cooperation in conducting dolphin population assessments when making a finding.

17. Deletes paragraph (e)(5)(v)(B) which contained proposed criteria for comparing a harvesting nation's mortality rate to the U.S. mortality rate during a five-year baseline period (1986–90). The criteria for comparison are now found in section (e)(5)(v)(A). The negative trend test which was proposed has been eliminated in response to the 1988 MMPA amendments.

18. Eliminates paragraph (e)(5)(v)(C) which described the variable 25/75 percent standard for nations with fewer than five observed trips. That standard

was changed to 25 percent only and is now contained in (e)(5)(v)(E).

19. Eliminates paragraph (e)(5)(v)(D) which provided for weighing the harvesting nation's mortality rate before comparing it with the U.S. rate. The weighing provision is now contained in (e)(5)(v)(E).

20. Eliminates paragraph (e)(5)(v)(E) which would have allowed the Assistant Administrator to consider special circumstances with a request for a finding.

21. Eliminates paragraph (e)(5)(vii)(B) and modifies paragraph (e)(5)(vii)(A) to reflect the submission of applications for initial findings that were received in response to the original interim rule. The findings for countries that had findings in effect on April 15, 1988, that did not submit the required paperwork by August 16, 1988, terminated on October 15, 1988.

22. Adds paragraph (e)(5)(viii) to require that the kill and serious injury data for individual species and stocks of marine mammals taken in 1986, 1987, and 1988 be included in the annual report covering 1988. This is necessary as the effective date of this rule requiring these new data will be after the August 16, 1988 due date for submitting applications for an initial finding under the interim final rule.

23. Adds a new paragraph (e)(5)(ix) which establishes the requirement for intermediary nations to ban imports of yellowfin tuna from any nation that is banned from exporting yellowfin tuna directly to the United States and provides for an embargo against yellowfin tuna and tuna products from any intermediary nation that does not comply with this requirement. The Secretary may waive this requirement for intermediary nations with no history of importing tuna from embargoed nations.

24. Adds a new paragraph (e)(5)(x) which requires certification of a nation under section 8 of the Fishermen's Protective Act of 1967 if an embargo against that nation under this section remains in effect for six months.

25. Eliminates the requirement in (e)(5)(i) that the Assistant Administrator consult with the Department of State in making a finding that imports can be allowed into the United States. Because the regulations did not provide explicitly for any role for the Department of State in the converse situation, in Agency decision-making leading to tuna being embargoed, and because the Department of State is not provided a consultive role in the Marine Mammal Protection Act, and based upon the actual needs of the Department of State in implementing this system, the limited consultation provision is replaced with a provision in the regulations at (e)(5)(xi) providing that the Assistant Administrator will promptly advise the Department of State of both embargo decisions and actions and finding decisions for its information and use.

26. Makes various editorial and numbering changes to conform the numbering as necessary to the changes made and to improve the clarity of certain sentences.

Revised Interim Final Rule

Requirements for Importation: Two-Part Test

This revised interim final rule implements two categories of requirements for yellowfin tuna importation certifications ("Two Part Test"). This Two Part Test will be used each year to determine whether to grant or extend a finding of comparability for any nation that has one or more vessels or certified charter vessels of greater than 400 short tons carrying capacity that purse seines for tuna in the ETP. This minimum vessel size is consistent with the U.S. experience that smaller vessels cannot effectively set and do not set on marine mammals.

First, a nation must have a regulatory program to protect marine mammals that is comparable to the U.S. program. The annual evaluation of the regulatory program will consider the comparability of laws, regulations, guidelines, the observer program, and the enforcement program which govern vessel operators and the gear and techniques they must use to prevent or minimize the number of marine mammals killed and seriously injured when purse seining for yellowfin tuna.

The second part of the test assesses the effectiveness of each nation's regulatory program based upon the nation's annual marine mammal kill rate. Each nation must demonstrate, using reliable and verifiable data, that the average annual rate of incidental mortality of marine mammals per ton of yellowfin tuna taken with marine mammals from fishing vessels operating under its laws is comparable, as set forth in these regulations, to the incidental rate of marine mammal mortality achieved by U.S. vessels fishing in the same geographic area and in association with the same species groups. For purposes of this test, two species groups are considered, common dolphins and all other marine mammal species. We will also consider three geographical areas. The reasons for partitioning mortality data by species group and by area were explained in the preamble of the earlier rule (53 FR 8910). Beginning with fishing in 1989, limitations on the taking of eastern spinner dolphin and coastal spotted dolphin also are included in the test. The comparable regulatory program test will be applied immediately and the kill rate test will be applied beginning in 1990. The kill rate test requires that the average kill per ton of a harvesting nation's fleet must be no greater than twice that of the U.S. fleet for the same time period by the end of 1989 and no greater than 1.25 times the U.S. rate for the same time period by the end of 1990 and thereafter.

Additional information may be requested from the nation before issuing an affirmative finding. An affirmative finding for the regulatory program test is likely to be issued if the program contains provisions substantially similar to those of the United States. Copies of the relevant U.S. regulations have been provided to all interested nations. Each nation's submission must be sufficiently documented and in adequate detail so that the Assistant Administrator will be able to determine that the nation's regulatory program is comparable in substance and effectiveness to the U.S. program.

The minimum documentation requirements are set forth in the regulations, and further explained in this preamble. Any nation that does not have an existing finding of comparability but has one or more vessels of greater than 400 short tons carrying capacity using purse seine gear in the ETP that desires to export yellowfin tuna or yellowfin tuna products to the United States must submit documentation to support a finding at least 120 days prior to the date it wishes the finding to be effective. A nation which has an affirmative finding in effect and is applying for renewal, must apply for renewal annually by submitting its report by July 31 or, if the nation participates in the IATTC observer program, within 14 days after the IATTC releases the required observer data, whichever is later. For renewal of an affirmative finding, the regulations provide that only new and changed information, including a description of the implementation of its program, must be provided. Existing information on file need not be resubmitted.

Comparable Regulatory Program Test

1. Marine mammal rescue gear, equipment and procedural requirements and guidelines.

At a minimum, the gear and procedural requirements must include the installation and use of a superapron

or fine mesh system in the purse seine net, a backdown procedure, the availability of speedboats with towing bridles to hold open nets, the availability of a raft to aid live animals after backdown, a prohibition on brailing and sacking up live animals from the net, and the installation and use during darkness of a lighting system capable of illuminating the backdown channel with at least 140,000 lumens. Sets on pure schools of eastern spinner dolphins and on pure schools of any other species of marine mammals except offshore spotted dolphin stocks, striped dolphin species, and common dolphin species must be prohibited.

By the beginning of the 1990 fishing year, additional requirements must be met for a program to be comparable. Purse seine sets on marine mammals must be required to be completed through backdown to rolling the net to sack-up by one-half hour after sundown, except that operators with demonstrated kill rates in sundown sets that are consistently as low as the fleet's daylight set average may be exempted from this prohibition. Use of explosive devices must be prohibited with the following exception. Explosive devices may be used to influence the movements of marine mammals, if the devices meet the following description (taken from 49 CFR 173.100(ii)):

Explosive pest control devices, Class C explosives, consist of a cardboard-pasteboard type tube not exceeding 4 inches in length and ¾ inch in diameter or a shotgun shell type having an explosive projectile. They may contain a mixture of potassium perchlorate, aluminum powder, sulfur, black powder, smokeless powder or similar pyrotechnic mixture. The component which produces the audible effect may not contain more than 40 grains of explosive composition.

The 1988 amendments further require that NOAA study the effects of Class C explosive devices on marine mammals in the tuna fishery and possibly restrict or prohibit their use by April 1, 1989. Should additional restrictions be applied to U.S. vessels, similar restrictions would have to be adopted by other harvesting nations to maintain a comparable program.

2. Observer Program

An observer program must be used to monitor the effectiveness of marine mammal rescue gear and procedures and to record the number of marine mammals by stock which are killed and seriously injured during fishing operations. To be comparable with the U.S. observer program, a nation must participate in the IATTC or other international observer program in which the United States participates and that program must achieve a level of observer coverage equal to that achieved by the U.S. program during the same period. The Assistant Administrator may determine, after 60 days notice in the **Federal Register**, that an alternative observer program is acceptable because it will provide a sufficiently reliable estimate of the nation's mortality rate. This includes making a determination that an alternative program with a lower level of observer coverage is acceptable because it provides a sufficiently reliable estimate of a nation's mortality rate.

3. A System to Deal With Operators With Problems

An advisory group must exist to identify problems and to provide solutions to improve the performance of individual fishermen in reducing incidental marine mammal mortality. A panel of expert fishing captains is used by the U.S. industry as a peer advisory group to review and improve individual skipper performance. A similar peer advisory group established by an individual nation or cooperatively with other nations on a regional basis, would be considered comparable, as would an advisory group of technical experts. When working with operators with problems, we expect these advisory groups to pay particular attention to sets that had a mortality of 15 animals or more. The U.S. industry uses this level of mortality as a threshold level above which the individual set is examined to determine what the cause of high mortality was. These sets require special attention by the nation to analyze operator performance or the effectiveness of fishing techniques to avoid future mortalities from similar causes.

By the beginning of 1990, a nation must have a system for identifying operators with consistently and substantially higher mortality rates than the majority of the nation's fleet, for the purpose of providing remedial training to these operators, and, if performance does not improve to that of the majority of the fleet, for removing the operator from the fishery.

Comparable Mortality Rate Test

As required by the 1988 amendments, this rule requires that by the end of the 1989 fishing year, a nation must achieve a fleet average marine mammal kill-per-ton rate that is no greater than twice that of the U.S. fleet for the same time period. By the end of the 1990 fishing year, the foreign nation's rate may not exceed 1.25 times that of the U.S. fleet for the same time period. For the purposes of this comparable rate test, a nation may offer the average rate for the most recent five year period or the average rate for only the most recent year, whichever is lower. The method to be used to compare mortality rates is described in detail below. The rates of marine mammal mortality (kill-per-ton) estimated from extensive observer data have varied significantly for the U.S. fleet since 1979 in each fishing area (Figure 1). We assume that the foreign kill rate will also vary significantly from year to year. To reduce this variability, NMFS will use a five year running average for kill rate comparison in 1990 and in subsequent years. This will provide a larger data base for use in the analysis. Most nations purse seining for tuna in the ETP were participating in the IATTC observer program by 1986 and are expected to continue gathering adequate data during the interim period of 1986 through 1990. If a country does not have five years of adequate data because it was not fishing in the ETP for one or more years, NMFS will use up to five years of data from those years for which the country was fishing and has data. If a nation's kill rate for the most recent year is lower than the multi-year average, the lower of the two averages will be used for comparison.

There are significant differences in mortality rates in three different areas of the ETP (Figure 2). These areas are the major inshore area (Area 1) and offshore area (Area 2) and all other areas fished (Area 3). Also, the marine mammal kill rate in sets on common dolphin is significantly greater than the kill rate from sets on all other species. NMFS has decided that these differences should be accounted for in applying the kill rate test. This results in a more fair and accurate comparison than a simple comparison of rates which does not consider the effect of area and species differences upon mortality rates.

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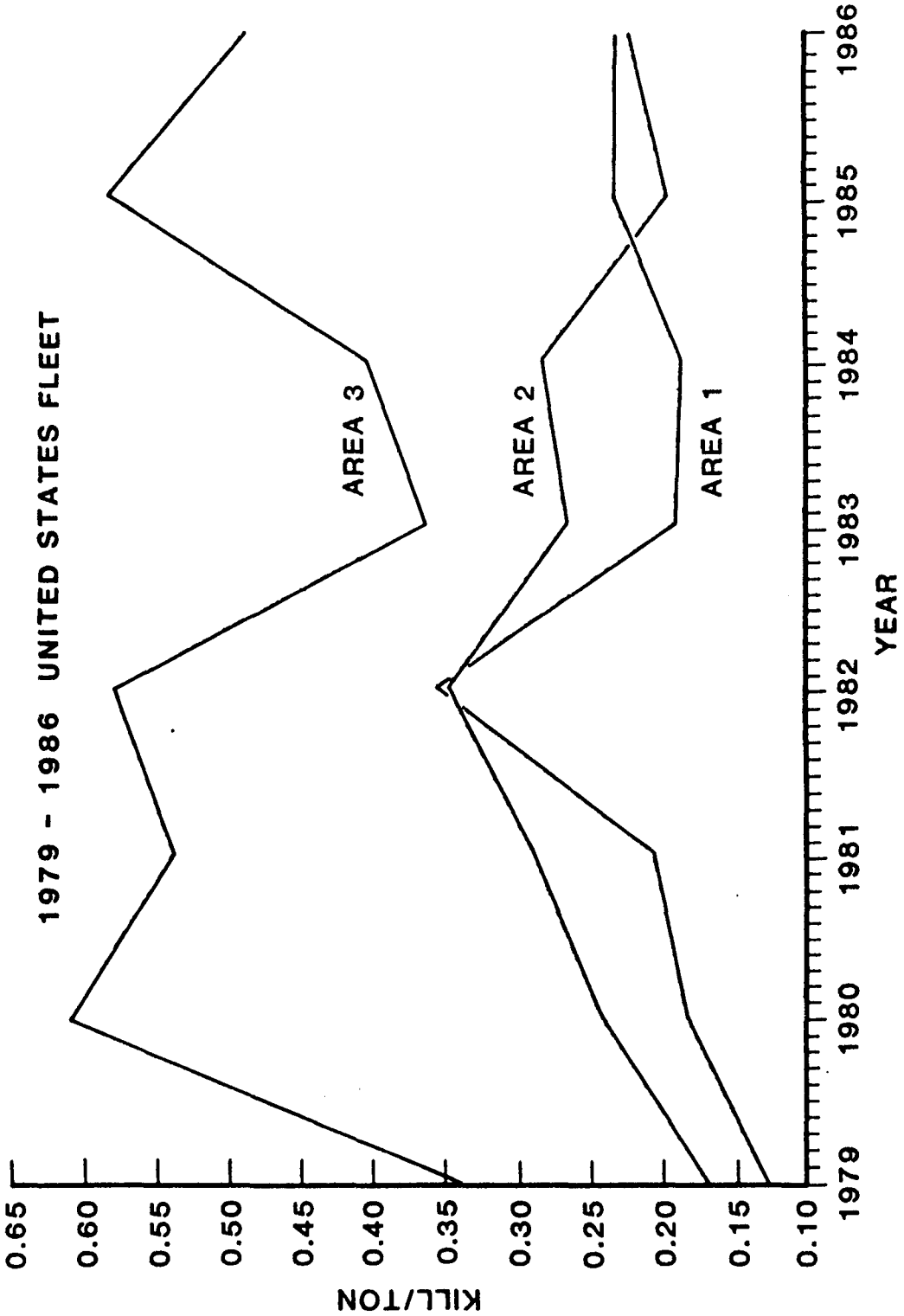

Figure 1. Kill-Per-Ton of Yellowfin Tuna Associated With Marine Mammals for the U.S. Fleet, 1979 - 1986.

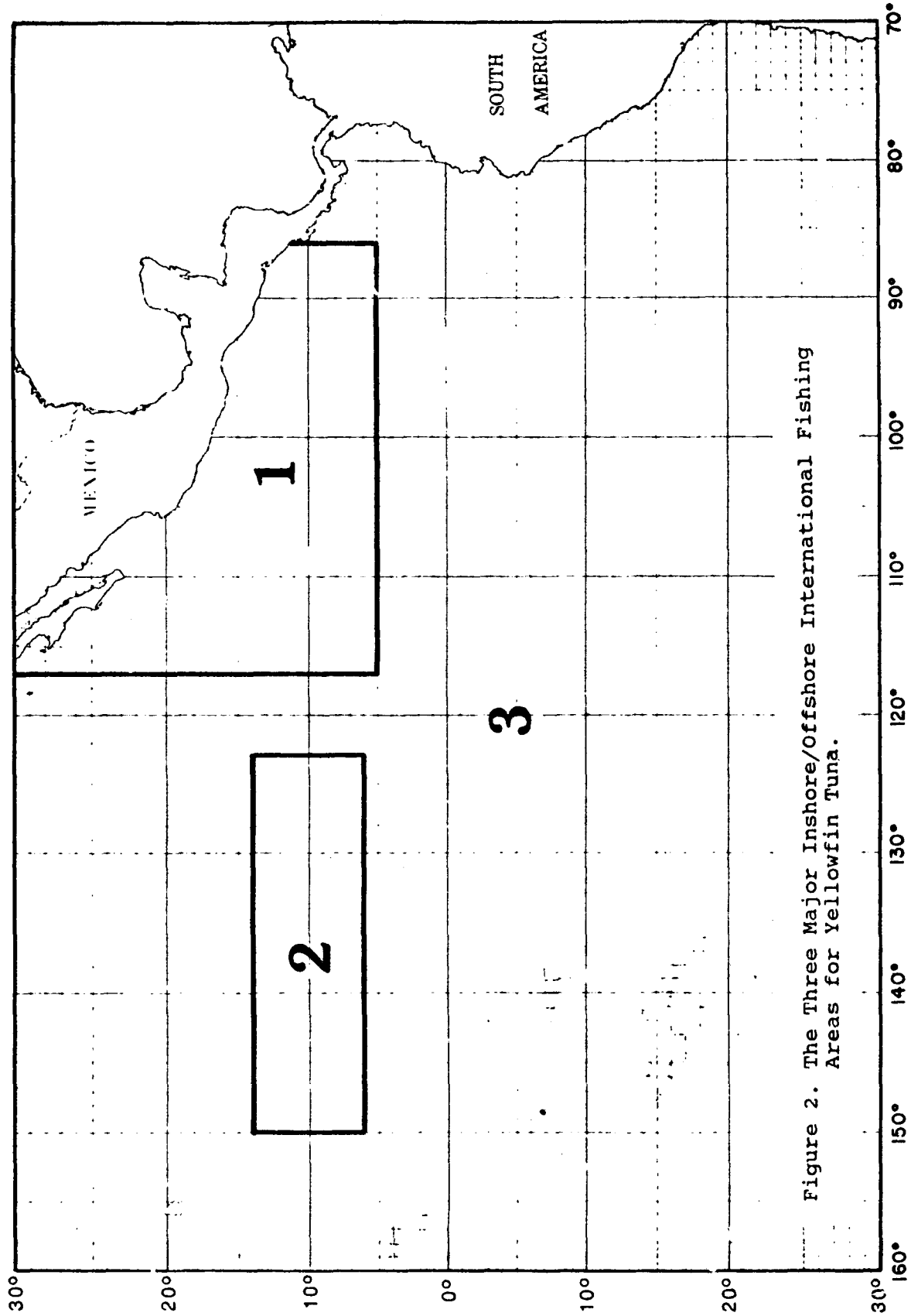

Figure 2. The Three Major Inshore/Offshore International Fishing Areas for Yellowfin Tuna.

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Therefore, the comparable mortality rate test will compare a nation's average mortality rate to the average mortality rate of the United States which is weighted to account for dissimilar amounts of fishing activity between the United States and the foreign nation in three discrete fishing areas and for two groupings of dolphin species. The foreign nation's average mortality rate using the most recent year of data, or the average of all of the data available from the last five years, whichever is lower, will be used to compare with the kill rates from the U.S. fleet for the same period.

In addition to this comparable rate test, each nation must limit its annual incidental mortality of eastern spinner dolphin and coastal spotted dolphin to 15 percent and 2 percent of its total marine mammal mortality. If these levels are exceeded in 1989 or any subsequent fishing year, the Assistant Administrator cannot make an affirmative finding for that nation. As a consequence, that nation's yellowfin tuna will be embargoed for at least one year.

Formulas Used to Calculate Foreign and U.S. Mortality Rates

The mortality rate (dolphins killed/ton yellowfin caught) for each foreign nation R_f is calculated using data stratified by year, species grouping and area as

$$R_f = \sum_{i=1}^{m} \sum_{j=1}^{2} \sum_{k=1}^{3} M_{ijk} \Big/ \sum_{i=1}^{m} \sum_{j=1}^{2} \sum_{k=1}^{3} C_{ijk}$$

where M_{ijk} equals the number of dolphins killed during year i, of species group j and in area k and C_{ijk} is the tons of yellowfin tuna caught during year i, on species group j and in area k. Note that m equals 1 if only the most recent year's data are used and equals 5 if the five-year running average is used.

The weighted average mortality rate for the U.S. fleet is calculated by weighing the U.S. rate by the proportion of the total yellowfin tuna caught by the foreign nation that was caught in each year, on each species grouping, and in each area. The U.S. weighted average (R_{US}) is calculated as:

$$R_{US} = (1/C\ldots)\left[\sum_{i=1}^{m} \sum_{j=1}^{2} \sum_{k=1}^{3} (K_{ijk}/T_{ijk})C_{ijk}\right]$$

where K_{ijk} equals the number of dolphins killed by the United States fleet during year i, of species grouping j and in area k and T_{ijk} equals the tons of yellowfin caught by the U.S. fleet during year i, on species grouping j and in area k. C_{ijk} equals the tons of yellowfin tuna caught by the foreign nation during year i, on species grouping j, and in area k and C . . . is the total catch of the foreign nation for all years, species groupings, and areas combined.

Finally, the U.S. rate (R_{US}) is multiplied by 1.25 to apply the standard that nations must have a kill rate within 25 percent of the U.S. rate. If the foreign nation's rate is less than or equal to the adjusted U.S. rate then they have met the mortality rate test standard.

Example

To simplify this hypothetical example, we will assume that nation X has chosen to use only the most recent year (or the only year data was collected). During the year, nation X has completed 6 observed trips and made 250 observed sets on dolphins. Dolphin mortality and yellowfin catch during dolphin sets for nation X and the United States during the most recent year are presented in Table 1.

1. Nation X Rate (hypothetical)

$$R_f = \frac{(1000+800+0+6\,00+5000+2500)}{(1000+500+0+2000+21000+6000)}$$

$$=9900/30500$$
$$=0.325$$

2. United States Rate (hypothetical)

$$R_{US} = (1/30500)\,[(200/500)1000+(600/1800)500+(100/400)0+(25/200)2000+(6000/20000)21000+(2000/6000)6000]$$
$$=(400+166.667+0+250+6300+2000)/30500$$
$$=0.299$$

3. Comparison of Nation X and United States Rates (hypothetical)

Nation X rate = 0.325
U.S. rate (R_{US}) × 1.25 = 0.299 × 1.25 = 0.374

Therefore, because Nation X's rate is less than the adjusted U.S. rate, it will be eligible to import yellowfin tuna into the United States.

TABLE 1.—NUMBER OF DOLPHINS KILLED AND YELLOWFIN TUNA CAUGHT BY NATION X AND THE UNITED STATES DURING THE MOST RECENT FISHING YEAR, ON COMMON AND ALL OTHER SPECIES, AND IN THREE FISHING AREAS

[Hypothetical example]

	Common dolphin sets		All other sets	
	Mortality catch		Mortality catch	
	(Animals)	(Tons)	(Animals)	(Tons)
Nation X [1]				
FISHING AREAS				
1	1,000	1,000	600	2,000
2	800	500	5,000	21,000
3	0	0	2,500	6,000
Total		1,500		29,000
United States				
1	200	500	25	200
2	600	1,800	6,000	20,000
3	100	400	2,000	6,000

[1] Nation X Catch—all sets = 30,500.

Intermediary Nations

Nations that export yellowfin tuna and tuna products to the United States and which also import yellowfin tuna and tuna products caught by vessels of

other nations will be required to take action under this rule, if the United States bans imports from any nation. Intermediary nations must certify to the U.S. Government that they have acted within 60 days of the U.S. ban to prohibit imports of yellowfin tuna and tuna products from a nation that is banned from directly exporting tuna to the United States. Intermediary nations that fail to provide such a certification within 90 days of the U.S. ban will not be allowed to import yellowfin tuna into the United States. The rule provides intermediary nations an additional 30 days to certify their action to the U.S. government. This period for notification to reach our government is intended to allow intermediary nations the full 60 days to be informed of the U.S. embargo of a nation's tuna and to take the necessary steps to prohibit import of the same products.

The reference to intermediary nations was contained in the 1988 amendments to the MMPA and is intended to prevent embargoed nations from circumventing the embargo by passing their tuna through other nations for importation into the United States. However, the amendment also provides the Secretary with discretion to consider its requirements and purposes satisfied without requiring formal governmental certifications when there is no reason to suspect that nations are importing tuna from embargoed nations. Accordingly, a nation, which the Secretary determines does not obtain any part of its tuna supply from embargoed nations, will not be required to certify that it has banned imports from the embargoed nation or nations. Each nation therefore, which expects to export tuna to the United States, should determine from its citizens whether yellowfin tuna from a nation whose tuna is prohibited from entry into the United States is also imported into their country. If a nation learns that it imported such tuna, then appropriate action, described above, should be taken. Should an intermediary nation be embargoed under this rule, other intermediary nations would be required to prohibit yellowfin imports from that nation as well, if they wish to continue to import tuna into the United States.

As of the date of publication of this rule, only El Salvador is prohibited from exporting yellowfin tuna and yellowfin tuna products to the United States. The U.S.S.R., which was prohibited from exporting yellowfin tuna to the United States under the previous rule (53 FR 8910, March 18, 1988), has not participated in the ETP fishery for over two years. Therefore, the prohibition on the importation of yellowfin tuna and tuna products into the United States is no longer appropriate and is hereby rescinded. The time period for intermediary nations to embargo tuna imported from these nations with existing embargoes will start running from the effective date of these regulations. The United States considers the publication of these regulations as the first effective opportunity to advise them to comply with these provisions recently added to the Marine Mammal Protection Act by the 1988 amendments.

Embargo of All Fish Products

This revised interim final rule requires that the Secretary of Commerce certify to the President when a ban on tuna imports under this rule remains in effect for six months. That certification will be considered a certification for the purposes of section 8 of the Fishermen's Protective Act of 1967 and could trigger an embargo on all fish products from the nation that was subject to the initial import ban. This provision applies to both harvesting and intermediary nations.

Certifications in Effect Before August 16, 1988

For harvesting nations, a finding of comparability (or "conformance") in effect before August 16, 1988, will continue in effect until a determination (either affirmative or negative) is made on a new request for a finding under these new regulations, if the request and required supporting documentation were submitted by August 16, 1988. If a request and documentation from a harvesting nation were not received by that date, the existing finding of conformance was rescinded and yellowfin tuna and tuna products from that nation were banned from importation into the United States. That ban continues until a new finding of comparability is made.

Certifications in Effect on the Date This Rule is Published

A finding of comparability that is in effect on the date these regulations are published in the **Federal Register** will remain in effect until a new finding is made based on the application for renewal that is required to be submitted by July 31, 1989 or, if the nation participates in the IATTC observer program, within 14 days after the IATTC release the required observer data, whichever is later. Should a nation with an affirmative finding fail to apply for a renewal of its finding by the required date, the finding will be terminated and imports from that nation will be banned.

Confidentiality

All data submitted by foreign nations in compliance with this rule will be kept confidential as allowed by U.S. law. Generally, this means that confidential business information will be made available to the public only in aggregated form.

Classification

This rule is being issued as an interim final rule because the statute requires harvesting nations meet action requirements by January 1, 1989, as well as additional requirements that must be in place by 1990. Public comment prior to publication is therefore impracticable.

The Assistant Administrator has determined that the modifications to the regulations being made at 50 CFR 216.24(e) will not have a significant impact on the human environment. NMFS has prepared an environmental assessment (EA) on the modification. The conclusion of that EA was a finding of no significant impact on the human environment, other than economic and social impacts. Therefore, an environmental impact statement is not required. The EA is available upon request (see **ADDRESS**).

The Under Secretary for Oceans and Atmosphere has determined that this rule is a "major" Federal action under Executive Order 12291. The potential annual effect on the U.S. economy, in the worst case, would exceed $100 million. However, this interim final rule is exempt from the advance review requirements of Executive Order 12291 under section 8(a)(2), which exempts actions that must meet statutory or judicial deadlines. Deadlines imposed by the Marine Mammal Protection Act Amendments of 1988 (Pub. L. 100-711) require that yellowfin tuna harvesting nations act to comply with provisions of the statute beginning January 1, 1989. This rule is being reported to the Director of the Office of Management and Budget with an explanation of why it is not possible to follow the procedures of that order.

The Regulatory Flexibility Act does not apply since the opportunity for public comment prior to publication of the interim final rule is not required by the Marine Mammal Protection Act or any other act. As a result, a Regulatory Flexibility Analysis was not prepared.

This rule contains collections of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). The collections which are subject to the Act are found at 50 CFR 216.24(e) (3) and (4) and have been approved by the Office of Management and Budget

(OMB) under OMB Control Number 0648-0040.

Public reporting burden for this collection of information is estimated to average .50 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. Importers are required to present the information on a form 370-1 "Yellowfin Tuna Certificate of Origin" at the time of entry. Burden hours for the salmon/halibut collection is estimated to be the same as for yellowfin tuna. Send comments regarding these burden estimates, or any other aspect of this collection of information including suggestions for reducing this burden, to the National Marine Fisheries Service ((F/PR1), 1335 East-West Highway, Silver Spring, MD 20910, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attn: Paperwork Reduction Act Project 0648-0040)).

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

List of Subjects in 50 CFR 216

Administrative practice and procedure, Imports, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

Date: March 1, 1989.

James E. Douglas, Jr.,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service,

For the reasons set forth in the preamble, 50 CFR Part 216 is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for 50 CFR Part 216 continues to read as follows:

Authority: 16 USC 1361-1407.

2. Section 216.3 is amended by revising the definition of "ETP Fishing Area 1" to include an easterly boundary at 86° W. longitude and adding one new definition for "intermediary nation," in alphabetical order, to read as follows:

§ 216.3 Definitions.

* * * * *

ETP Fishing Area 1 means the northern coastal portion of the ETP east of 117° W. longitude, north of 5° N. latitude, and west of 86° W. longitude.

* * *

Intermediary nation means a nation which exports yellowfin tuna or tuna products to the United States, and which imports yellowfin tuna or tuna products.

* * * * *

3. Section 216.24 is amended by revising paragraphs (e)(1), (2), (3), (4), and (5) to read as follows:

§ 216.24 Taking and related acts incidental to commercial fishing operations.

* * * * *

(e) *Importation.* (1) It is illegal to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if the fish have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of marine mammals in excess of that allowed under this part for U.S. fishermen or in excess of what is specified in subsection (e)(5) in the case of fishing for yellowfin tuna.

(2) The following fish and categories of fish, which the Assistant Administrator has determined may be involved with commercial fishing operations which cause the death or injury of marine mammals, are subject to the requirements of this section:

(i) *Yellowfin tuna.* The following U.S. Harmonized Tariff Schedule Item Numbers identify the categories of tuna and tuna products under which yellowfin tuna is imported into the United States and which are subject to the restrictions of paragraphs (e)(3) and (e)(5) of this section:

(A) Fish, fresh or chilled, excluding fish fillets and other fish meat of heading 0302:

0302.32.00.00 Yellowfin tunas.

(B) Fish, frozen, excluding fish fillets and other fish meat of heading 0303:

0303.42.00 Yellowfin tunas

(c) *Prepared fish:* fish whole or in pieces, but not minced: Tuna, skipjack and Atlantic bonito:

1604.14.10.00 Tunas and skipjack; in airtight containers; in oil, except cans marked as other than yellowfin tuna in a manner approved in advance by the National Marine Fisheries Service Southwest Regional Director.

1604.14.20.40 Tunas and skipjack in airtight containers; not in oil; other than albacore, except cans marked as other than yellowfin tuna in a manner approved in advance by the National Marine Fisheries Service Southwest Regional Director.

1604.14.30.40 Tunas and skipjack in airtight containers; other; other than albacore, except cans marked as other than yellowfin tuna in a manner approved in advance by the National Marine Fisheries Service Southwest Regional Director.

1604.14.40.00 Tunas and skipjack; not in airtight containers; in bulk or in immediate containers weighing with their contents over 6.8 kg each, not in oil.

1604.14.50.00 Tunas and skipjack; in airtight containers; other.

(ii) *Salmon and Halibut.* The following U.S. Harmonized Tariff Schedule Item Numbers identify the categories of salmon and halibut products which are imported into the United States and are subject to the restrictions of paragraph (e)(4) of this section:

(A) Fish, fresh or chilled, excluding fish fillets and other fish meat of heading 0302:

0302.12.00 Pacific salmon, Atlantic salmon, and Danube salmon.

0302.21.00.00 Halibut and Greenland turbot.

(B) Fish, frozen, excluding fish fillets and other fish meat of heading 0303:

0303.10.00 Pacific salmon.

0303.22.00 Atlantic salmon and Danube salmon.

0303.31.00.00 Halibut and Greenland turbot.

(C) Fish fillets and other fish meat, fresh, chilled or frozen of heading 0304:

0304.10.40.40 Fresh or chilled fillets; Flatfish.

0304.10.40.50 Fresh or chilled fillets; other (salmon).

0304.20.20.22 Frozen fillets; Halibut.

0304.20.60.50 Other; Halibut.

0304.20.60.80 Other (salmon).

(D) Fish, dried, salted or in brine; smoked fish, whether or not cooked before or during the smoking process:

0305.41.00.00 Smoked fish, including fillets: Salmon.

0305.69.40.00 Fish salted but not dried or smoked and fish in brine: Salmon.

(E) Prepared or preserved fish; fish, whole or in pieces, but not minced:

1604.11 Salmon.

(3) *Yellowfin tuna.* (i) All shipments of tuna and tuna products listed in paragraph (e)(2)(i) of this section, from any nation, may be imported into the United States only if (1) accompanied by a separate Yellowfin Tuna Certificate of Origin (Standard Form 370-1); and (2) in the case of a harvesting nation, the finding allowing importation is made as required by paragraph (e)(5)(i) or, in the case of an intermediary nation, an embargo has not been imposed under paragraph (e)(5)(xi). Shipments of tuna and tuna products from nations which are both harvesting and intermediary nations must satisfy the provisions which apply to both categories of nations in order to be imported into the United States.

(ii) The Yellowfin Tuna Certificate of Origin must include the following information:

(A) Exporter (Name and Address);

(B) Consignee (Name and Address);

(C) Identity and quantity of the tuna to be imported, listed by U.S. tariff schedule number;

(D) Areas of harvest (ETP, western and central Pacific Ocean, Atlantic Ocean, Indian Ocean);

(E) Name of vessel(s) that caught the tuna, country under whose laws the vessel operated, and the date(s) of fishing trip on which the tuna was caught;

(F) Other documentation as may be required by the Assistant Administrator, subsequent to granting a finding in paragraph (e)(5) of this section;

(G) A declaration to be signed by either a responsible government official from the harvesting nation, the vessel master, the vessel owner's representative, or a representative of the cannery which processed the fish which states; "I certify that the above information is complete, true and correct to the best of my knowledge and belief."

(4) *Salmon and Halibut.* All shipments of fish and fish products listed in paragraph (e)(2)(ii) of this section, from any nation, may not be imported into the United States unless the following conditions are met:

(i) The shipment is accompanied by a commercial invoice and/or a bill of lading indicating the following:

(A) Nation of registry of the fishing vessel(s) involved;

(B) Exporter (name and address);

(C) Consignee (name and address);

(D) Identity and quantity of the fish or fish products to be imported; *and*

(ii) The shipment is accompanied by a statement by a responsible official of the harvesting nation or the master of the vessel which caught the fish that such fish were not caught in a manner prohibited for U.S. fishermen by these regulations. The statement will identify the species, quantity, and exporter of the fish to which the statement refers, and be submitted at the time of importation; *or*

(iii) A responsible official of the harvesting nation may certify to the Assistant Administrator that all of its flag vessels are fishing in conformance with these regulations or that the fishing technology practiced by the harvesting nation with respect to the species of fish presented for importation into the United States does not result in deaths to marine mammals in excess of that which results from U.S. commercial fishing operations as prescribed by these regulations. Upon receipt of a statement of conformance, the Assistant Administrator may then make a finding, and publish such finding in the **Federal Register**, that fish imports listed in paragraph (e)(2)(ii) of this section from the nation were not caught with commercial fishing technology which results in the incidental kill of marine mammals in excess of U.S. standards.

(5) *Yellowfin tuna.* (i) Any tuna or tuna products in the classifications listed in paragraph (e)(2)(i) of this section, from harvesting nations whose vessels of greater than 400 short tons carrying capacity operate in the ETP tuna purse seine fishery as determined by the Assistant Administrator, may not be imported into the United States unless the Assistant Administrator makes an affirmative finding and publishes the finding in the **Federal Register** that:

(A) The government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to the regulatory program of the United States; and

(B) The average rate of incidental mortality by the vessels of the harvesting nation is comparable to the average rate of incidental mortality of marine mammals by U.S. vessels in the course of such harvesting.

(ii) A harvesting nation which desires an initial finding under these regulations that will allow it to import into the United States those products listed in paragraph (e)(2)(i) of this section must provide the Assistant Administrator with the following information:

(A) A detailed description of the nation's regulatory and enforcement program governing incidental taking of marine mammals in the purse seine fishery for yellowfin tuna, including:

(*1*) A description, with copies of relevant laws, implementing regulations and guidelines, of the gear and procedures required in the fishery to protect marine mammals, including but not limited to the following:

(*i*) A description of the methods used to identify problems and to take corrective actions to improve the performance of individual fishermen in reducing incidental mortality and serious injury. By 1990 the methods must identify individual operators with marine mammal mortality rates which are consistently and substantially higher than the majority of the nation's fleet, and provide for corrective training and, ultimately, suspension and removal from the fishery if the operator's performance does not improve to at least the performance of the majority of the fleet in a reasonable time period;

(*ii*) By 1990, a description of a regulatory system in operation which ensures that all marine mammal sets are completed through backdown to rolling the net to sack-up no later than one-half hour after sundown, except that individual operators may be exempted, if they have maintained consistently a rate of kill during their observed sundown sets which is not higher than that of the nation's fleet average during daylight sets made during the time period used for their comparability finding; and

(*iii*) By 1990, a description of its restrictions on the use of explosive devices in the purse seine fishery which are comparable to those of the United States.

(*2*) A detailed description of the method (e.g., IATTC or other international program observer records), and level, of observer coverage by which the incidental mortality and serious injury of marine mammals will be monitored;

(B) A list of its vessels and any certified charter vessels of greater than 400 short tons carrying capacity which purse seined for yellowfin tuna at any time during the preceding two years in the ETP, indicating the status of each such vessel during that two year period (i.e. actively fishing in ETP, fishing in other waters; in port for repairs; inactive) and the status of each vessel expected to operate in the ETP in the year in which the submission is made.

(C) A compilation of the best available data for the 1986 calendar year and each subsequent calendar year on the performance of any of its purse seine vessels (including certified charter vessels) fishing at any time for tuna associated with marine mammals within the ETP including the following:

(*1*) Total number of tons of yellowfin tuna observed caught in each fishing area by purse seine sets on:

(*i*) Common dolphin and

(*ii*) All other marine mammal species;

(*2*) Total number of marine mammals in each fishing area by species/stock observed killed and seriously injured by purse seine sets on:

(*i*) Common dolphin and

(*ii*) All other marine mammal species;

(*3*) Total number of observed trips and total number of observed purse seine sets on marine mammals in each fishing area by the nation's purse seine fleet during the year;

(*4*) Total number of vessel trips and total number of purse seine sets on marine mammals in each fishing area by the nation's purse seine fleet during the year; and

(*5*) The total number of observed purse seine sets in each fishing area in which more than 15 marine mammals were killed.

(D) Data required by paragraph (e)(5)(ii)(C)(*2*) presented individually for the following marine mammal species/stocks: offshore spotted dolphin, coastal spotted dolphin, eastern spinner dolphin, whitebelly spinner dolphin, common dolphin, striped dolphin, and "other marine mammals".

(E) A description of the source of the data provided in accordance with paragraph (e)(5)(ii)(C) of this section. The observer program from which these data are provided must be operated by the IATTC or another international program in which the United States participates and must sample at least the same percentage of the fishing trips as the United States achieves over the same time period, unless the Assistant Administrator determines that an alternate observer program, including a lesser level of observer coverage, will provide a sufficiently reliable average rate of incidental taking for the nation.

(iii) A nation applying for its initial finding of comparability should apply at least 120 days before the desired effective date. The Assistant Administrator's determination on a nation's application for its initial finding will be announced and published in the **Federal Register** within 120 days of receipt of the information required in paragraph (e)(5)(ii) of this section. A finding is valid only for the period for which it was issued, and may be terminated before the end of the year if the Assistant Administrator finds that the nation no longer has a comparable regulatory program or kill rate.

(iv) A harvesting nation, which has in effect a positive finding under this section, may request renewal of its finding for the subsequent calendar year by providing the Assistant Administrator July 31, or for nations participating in the IATTC observer program, within 14 days after the date the IATTC releases data on porpoise mortality, whichever is later, an annual report updating the information listed in § 216.24(e)(5)(ii) which is current through the previous full calendar year.

(v) The Assistant Administrator will make an affirmative finding or renew an affirmative finding for a harvesting nation if:

(A) The harvesting nation has provided all information required by paragraphs (e)(5)(ii) and (e)(5)(iv) of this section;

(B) The nation's regulatory program is comparable to the regulatory program of the United States as described in paragraphs (a), (b), (c), (d)(2), and (f) of this section and the nation has incorporated into its regulatory program such additional prohibitions as the United States may apply to its own vessels within 180 days after the prohibition applies to U.S. vessels, except that provisions for identifying and removing problem operators, prohibiting sundown sets, and restricting the use of explosives described in (e)(5)(ii)(A)(*1*) must be applied by a nation to its vessels by January 1, 1990;

(C) The data on marine mammal mortality and serious injury submitted by the harvesting nation are determined to be accurate;

(D) The observer coverage of fishing trips was equal to that achieved by the United States during the same time period or, if less, was determined by the Assistant Administrator to provide a sufficiently accurate sample of the nation's fleet mortality rate;

(E) The average kill-per-ton rate for the longest period of time for which data are available, up to 5 consecutive years, or for the most recent year, whichever is lower, is no more than 25 percent greater than the U.S. average for the same time period, after the U.S. mortality rate is weighed to account for dissimilar amounts of fishing activities between the two nations in the three ETP fishing areas and for common dolphin and other marine mammal species, except as provided in (e)(5)(v)(F) below for findings made in 1990;

(F) For findings made in 1990 only, which are based on data collected through the 1989 fishing year, a nation's average mortality rate is no more than twice that of the U.S.-flag fleet for the same period, after the U.S. mortality rate is weighed to account for dissimilar amounts of fishing activities between the two nations in the three ETP fishing areas and for common dolphin and other marine mammal species;

(G) For the 1989 fishing year and subsequent years, the nation's observed kill of eastern spinner dolphin (*Stenella longirostris*) and coastal spotted (*Stenella attenuata*) dolphin is no greater than 15 percent and 2 percent, respectively, of the nation's total annual observed dolphin mortality; and

(H) The nation has complied with all reasonable requests by the Assistant Administrator for cooperation in carrying out dolphin population assessments in the ETP.

(vi) The Assistant Administrator may require verification of statements made in connection with requests to allow importations. The Assistant Administrator may reconsider a finding upon a request from and the submission of additional information by the harvesting nation.

(vii) Any finding in effect on April 18, 1988 will remain in effect until the Assistant Administrator's decision on the 1988 application is announced or until September 1, 1989, whichever is earlier, if the Assistant Administrator received on or before August 16, 1988, a valid, signed and substantially complete application for a new finding.

(viii) The 1988 annual report (to be submitted in 1989) required in paragraph (e)(5)(iv) of this section, must include data for the years 1986, 1987, and 1988, as requested in paragraph (e)(5)(ii)(C)(*2*) of this rule, before the Assistant Administrator will consider a request for a renewal of a finding in 1989. However, data on coastal spotted dolphin do not have to be submitted until the 1989 annual report.

(ix) Any tuna or tuna products in the classifications listed in paragraph (e)(2)(i) of this section, from any intermediary nation, may not be imported into the United States if the Assistant Administrator determines and publishes the determination in the **Federal Register** that the intermediary nation has not provided reasonable proof and has not certified to the United States that it has acted to ban the importation into its nation of all yellowfin tuna and tuna products from those nations from which the United States has banned the importation of yellowfin tuna and tuna products. The Secretary will not require an intermediary nation to certify that it has implemented a ban on yellowfin tuna and tuna products from nations embargoed by the United States, if the Secretary is satisfied that the intermediary nation imports tuna products, directly or indirectly, from sources other than an embargoed nation. The intermediary nation's ban must be effective within sixty days of the effective date of the United States ban to avoid a determination prohibiting importation, and the intermediary nation must supply the Assistant Administrator with the reasonable proof and certification within 90 days of the effective date of the United States ban in order to avoid imposition of the embargo on the 91st day. An embargo under this paragraph may be lifted by the Assistant Administrator upon a determination announced in the **Federal Register**, based upon new information supplied by the embargoed nation, that the nation has acted to ban yellowfin tuna and tuna products from those nations from which the United States has banned the importation of yellowfin tuna and tuna products.

(x) After six months of an embargo being in place against a nation under this section, that fact shall be certified to the President for purposes of

certification under section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as the embargo is in effect.

(xi) The Assistant Administrator will promptly advise the Department of State of embargo decisions and actions and of finding determinations.

* * * * *

[FR Doc. 89-5154 Filed 3-2-89; 8:45 am]
BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 54, No. 43
Tuesday, March 7, 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

Agricultural Marketing Service

7 CFR Part 58

[DA-88-119]

Grading and Inspection, General Specifications for Approved Dairy Plants and Standards for Grades of Dairy Products; Proposed Revision of United States Standards for Grades of Butter

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document proposes revisions in the United States Standards for Grades of Butter. The standards are being revised to minimize the impact of the "short" body defect in the grading process. The revisions take into consideration the changes in production technology and marketing practices. Modern commercial packaging equipment tends to rework the butter so that the condition of "short" body defect is eliminated or greatly minimized in the butter in the final retail butter package.

DATE: Comments must be submitted on or before April 6, 1989.

ADDRESS: Comments should be sent to Director, Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, Room 2750 South Building, P.O. Box 95456, Washington, DC 20090-6456.

FOR FURTHER INFORMATION CONTACT: Roland S. Golden, Dairy Products Marketing Specialist, USDA/AMS/Dairy Division, Room 2750 South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-7473.

SUPPLEMENTARY INFORMATION: This proposed rule has been reviewed under USDA guidelines implementing Executive Order 12291 and Secretary's Memorandum 1512-1 and has been classified as a "non-major" rule under criteria contained therein.

The Administrator of the Agricultural Marketing Service has determined that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities because it is a voluntary standard and the revision will not increase costs to those utilizing the standard.

In addition, the Agency's Dairy Standardization Section conducted a review of the United States Standards for Butter. The objective of the review was to obtain both current and historical information relating to the impact of the "short" body defect in the butter grading process. "Short" body relates to the brittleness of butter and is influenced by processing techniques.

The review involved the collection and evaluation of information from the Agency's Dairy Grading Section and from the American Butter Institute, which represents the butter industry. It was determined from this information that modern commercial packaging equipment is able to rework butter in such a way that any "short" body defect in the butter is eliminated or greatly minimized when the butter is converted into retail packages.

Because of this, less importance should be given to the "short" body defect when grading butter. Currently, the standards require that butter possessing a "definite short" body defect receive the next lower grade. With the present packaging technology, however, such downgrading is inappropriate since the defect no longer causes problems when the butter is packaged for consumers. It is therefore proposed that the U.S. Standards for Grades of Butter be revised to minimize the impact of the "short" body defect. Also, it is proposed that the definition of "short" body characteristics be amended to add a definition for "pronounced short."

This proposal would:

1. Delete the "½" disrating for "slight short."
2. Change the "1" disrating for "definite short" to a "½" disrating.
3. Provide for a "1" disrating for "pronounced short."
4. Show a definition for "pronounced short" in the "Explanation of Terms" section.

USDA grade standards are voluntary standards that are developed to assist the orderly marketing process. Dairy plants are free to choose whether or not to use these grade standards. USDA grade standards for dairy products have been developed to identify the degree of quality in the various products. Quality in general refers to usefulness, desirability, and value of the product—its marketability as a commodity. When butter is officially graded, the USDA regulations governing the grading of manufactured or processed dairy products would be in effect. These regulations also require that fees and charges be assessed for grading services provided by USDA.

All written submissions made pursuant to this notice will be made available for public inspection at the Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, DC, during regular business hours.

List of Subjects in 7 CFR Part 58

Food grades and standards, Dairy products.

For the reasons set forth in the preamble, it is proposed that 7 CFR Part 58 be amended as follows:

PART 58—[AMENDED]

1. The authority citation for 7 CFR Part 58 continues to read as follows:

Authority: Secs. 202-208, 60 Stat. 1087, as amended; 7 U.S.C. 1621-1627 unless otherwise noted.

2. In § 58.2627, Table II is revised to read as follows:

§ 58.2627 Specifications for U.S. grades of butter.

* * * * *

TABLE II—CHARACTERISTICS AND DISRATINGS IN BODY, COLOR, AND SALT

Characteristics	Disratings		
	S	D	P
Body:			
Short	.....	½	1
Crumbly	½	1	.....
Gummy	½	1	.....
Leaky	½	1	2
Mealy or grainy	½	1	.....
Weak	½	1	.....
Sticky	½	1	.....
Ragged boring	1	2	.....
Color:			
Wavy	½	1	.....
Mottled	1	2	.....
Streaked	1	2	.....
Color specks	1	2	.....
Salt:			
Sharp	½	1	.....

TABLE II—CHARACTERISTICS AND DISRATINGS IN BODY, COLOR, AND SALT—Continued

Characteristics	Disratings		
	S	D	P
Gritty	1	2	.....

S—Slight; D—Definite; P—Pronounced.

3. Section 58.2635(b)(6) is revised to read as follows:

§ 58.2635 Explanation of terms.

* * * * *

(b) * * *

(6) *Short.* The texture is short-grained, lacks plasticity and tends toward brittleness. The intensity is described as "slight" when the butter lacks pliability and tends to be brittle; "definite" when sharp and distinct breaks form as pressure is applied against the butter plug; and "pronounced" when sharp and distinct breaks form in the butter surface when the trier is inserted, or when segments of the butter plug separate along fracture lines.

* * * * *

Signed at Washington, DC, on: March 2, 1989.

Patrick Boyle,

Administrator, Agricultural Marketing Service.

[FR Doc. 89-5233 Filed 3-6-89; 8:45 am]

BILLING CODE 3410-02-M

Animal and Plant Health Inspection Service

[Docket No. 87-092]

7 CFR Part 318

Sharwil Avocados From Hawaii

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend "Subpart—Hawaiian Fruits and Vegetables" quarantine and regulations to allow interstate movement of untreated Sharwil avocados from Hawaii to any destination. Movement would be authorized by a certificate upon compliance with certain harvesting and handling requirements. The interstate movement of avocados from Hawaii is regulated to prevent spread of the Mediterranean fruit fly, the melon fly, and the Oriental fruit fly. It appears, however, that the Sharwil variety of avocado is not a host to these fruit flies if they are picked, handled, and packed in compliance with the regulation.

DATE: Consideration will be given only to comments postmarked or received on or before May 8, 1989.

ADDRESSES: Send an original and two copies of written comments to Helene R. Wright, Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket Number 87-092. Comments received may be inspected at USDA, 14th and Independence Avenue, SW., Room 1141-South Building, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Mr. L.H. Tengan, Staff Officer, Operations Support, International Services, APHIS, USDA, Room 654, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8892.

SUPPLEMENTARY INFORMATION:

Background

The Hawaiian Fruits and Vegetables regulations (contained in 7 CFR 318.13 through 318.13-17 and referred to below as the regulations), among other things, govern the interstate movement from Hawaii of avocados in a raw or unprocessed state. Regulation is necessary to prevent spread of the Mediterranean fruit fly (*Ceratitis capitata* (Wied.)), the melon fly (*Dacus cucurbitae* A(Coq.)), and the Oriental fruit fly (*Dacus dorsalis* (Hendel)). These fruit flies, commonly referred to as "Trifly," infest Hawaii but not the rest of the United States.

In the early 1980's, Agricultural Research Service (ARS) scientists determined that Shawil avocados are not hosts to Trifly if they are picked with a stem attached and, within 24 hours after being picked, certain handling procedures are followed and the avocados are packed in cartons impervious to Trifly. This research [1] provided the basis for a proposal, published in the November 19, 1985 **Federal Register** (50 FR 47551-47555, Docket No. 85-330), to allow certification, for movement to any destination in the United States, of Sharwil avocados that were picked and then packed, under specified conditions, within the 24-hour safe period.

In a document published in the December 11, 1986 **Federal Register** (51 FR 44746-44751, Docket No. 86-332), we withdrew our "any destination" proposal and substituted a more limited proposal to allow movement of Hawaiian Sharwil avocados to Alaska only. At that time, we were not able to demonstrate that our proposed monitoring of avocado handling during the 24-hour safe period would be effective. The "Alaska only" final rule was published in the March 20, 1987 **Federal Register** (52 FR 8863-8865, Docket No. 87-003).

Monitoring

Two harvest/shipping seasons for Sharwil avocados have passed since we issued our 1986 withdrawal notice. During this period, over 35 metric tons of Sharwil avocados have been moved from Hawaii to Alaska. No violations of the picking and the 24-hour harvest-to-packing requirements have been discovered by federal or state inspectors following the prescribed monitoring procedures.

If this monitoring were not effective, and some avocados had been packed after the 24-hour safe period or without the required stem, or been picked up off the ground, at least a few of the avocados would have carried Trifly to Alaska. In fact, no avocados without the required stem, and no eggs, larvae, or flies have been discovered after the avocados arrived in Alaska. We believe that this proves that our monitoring requirements are stringent enough to ensure that the avocados have the required stem, are picked off a tree and are packed within 24 hours after they are picked and, therefore, we are reinstating the proposal to allow movement of Hawaiian Sharwil avocados to any interstater destination.

Certification

Movement of a regulated article from a quarantined area must be authorized by issuance of an official document. When movement is limited to specified destinations, the document used is a limited permit. Thus, the current regulations require issuance of a limited permit because a untreated Hawaiian Sharwil avocados may be moved interstate to Alaska only. Since the regulations would be amended to allow movement to any interstate destination, the proper authorizing document would be a certificate, not a limited permit.

We also propose to delete § 318.13-3(b)(2) and to revise § 318.13-4(c). Both paragraphs currently contain provisions

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[1] The initial ARS research was conducted during Hawaii's January-March 1985 harvesting season on 38,241 Sharwil avocados. At our request, ARS continued the study until February 1987. A total of 114,112 Sharwil avocados were ultimately inspected during the 24-hour post-picking period. No Trifly eggs or larvae were found. Documents concerning the ARS research may be obtained from Mr. L.H. Tengan, Staff Officer, Operations Support, International Services, APHIS, USDA, Room 854, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8892.

that relate only to the movement of Hawaiian Sharwil avocados, under limited permit, to Alaska.

Miscellaneous

To reflect agency policy, we are proposing to amend the regulations by removing all references to "Deputy Administrator" and "Plant Protection and Quarantine Programs," replacing them with references to "Administrator" and "Animal and Plant Health Inspection Service," respectively. Definitions of the replacement phrases would be added to § 318.13–1.

Under current § 318.13–2(a)(2), Sharwil avocados moved from Hawaii to Alaska are prohibited further interstate movement. Our proposal deletes this provision, since it will allow movement of Hawaiian Sharwil avocados to any interestate destination.

Under the regulations, all fruits and vegetables whose movement from Hawaii is regulated are listed in § 318.13–2(b). The movement of Sharwil avocados from Hawaii is restricted under the regulations, but this fruit is not currently listed as a regulated article. We propose to correct this oversight by adding the following reference to the list of regulated articles in § 318.13–2(b): "Avocado (Persea americana Mill. cultivar Sharwil) Sharwil avocado."

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this proposed rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this proposed rule would have an effect on the economy of less than $100 million; would not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions; and would not cause a significant adverse effect 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.

The Hawaiian Sharwil avocado industry is small. In 1986–1987, production was limited to about 100 acres, yielding approximately 80 tons of Hawaiian Sharwil avocados. In contrast, the total annual United States avocado production was 273,000 tons during this same period. Foreign-grown avocados imported for consumption by American consumers totaled 5,622 tons in 1985 (the last year for which figures are available). Thus, the amount of avocados moved interstate from Hawaii constitutes less than one tenth of one percent of the total annual United States avocado production.

It further appears that allowing shipments to any interstate destination would not appreciably increase Hawaiian Sharwil avocado production. Sharwil avocados can be grown only under certain climatic and soil conditions, which are not widely available throughout the Hawaiian Islands. Thus, the possibility of increases in Sharwil avocado production is limited.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This proposed rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

List of Subjects in 7 CFR Part 318

Agricultural commodities, Avocados, Guam, Hawaii, Plant diseases, Plant pests, Plants (Agriculture), Puerto Rico, Quarantine, Transportation, Virgin Islands

PART 318—HAWAIIAN AND TERRITORIAL QUARANTINE NOTICES

Accordingly, it is proposed to amend 7 CFR Part 318 as follows:

1. The authority citation for 7 CFR Part 318 would continue to read as follows:

Authority: 7 U.S.C. 150dd, 150ee, 150ff, 151–167; 7 CFR 2.17, 2.51, and 371.2(c).

§§ 318.13 through 318.13–17 [Amended]

2. Sections 318.13 through 318.13–17 would be amended by removing "Deputy Administrator of the Plant Protection and Quarantine Programs" and "Deputy Administrator", and inserting "Administrator" each time they appear.

3. Sections 318.13 through 318.13–17 would be amended by removing "Plant Protection and Quarantine Programs", and inserting "Animal and Plant Health Inspection Service".

§ 318.13–1 [Amended]

4. Section 318.13–1 would be amended as follows:

a. The definition of "Compliance agreement" would be amended by removing "§ 318.13–4(g)" and inserting "§ 318.13–4(e), and § 318.13–4g".

b. The definition of "Deputy Administrator" would be removed.

d. A new definition would be added for "Animal and Plant Health Inspection Service" to read as follows:

§ 318.13–1 Definitions.

* * * * *

Animal and Plant Health Inspection Service. The Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS).

* * * * *

§ 318.13–2 [Amended]

5. Section 318.13–2 would be amended by removing and reserving paragraph (a)(2).

6. Section 318.13–2(b) would be amended by adding, in alphabetical order, the following listing:

* * * * *

Avocado (Persea americana Mill. cultivar Sharwil) Sharwil avocado.

* * * * *

§ 318.13–3 [Amended]

7. Section 318.13–3 would be amended by removing and reserving paragraph (b)(2).

8. Section 318.13–4 would be amended as follows:

a. Paragraphs (c) and (d) would be redesignated as paragraphs (d) and (e), respectively.

b. A new paragraph (c) would be added to read as follows:

c. Newly redesignated paragraph (d) would be revised to read as follows:

§ 318.13–4 Conditions governing the issuance of certificates or limited permits.

* * * * *

(c) *Certification of Sharwil avocados.* Certificates will be issued only for the interstate movement of Sharwil avocados if the provisions of § 318.13–4h are met.

(d) *Limited Permits.* Limited permits may be issued by an inspector for the movement of noncertified regulated articles designated in § 318.13–3(b).

* * * * *

§ 318.13–4h [Amended]

9. Section 318.13–4h would be amended as follows:

a. The section heading would be amended by removing "limited permits for Sharwil avocados for movement to

Alaska" and inserting "certification of Sharwil avocados".

b. The introductory paragraph would be amended by removing "limited permit for movement from Hawaii to Alaska" and inserting "certificates for interstate movement from Hawaii".

c. Paragraph (c) would be amended by removing "and were clearly marked 'To be distributed in the United States only in Alaska' ".

d. Paragraph (f) would be amended by removing "movement from Hawaii to Alaska" and inserting "interstate movement from Hawaii".

e. Paragraph (e) would be amended by removing "limited permit" and inserting "certificate", and by removing "marked".

Done at Washington, DC, this 2nd day of March 1989.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 89-5192 Filed 3-6-89; 8:45 am]

BILLING CODE 3410-34-M

Agricultural Marketing Service

7 CFR Part 906

[Docket No. FV-89-017]

Oranges and Grapefruit Grown in the Lower Rio Grande Valley in Texas; Proposed Relaxation of the Requirements Governing the Shipment of Oranges and Grapefruit to Approved Citrus Processors

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would allow handlers to ship Texas oranges and grapefruit not meeting minimum grade and size requirements to approved processors for manufacturing into fresh sections and fresh juice without preservative treatment. This proposed would also add new safeguards, which firms must meet to become approved processors under the order, so that lower quality fruit could be safely shipped for these purposes without being diverted to fresh markets. These changes are designed to expand markets for Texas oranges and grapefruit by permitting fruit to be shipped for use in fresh sections and fresh juice products.

DATE: Comments must be received by March 22, 1989.

ADDRESS: Interested persons are invited to submit written comments concerning this rule to: Docket Clerk, Fruit and Vetetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456. Three copies of all written material shall be submitted, and they will be made available for public inspection in the office of the Docket Clerk during regular business hours. All comments should reference the date and page number of this issue of the Federal Register.

FOR FURTHER INFORMATION CONTACT: Gary C. Rasmussen, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456; telephone: (202) 475-3918.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under the Marketing Agreement and Marketing Order No. 906, as amended [7 CFR Part 906], regulating the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1947, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act.

This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under critieria 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 this action on small entities.

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 78 handlers of Texas oranges and grapefruit subject to regulation under the Texas citrus marketing order, and approximately 2,500 orange and grapefruit producers in Texas. 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 these handlers and producers may be classified as small entities.

The Texas Valley Citrus Committee (committee), which administers the order locally, unanimously recommended that §§ 906.120 and 906.123 of the rules and regulations be amended to relax the marketing order requirements for Texas oranges and grapefruit shipped to approved processors for manufacturing into fresh citrus sections and fresh juice. Currently Texas oranges and grapefruit shipped to approved processors for manufacturing into fresh citrus sections and fresh juice are exempt from handling requirements and assessment obligations under the order if such fruit is treated with a preservative. The proposed rule would remove the required treatment as a condition for exemption. This would enable handlers to ship fruit not meeting minimum grade and size requirements, such as packinghouse eliminations, to approved processors for conversion into sectioned fruit or fresh juice without prevervative treatment. Unless exempted fresh fruit shipped out of the production area must meet minimum grade, size, and container and pack requirements, and be inspected and certified as meeting these requirements. In addition, handlers must pay assessments to the committee on such shipments.

The proposal also includes safeguards, in addition to those currently specified, to help prevent such fruit from being diverted to fresh market outlets. These new safeguards would require the processor, as a condition of approval, to agree to radom facility inspections and to certify that the firm has no facilities, equipment, or outlet to repack or sell the fruit in fresh form. These safeguards would enable the committee to monitor approved processors and their facilities to help make sure that exempted fruit was not diverted to the fresh market. The new safeguards would also require approved processors to hold a license issued under the Perishable Agricultural Commodities Act (PACA) (7 CFR 46.4) when buying Texas oranges and grapefruit for processing. This requirement is designed to help make sure that the processor will comply with the requirements which must be met by approved processors under the order. The PACA requires that merchants, dealers and brokers involved in buying, selling, negotiating sales, purchasing or handling consignments of fruits and vegetables in interstate or foreign commerce must be licensed in accordance with the provisions of the PACA. Most firms applying to the committee to become approved processors under the marketing order would already have a PACA license

because they would be performing activities covered under the PACA.

The committee believes that the removal of the current processing limitations for sections and juice will provide additional outlets for fruit not meeting minimum grade and size requirements and promote utilization of the crops. This action also allow additional firms without pasteurizers and other capital intensive equipment to become approved processors. The committee also believes that with the additional safeguards, exempted fruit can be shipped for these purposes without being diverted to the fresh market.

The industry is gradually recovering from the devastating freezes of the early 1980's. The objective of this proposed action is to expand markets for Texas oranges and grapefruit by permitting fruit not meeting marketing order grade and size requirements to be shipped to processors for the manufacture of fresh juice and sections without preservative treatment.

Section 906.120 of the regulations issued under the order defines the term "processing" and provides for exempting fruit for processing from the provisions of §§ 906.34 and 906.40 of the order, if the fruit is handled in accordance with the provisions of § 906.123. This proposed action would redefine the term "processing" to include in that definition fruit converted into fresh sections and fresh juice. Section 906.123 of the regulations issued under the order defines the term "approved processor" and establishes safeguards which persons must meet to be recognized as approved processors by the committee. This proposed action would redefine the term "approved processor" and establish the additional safeguards which processors must meet to be approved by the committee in order to handle exempted fruit.

Sections 906.120 and 906.123 were issued on a continuing basis subject to modification, suspension, or termination by the Secretary. The committee meets from time to time to consider recommendations for modification, suspension, or termination of the rules and regulatory requirements for Texas oranges and grapefruit. Committee meetings are open to the public and interested person may express their views at these meetings. The Agricultural Marketing Service reviews committee recommendations and other information submitted by the committee and other available information, and determines whether modification, suspension, or termination of the regulatory requirements will tend to effectuate the declared policy of the Act.

Texas orange and grapefruit shipments to markets in the United States, Canada, and Mexico are regulated under this marketing order. Certain shipments are exempt from the handling requirements effective under the marketing order. Handlers may ship oranges and grapefruit within the production area (the counties of Cameron, Hidalgo, and Willacy) exempt from all marketing order requirements. Grapefruit shipped in gift packages of not more than 500 pounds which are individually addressed and not for resale are exempt from handling requirements. Also, oranges and grapefruit shipped under the minimum quantity exemption provisions, and for relief, charity, and home use are exempt under certain conditions. In addition, oranges and grapefruit shipped to approved processors for conversion into canned or frozen products are not subject to the handling requirements.

Therefore, the Department's view is that the impact of this proposed action would be beneficial to producers and handlers because it would enable handlers to expand the markets for Texas oranges and grapefruit by shipping additional supplies of fruit to approved processors for conversion into fresh sections and fresh juice without preservatives.

Based on the above, the Administrator of AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

There would be no change in the reporting or recordkeeping requirements as the result of this action that would require submission of such requirements to the Office of Management and Budget (OMB) for approval. The information collection requirements contained in the regulations proposed to be amended have been approved previously by OMB under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0581-0068.

It is found and determined that a comment period of less than 30 days is appropriate because this action needs to become effective promptly so that it will apply to as much of the 1988-89 season crop as possible. If adopted, this proposed rule would allow handlers to ship Texas oranges and grapefruit not meeting minimum grade and size requirements to approved processors for manufacturing into fresh sections and fresh juice without preservative treatment.

List of Subjects in 7 CFR Part 906

Marketing agreements and orders, Texas, Grapefruit, Oranges.

For the reasons set forth in the preamble, it is proposed that 7 CFR Part 906 be amended as follows:

PART 906—ORANGES AND GRAPEFRUIT GROWN IN THE LOWER RIO GRANDE VALLEY IN TEXAS

1. The authority citation for 7 CFR Part 906 continues to read as follows:

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

2. Section 906.120 is amended by revising paragraph (b) to read as follows:

§ 906.120 Fruit exempt from regulations.

* * * * *

(b) The term "processing" as used in § 906.42 (b) means the manufacture of any orange or grapefruit product which has been converted into sectioned fruit or into fresh juice, or preserved by any commercial process, including canning, freezing, dehydrating, drying, and the addition of chemical substances, or by fermentation. Fruit so processed, if handled in accordance with § 906.123, shall be exempt from the provisions of §§ 906.34 and 906.40.

* * * * *

3. Section 906.123 is amended by revising paragraph (b) to read as follows:

§ 906.123 Fruit for processing.

* * * * *

(b) *Approved processor.* Any person who desires to acquire, as an approved processor, fruit for processing, as set forth in § 906.120(b), shall, prior thereto, file an application with the committee on a form approved by it, which shall contain, but not be limited to, the following information:

(1) Name and address of applicant;

(2) Location of plant or plants where manufacturing is to take place;

(3) Approximate quantity of fruit used each month;

(4) A statement that the fruit obtained exempt from fresh fruit regulations will not be resold or transferred for resale, directly or indirectly, but will be used only for processing;

(5) A statement agreeing to hold a license issued under the Perishable Agricultural Commodities Act [7 CFR 46.4] when buying Texas oranges and grapefruit for processing;

(6) A statement agreeing to undergo random inspection by the committee;

(7) A statement that the requesting processor has no facilities, equipment, or outlet to repack or sell fruit in fresh form;

(8) A statement agreeing to submit such reports as are required by the committee.

Such application shall be investigated by the committee staff. After such investigation, the staff shall report its findings to the committee at its next meeting or to its delegated subcommittee. Based upon the staff's report and other reliable information, the committee or delegated subcommittee shall approve or disapprove the applciation and notify the applicant accordingly. If the application is approved, the applicant's name shall be placed upon the list of approved processors.

* * * * *

Dated: March 2, 1989.

Robert C. Kenney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 89-5231 Filed 3-6-89; 8:45 am]

BILLING CODE 3410-02-M

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7 CFR Part 917

[Docket No. FV-89-014]

Fresh Pears, Plums, and Peaches Grown in California; Proposed Rule Redefining Producer Representation Areas and Changing the Representation on the Peach Commodity Committee

AGENCY: Agricultural Marketing, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would make changes in representation areas and producer representation on the Peach Commodity Committee within the production area for California peaches. The proposal is needed to provide equitable representation on the committee based upon the proportionate quantity of fruit shipped from each representation area. The proposed action was unanimously recommended by the committee at its November 17, 1988, meeting.

DATE: Comments must be received April 6, 1989.

ADDRESS: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2085-S, Washington, DC 20090-6456. Comments should reference the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Patrick Packnett, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, D.C. 20090-6456; telephone 202-475-3862.

SUPPLEMENTARY INFORMATION: This rule is proposed under Marketing Agreement and Order No. 917 [7 CFR Part 917], regulating the handling of fresh pears, plums and peaches grown in California. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act.

This proposed 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 this proposed rule on small entities.

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 520 handlers of plums, peaches and nectarines currently regulated under marketing orders [7 CFR Parts 916 and 917] and approximately 2030 producers of these commodities 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 thean $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of the handlers and producers of these commodities may be classified as small entities.

The production area for California peaches is divided into six representation areas for the purpose of producer representation on the 13-member Peach Commodity Committee (committee). The currrent representation areas and committee representation for those areas are specified in paragraph (a) through (f) of § 917.22 as follows:

(a) South Coast District and Southern California District: one nominee.

(b) Tehachapi District and Kern District: one nominee.

(c) Tulare District: one nominee.

(d) Fresno District: eight nominees.

(e) Stanislaus District and Stockton District: one nominee.

(f) All of the production area not included in paragraphs (a) through (e) of this section: one nominee.

Paragraph (g) of § 917.35 of the order authorizes each commodity committee, with the approval of the Secretary, to change the representation of any representation area. Any such change must be based, so far as practicable, upon the proportionate quantity of peaches shipped from the respective representation area during the three preceding fiscal periods. In addition, and again so far as practicable, a member position should be assigned to any representation area from which five percent of regulated shipments have originated during such periods.

The peach committee recommended that the number of representation areas be reduced from six to five by combining Area "f" (the balance of the state), with Area "d" (Fresno District), and that the combined area be assigned nine member positions on the committee. These proposed changes would be included in a new § 917.120 and are intended to provide representation that is more nearly based upon the proportionate quantity of fruit shipped from each of the representation areas during the preceding three fiscal periods.

During the three years period 1986-1988 peach production totaled 41,683,000 packages. During that period, Area "d" (Fresno District), with eight members accounted for 35,590,000 packages or 85.4 percent of the total production. Area "f", with one member, accounted for 221,000 packages or only one-half of one percent of the total production.

Basing representation for the 13-member committee solely on the proportionate quantity of peaches shipped from each representation area would mean that every 7.69 percent of the total production shipped should be represented by one member on the committee. On this basis, Area "d", which accounted for 85.4 percent of the total production shipped during the past three years, would be entitled to 11 positions on the committee and Area "f" with only one-half of one percent of the shipments would not be allocated any positions on the committee. Providing three additonal members for Area "d", while retaining a 13-member committee, would require Area "f" and two other areas to lose positions on the committee. The committee indicated that it was not in the program's best interest to allocate 11 positions to Area "d" because doing

so would cause the committee to lose valuable input in deliberations from a large part of the production area. The committee further indicated that growers from Area "f" have had limited interest in program matters in recent years and that the persons currently representing this small region are no longer interested in serving on the committee.

In recognition of these considerations, the committee recommended that area "d" and "f" be combined and that the combined area be provided nine positions on the committee. Bringing representation more in line with the proportionate quantity of peaches shipped from each representation area is warranted and would not impose any additional costs on producers or handlers.

Based on the above, the Administrator of AMS has determined that this proposed action would not have a significant economic impact on a substantial number of small entities.

Lists of Subjects in 7 CFR Part 917

Marketing agreements and order, Pears, Plums, Peaches, California.

For the reasons set forth in the preamble, 7 CFR Part 917 is proposed to be amended as follows:

PART 917—FRESH PEARS, PLUMS AND PEACHES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 917 continues to read as follows:

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

2. New § 917.120 is added to read as follows:

§ 917.120 Changes in nomination of Peach Commodity Committee members.

Nomination for membership on the Peach Commodity Committee shall be made by growers of peaches in the respective representation areas, as follows:

(a) South Coast District and Southern California District: one nominee.

(b) Tehachapi District and Kern District: one nominee.

(c) Tulare District: one nominee.

(d) Stanislaus District and Stockton District: one nominee.

(e) Fresno District and all of the production area not included in paragraphs (a) through (d) of this section: nine nominees.

Dated: March 2, 1989.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 89–5190 Filed 3–6–89; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 1106

[DA–89–011]

Milk in the Southwest Plains Marketing Area; Proposed Suspension of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed suspension of rule.

SUMMARY: This notice invites written comments on a proposal for the months of March through August 1989 that would suspend the monthly requirement under the Southwest Plains milk order that a dairy farmer's milk be received at a pool plant in order to be eligible for diversion to nonpool plants. The action was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that represents producers who supply milk for the market. Mid-Am contends that the action is necessary to assure the efficient disposition of an increasing supply of milk from producers who have historically supplied the market's fluid milk requirements.

DATE: Comments are due on or before March 14, 1989.

ADDRESS: Comments (Two copies) should be filed with the USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: John F. Borovies, Marketing Specialist, USDA/AMS/Dairy Divison, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 447–2089.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers would continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

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

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), the suspension of the following provisions of the order regulating the handling of milk in the Southwest Plains marketing area is being considered for the months of March through August 1989.

In § 1106.13, paragraph (d)(1) in its entirety.

All persons who want to send written data, views or arguments about the proposed suspension should send two copies of them to the USDA/AMS/Dairy Divison, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, by the 7th day after publication of this notice in the **Federal Register.** The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include March in the suspension period.

The comments that are sent will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.27(b)).

Statement of Consideration

The proposal for March through August 1989 would suspend the monthly requirement that a dairy farmer's milk be received at a pool plant in order to be eligible for diversion to nonpool plants. The order provides that a dairy farmer's milk may be diverted to nonpool plants and still be priced under the order if at least one day's production of such person is physically received at a pool plant during the month.

The suspension was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that represents a substantial number of producers who supply the market. Mid-Am contends that the action is needed because the market's production is increasing at a faster rate than fluid milk sales. As a result, Mid-Am contends that there will be ample supplies of milk available in the vicinity of the market's distributing plants to supply the fluid milk needs of such plants during the months of March–August this year. Thus, Mid-Am maintains that the milk of producers can be marketed more economically during this six-month period by supplying the needs of distributing plants with nearby milk and

by moving the milk of more distant producers directly from the farm to manufacturing plants in the procurement area. Mid-Am contends that the requirement that each producer's milk be received at a pool plant one time each month will result in uneconomical and inefficient movements of milk to maintain pool status of producers who have historically been associated with the Southwest Plains market.

List of Subjects in 7 CFR Part 1106

Milk marketing orders, Milk, Dairy products.

The authority citation for 7 CFR Part 1106 continues to read as follows:

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

Signed at Washington, DC, on: March 2, 1989.

J. Patrick Boyle,

Administrator.

[FR Doc. 89–5191 Filed 3–6–89; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 204

[INS #: 1055–89]

Acceptance by Overseas Immigration and Naturalization Service Offices and United States Consulates of Jurisdiction of Relative Petitions Based on Residence of Petitioners; Correction

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Correction in proposed rule document number INS 1055–89 beginning on page 7433, in the issue of Tuesday, February 21, 1989.

SUMMARY: This corrects a paragraph in the proposed rule published on February 21, 1989 at 54 FR 7433, and extends the comment period.

DATES: Written comments must be received on or before (insert 30 days from date of publication in the Federal Register).

FOR FURTHER INFORMATION CONTACT: Yolanda Sanchez-K., Senior Immigration Examiner, Immigration and Naturalization Service, 425 I Street, NW., Room 7215, Washington, DC 20536, (202) 633–5014.

PART 204—PETITION TO CLASSIFY ALIEN AS RELATIVE OF A UNITED STATES CITIZEN OR AS A PREFERENCE IMMIGRANT

§ 204.1 [Corrected]

On page 7434 in the first column, § 204.1(a)(3)(iii) is correctly revised to read:

(a) * * *

(3) * * *

(iii) *Jurisdiction assumed by United States consular officers.* United States consular officers assigned to visa-issuing posts abroad, except those in countries listed in paragraph (a)(3)(ii) of this section, are authorized to approve any relative petition filed on Form I–130 if the petitioner and the beneficiary reside in the area over which the consular officers have jurisdiction. In emergent or humanitarian cases, the U.S. consular officers may use discretion in accepting an I–130 filed by a petitioner who does not reside within the consulate's jurisdiction. While these consular officers are authorized to approve petitions, they must refer any petition which is not clearly approvable to the appropriate Service office for a decision. Consultation with the appropriate Service office abroad may be sought prior to stateside referral.

* * * * *

Dated: March 3, 1989.

James A. Puleo,

Assistant Commissioner, Adjudications, Immigration and Naturalization Service.

[FR Doc. 89–5251 Filed 3–6–89; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 91

[Docket No. 89–003]

Ports Designated for Exportation of Animals, Chicago, IL

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the "Inspection and Handling of Livestock for Exportation" regulations by adding the Knief Quarantine Facility as an export inspection facility for the port of Chicago. The effect of this action will be to add an additional inspection facility for the port. We believe that this facility meets the requirements of the regulations for inclusion in the list of export inspection facilities.

DATE: May 8, 1989.

ADDRESSES: Send an original and two copies of written comments to Helene R. Wright, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Buildinig, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket Number 89–003. Comments received may be inspected at USDA, Room 1141, South Building, 14th and Independent Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. George O. Winegar, Senior Staff Veterinarian, Import-Export Animals Staff, VS, APHIS, USDA, Room 761 Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782; (301) 436–8383.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR Part 91, "Inspection and Handling of Livestock for Exportation" (referred to below as the regulations) prescribe conditions for exporting animals from the United States. We are proposing to amend § 91.14 by adding the Knief Quarantine Facility as an export inspection facility for the port of Chicago. With certain exceptions, all animals exported are required to be exported through ports desingated as ports of embarkation.

To receive approval as a port of embarkation, a port must have export inspection facilities available for inspecting, holding, feeding, and watering animals prior to exportation in order to ensure that the animals meet certain requirements specified in the regulations. The regulations provide that approval of each export inspection facility shall be based on compliance with specified standards in § 91.14(c) concerning materials, size, inspection implements, cleaning and disinfection, feed and water, access, testing and treatment, location, disposal of animals wastes, lighting, and office and rest room facilities.

We believe that the Knief Quarantine Facility meets the requirements of § 91.14(c). The facility's address is 11 N 470 Chapman Road, Box 305, Burlington, Illinois 60109. Therefore, we propose to add the Knief Quarantine Facility as an export inspection facility for the airport of Chicago.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this proposed rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule". Based on information

compiled by the Department, we have determined that this rule would have an effect on the economy of less than $100 million; would not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and would not cause a significant adverse effect 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.

There is now only one export inspection facility currently approved in the Chicago area. There are fewer than 50 exporters using this facility. Most of these would be considered small entities. This proposal would allow exporters the option of an additional export inspection facility for the Chicago, Illinois, airport with minimal economic effect.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This proposed rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

List of Subjects in 9 CFR Part 91

Animal diseases, Animal welfare, Exports, Livestock and livestock products, Transportation.

PART 91—INSPECTION AND HANDLING OF LIVESTOCK FOR EXPORTATION

Accordingly, 9 CFR Part 91 would be amended as follows:

1. The authority citation for Part 91 would continue to read as follows:

Authority 21U.S.C. 105, 112, 113, 114a, 120, 121,, 134b, 134f, 612, 613, 614, 618, 46 U.S.C. 466a, 466b, 49 U.S.C. 1509(d); 7 CFR 2.17, 2.51, and 371.2(d).

2. Section 91.14 would be amended by adding a new paragraph (a)(4)(i)(B) to read as follows:

(a) * * *

(4) Illinois.

(i) * * *

(B) Knief Quarantine Facility, 11 N 470 Chapman Road, Box 305, Burlington, Illinois 60109, (312) 683-3873.

* * * * *

Done in Washington, DC, this 2d day of March 1989

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 89-5193 Filed 3-6-89; 8:45 am]

BILLING CODE 3410-34-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 34

Hybrid and Related Instruments; Extension of Comment Period for Proposed Rules and Statutory Interpretation

AGENCY: Commodity Futures Trading Commission.

ACTION: Extension of comment period.

SUMMARY: On January 11, 1989, the Commodity Futures Trading Commission ("Commission") published in the **Federal Register** proposed regulations concerning certain "hybrid" instruments that combine characteristics of commodity option contracts with debt or depository interests. 54 FR 1128 (January 11, 1989). The proposed rules would establish an exemption from CFTC regulations under the Commodity Exchange Act for hybrid instruments with limited commodity option components, based upon the limited nature of the option component and deference to other existing regulatory standards applicable to the noncommodity component of such instruments. In addition, the proposed rules would establish a notice requirement, under certain limited circumstances, for hybrid instruments qualifying for the proposed exemption. The Commission also published, in a companion release, a statutory interpretation intended to clarify the status of certain other categories of hybrid instruments. 54 FR 1139 (January 11, 1989). Both the proposed rules and statutory interpretation notices provided a period for public comment which ended February 27, 1989.

The Commission has been requested by several potential commenters to extend the comment period for the Commission's notice of proposed rulemaking and statutory interpretation. Such additional time has been requested in order to allow those commenters (*i.e.*, organizations and practitioners) to receive and analyze the comments of their memberships or to obtain the views of their clients on the issues raised by the Commission's rule proposal and statutory interpretation. The Commission believes that a thirty-day extension of the public comment period is appropriate to enhance the opportunity for interested parties to comment on the issues raised in the above releases.

DATE: All comments on the Commission's notice of proposed rulemaking concerning the regulation of hybrid and related instruments (54 FR 1128 (January 11, 1989)) and statutory interpretation (54 FR 1139 (January 11, 1989)) must be received by April 6, 1989.

ADDRESS: Comments should be sent to the Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581.

FOR FURTHER INFORMATION CONTACT: Robert H. Rosenfeld, Esq., Staff Attorney, Division of Trading and Markets, telephone (202) 254-8955, David R. Merrill, Esq., Assistant General Counsel, Office of the General Counsel, telephone (202) 254-9880, or Eugene Moriarty, Director, Research Section, Division of Economic Analysis, telephone (202) 254-6990, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581.

Issued in Washington, DC on March 1, 1989.

Jean A. Webb,

Secretary to the Commission.

[FR Doc. 89-5186 Filed 3-6-89; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[EE-130-86]

Benefits Provided Under Certain Employee Benefit Plans

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to benefits provided under certain employee benefit plans under sections 89 and 125 of the Internal Revenue Code of 1986. The regulations reflect changes made by the Revenue Act of 1978, the Tax Reform Act of 1984, the Tax Reform Act of 1986, and the Technical and Miscellaneous Revenue Act of 1988. The regulations provide the public with guidance on the

nondiscrimination and qualification requirements for certain employee benefit plans and affect sponsors of, and participants in, a variety of types of plans, including accident and health plans, group-term life insurance, and dependent care assistance programs.

DATES: Written comments and requests for a public hearing must be delivered or mailed on or before May 8, 1989. The amendments are generally proposed to apply to plan years beginning after December 31, 1988.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:CORP:T:R (EE-130-86), Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Felix Zech or David Munroe of the Office of the Assistant Chief Counsel, Employee Benefits and Exempt Organizations, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 (Attention: CC:CORP:T:R (EE-130-86)) ((202) 535-3818) (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503, with copies to the Internal Revenue Service, Attention: IRS Reports Clearance Officer TR:FP, Washington, DC 20224.

The collections of information in these regulations are in §§ 1.89(a)-1 and 1.89(k)-1. Certain of this information is required by the Internal Revenue Service to memorialize the method of testing used by the employer in determining whether it meets the requirements of section 89(a) and correctly reports an employee's wages on the Form W-2. Additional requirements include the preparation of a written plan document, a notice relating to benefits (both required under section 89(k)). The likely respondents/recordkeepers are employers who provide welfare benefit programs to their employees.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual recordkeepers may require more or less time, depending on their particular circumstances.

The burden estimates represent an estimation of the actual time for recordkeeping, learning about the law, computations and testings.

The estimated total annual reporting and/or recordkeeping burden: 9,000,000 hours. With respect to learning about the law, testing and making any written elections, the estimated annual burden per respondent/recordkeeper varies from 1 hour to 40 hours, depending on individual circumstances, with an estimated average of 10 hours. The estimated number of respondents and/or recordkeepers: 750,000. With respect to physically preparing the written plan, notice and statement relating to employees, the estimated annual burden per respondent/recordkeeper varies from 30 minutes to 4 hours, depending on individual circumstances, with an estimated average of 2 hours. The estimated number of respondents and/or recordkeepers: 750,000. Estimated annual frequency of response (for reporting requirements only): as necessary.

Background

This document contains proposed additions to the Income Tax Regulations (26 CFR Part 1) under sections 89 and 125 of the Internal Revenue Code of 1986 (Code). The additions with respect to section 89 are proposed to conform the regulations to section 1151 of the Tax Reform Act of 1986 (TRA '86) (100 Stat. 2494), and section 3021 of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA '88) (102 Stat. 3625). The additions with respect to section 125 are proposed pursuant to section 134 of the Revenue Act of 1978 (92 Stat. 2763), section 101 of the Technical Corrections Act of 1979 (92 Stat. 2227), section 226 of the Miscellaneous Revenue Act of 1980 (94 Stat. 3525), section 531(b)(4) of the Tax Reform Act of 1984 (96 Stat. 494), section 1151 of the Tax Reform Act of 1986 (TRA '86) (100 Stat. 2494), and section 1011B of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA '88) (102 Stat. 3485).

Section 89 was intended, in part, to discourage employers from offering health plans and other welfare benefits that disproportionately favor highly compensated employees either as to coverage or extent of benefits. A principal objective of this legislation was to extend health coverage for employees not now covered. The sanction for failing to meet nondiscrimination criteria outlined in the statute and this implementing rule is the taxation of the excess value of highly compensated employees' benefits.

To help provide an improved basis for evaluation of the specific content and effect of the statute and these regulations, comments are invited on changes in plan provisions, the numbers and types of employee eligible for plans affected by these regulations, and employee participation rates that may be associated with one or more changes proposed in these regulations. Information indicating the effect on particular groups of employees identified by wage levels, occupations, industries or other characteristics would be especially useful. Comments also are invited on the expected effect on costs to employers and health providers which result from particular requirements.

Explanation of Rules

The proposed regulations include guidance in three general areas. First, they provide information with respect to miscellaneous matters relating to the nondiscrimination rules of section 89(a). Second, the proposed regulations contain detailed guidance with respect to the qualification requirements of section 89(k). Finally, the proposed regulations include questions and answers relating to section 125 (cafeteria plans) and supplementing the existing proposed regulations contained at § 1.125-1 (49 FR 19321). The proposed regulations include a variety of special rules to facilitate the application of and compliance with sections 89 and 125, particularly for plan years beginning in 1989.

1. In General

These proposed regulations constitute the issuance of comprehensive section 89 rules on which taxpayers may rely. Nevertheless, until the later of January 1, 1990, or the beginning of the second testing year beginning after December 31, 1988, if an employer reasonably and in good faith complies with the requirements of section 89 (including the legislative history thereto), the employer will be treated as having satisfied section 89. After this transition period, this standard of compliance will not apply to the extent that these proposed regulations address issues under section 89. Whether compliance is reasonable and in good faith is to be determined on the basis of all the facts and circumstances, including whether the employer makes a reasonable and good faith effort to collect and analyze the necessary data and information, and whether the employer consistently resolves unclear issues in its favor.

These questions and answers do not provide comprehensive guidance on certain issues. For example, no guidance is provided on the special multiemployer plan rules adopted in TAMRA '88. In addition, this guidance does not address the separate line of business rules of section 414(r) or the extent to which additional employer disaggregation is available under section 89. In addition, the proposed regulations generally do not address the application of section 89 to group-term life insurance. These matters will be addressed in future guidance.

The proposed regulations also do not address certain issues with regard to the application of section 89 to former employees and with regard to who is an excludable employee under section 89(h). Nevertheless, under the excludable employee rules, if any employee included in a collective bargaining unit receives any employer-provided benefit, no employee in that collective bargaining unit may be treated as an excludable employee merely because the employee is a member of the collective bargaining unit. This is the case without regard to the fact that the employer-provided benefit is in the form of an employer contribution under a collective bargaining agreement to a multiemployer plan. See section 1151(k) of TRA '86 and paragraph (a)(2) of Question and Answer (Q&A) 10 of the proposed regulation for the effective date of section 89 for certain collectively bargained plans.

The proposed regulations provide that, in general, section 414(n) applies to employee benefit plans covered by section 89 in the same manner as it applies to qualified plans covered by section 401(a). They also include a delegation to the Commissioner to provide guidance in the form of revenue rulings, notices or other publications of general applicability on the extent to which the differing nature of these types of plans require different rules. The Service invites comments on the manner in which the leased employee rules apply to plans covered by section 89 and, in particular, on the extent to which different rules are appropriate.

The proposed regulations also clarify that plans are not exempt from section 89 merely because they are maintained by the federal government, state or local governments, or employee organizations. In addition, plans maintained by tax-exempt entities are subject to the requirements of section 89, with the exception that a plan maintained exclusively for church employees by an entity described in section 3121(w) is not required to satisfy the requirements of section 89.

If the public wishes to comment on the content and timing of additional guidance that may be required to implement the law, the Service will consider these comments in developing further guidance. In particular, the Service invites comments regarding the exclusion of certain classes of employees for purposes of applying the nondiscrimination rules of section 89 (e.g., prisoners incarcerated in federal or state institutions or clients in sheltered workshops maintained by charitable entities) similar to the exclusion provided in the safe harbors in Notice 89-23, 1989-8 I.R.B. 25.

2. Nondiscrimination Requirements

Section 89(a) is generally applicable to accident and health plans within the meaning of sections 105 and 106 (health plans) and group-term life insurance plans within the meaning of section 79. In addition, an employer may elect to treat certain other plans as subject to section 89(a). The term "benefit" appears throughout the proposed regulations. Unless indicated otherwise, the term "benefit" in connection with the nondiscrimination requirements of section 89(a) means the value of the coverage provided under the plan in the case of insurance type plans and, in the case of noninsurance type plans, the value of the payments, reimbursements, services and products provided under the plan. The proposed regulation contained at § 1.89(a)-1 includes questions and answers relating to nondiscrimination rules for purposes of section 89.

Q&A-1 of § 1.89(a)-1 sets forth in general terms the nondiscrimination tests applicable under section 89(a). In general, an employer has two approaches to nondiscrimination testing under section 89. Under the first approach, an employer's employee benefit plan satisfies section 89(a) only if (i) at least 50 percent of the employees eligible to participate in a plan are nonhighly compensated employees (the 50 percent eligibility test); (ii) at least 90 percent of the nonhighly compensated employees are eligible to participate in the plan or plans of the same type that, on an aggregate basis, are at least 50 percent as valuable as the combined value of the plans of the same type that are available to any highly compensated employee (the 90 percent/50 percent eligibility test); and (iii) the average benefit received by nonhighly compensated employees under all plans of the same type is at least 75 percent of the average benefit received by highly compensated employees under such plans (the 75 percent benefits test).

Under the second approach, an employer's employee benefit plan satisfies section 89(a) only if it benefits at least 80 percent of the employer's nonhighly compensated employees (the 80 percent coverage test). An employer may elect to test its health and group-term life insurance plans (and determine excess benefits, if any) under the 80 percent coverage test notwithstanding the fact that the first approach would produce different amounts of excess benefits.

Under either of the two approaches, a plan fails to satisfy section 89(a) if the plan contains any provision that by its terms, operation or otherwise discriminates in favor of highly compensated employees (the nondiscriminatory provisions test).

For 1989 and 1990, an employer may decide to adopt an alternative to the 75 percent benefits test for its health plans. Under this alternative, set forth in Q&A-2, an employer must treat as includible in gross income (i.e., as discriminatory excess benefits) all employer-provided coverage under its health plans with respect to certain highly compensated employees. Also, if an employer adopts this alternative for 1989, the employer may use a modified version of the 90 percent/50 percent eligibility test under which at least 80 percent of the nonhighly compensated employees must be eligible to participate in plans of the same type that, on an aggregate basis, are at least 66 percent as valuable as the aggregate value of the plans of the same type available to any highly compensated employee. For testing years ending in 1990, this modified version of the 90 percent/50 percent eligibility test is not available and the class of highly compensated employees who are considered to receive taxable employer-provided health coverage under the alternative to the 75 percent benefits test is broadened.

Q&A-2 also provides a permanent alternative to the general nondiscrimination tests for certain large employers whose employees are substantially all nonhighly compensated employees. Under this alternative, an employer's health plans satisfy section 89(a) if the employer employs at least 5,000 individuals; at least 90 percent of the full-time active employees are nonhighly compensated employees; less than 0.75 percent of all active employees have compensation in excess of twice the section 414(q)(1)(C) amount ($50,000 indexed); at least 80 percent of those employees eligible to participate in each plan are nonhighly compensated

employees and 80 percent of the nonhighly compensated employees have available to them under all health plans a health benefit that is at least 80 percent as valuable as the largest such benefits available to any highly compensated employee; and at least 66 percent of all nonhighly compensated employees receive core health benefits that are at least 66 percent as valuable as the largest such benefit available to any highly compensated employee. In addition, the nondiscriminatory provisions test must be satisfied. This alternative is only available to determine if any employer's health plan or plans are discriminatory: it is not available to determine the amount of excess benefits.

Core health coverage generally means comprehensive major medical and hospitalization coverage. Dental, vision and health coverages provided under flexible spending arrangements (see paragraph (c) of Q&A-7 of proposed § 1.125-2) are not core health benefits. Note that the definition of "core health coverage" under section 89 is not necessarily the same as the definition of "core coverage" under section 4980B (COBRA continuation coverage) and, therefore, no inference should be drawn from these proposed regulations with respect to the meaning of such term under section 4980B.

Q&A-3 details the treatment of family and other coverage under section 89 and the extent to which such coverages may be tested separately from employee-only coverage. Included in Q&A-3 is guidance relating to the use of sworn statements when employee-only coverage is to be tested separately. The proposed regulations state that a sworn statement need not be notarized but, for testing years commencing on or after January 1, 1990, a sworn statement must be made under penalty of perjury. An example of a sworn statement is provided.

Q&A-4 sets forth rules relating to health plan comparability and health plan aggregation for the purposes of the 50 percent eligibility test and the 80 percent coverage tests. These rules were changed extensively by TAMRA '88. The comparability rules in the proposed regulations generally enable health plans that fail the 50 percent eligibility test or the 80 percent coverage test on an individual basis to satisfy such tests on a group basis.

Q&A-5 and Q&A-6 of the proposed regulation set forth the method for nondiscrimination testing. Q&A-5 states that testing for compliance with the nondiscrimination requirements of section 89(a) is done by reference to the employees employed on, and benefits provided for, a single day (the testing day), and such results are then annualized for the entire testing year with adjustments to reflect certain benefit changes during the testing year (both before and after the testing day). In general, the facts on the testing day must be adjusted to reflect benefit changes due to changes in plan terms and, in the case of highly compensated employees, changes in elections by such employees. If the terms of available plans change during an open season, benefit changes that occur due to elections during that open season are considered changes due to changes in plan terms. The proposed regulation contains a transition rule for 1989 that generally allows benefit changes prior to July 1, 1989 to be disregarded.

The employer must designate a uniform 12-month testing period for all its plans of the same type. In certain circumstances, an employer may elect a short testing year. To the extent that the employer elects to test plans of different types together for purposes of certain nondiscrimination tests, all these plans must be tested on a uniform testing year. Thus, if an employer tests its group-term life insurance plans with its dependent care assistance programs for purposes of the 75 percent benefits test, all such plans and programs must be tested on the same 12-month period. The same rule applies where the employer aggregates its health plans with its group-term life insurance plans to enable its group-term life insurance plans to satisfy the requirements of the 75 percent benefits test.

As set forth in Q&A-6, the first testing year of an employer with respect to plans of the same type generally must begin on the first day of the first plan year that any plan of that type is subject to section 89. Also, the employer may use an earlier testing year, including the calendar year, for 1989. Thus, for testing years beginning in 1989, the employer is required to test all its plans of the same type together even though not all of such plans are subject to the requirements of section 89 for the entire testing year. In these circumstances, the proposed regulation requires an employer to test all benefits under the plans as if they were subject to section 89 for the entire testing year. However, in determining any excess benefits under the plans, Q&A-6 contains rules under which an employer may prorate the amount of any excess to reflect the extent to which coverage is subject to section 89.

Q&A-7 sets forth rules relating to valuing coverage under a health plan. These rules apply until the Service publishes valuation procedures under section 89(g)(3)(B). Q&A-7 provides that an employer may use any reasonable method for valuing a health plan and specifies that the cost of the health plan is a reasonable method of valuation. Specifically, in valuing coverage an employer is permitted to use the cost of the applicable premium under section 4980B(f)(4) for continuation coverage under a group health plan and is permitted to adjust the premium for differences related to geographic locale, the demographics of the participant population, and utilization. No inference should be drawn from Q&A-7 concerning the method that may be used to determine the applicable premium under section 4980B(f)(4).

The proposed regulation clarifies that cost containment features may be disregarded under a reasonable method of valuation. Similarly, the fact that a delivery system used by a plan is different from a delivery system used by another plan should not affect the values of such plans. Thus, the fact that one plan is provided through a health maintenance organization and another through a traditional indemnity program should not cause the value of the plans to differ as long as the coverage under both plans is substantially similar.

The method of valuing health plans used by an employer for purposes of section 89 must be applied consistently for all the employer's health plans, except that the employer may use the cost method described in section 89(g)(3)(E) for multiemployer plans.

When determining the amount of excess benefits under section 89(b), an employer is required to use the cost method used for determining the applicable premium under section 4980B(f)(4), even if that was not the valuation method the employer used for testing purposes. This method must be used for calculating both the highly and nonhighly compensated employees' employer-provided benefits when excess benefits for highly compensated employees are determined. The only permissible adjustment to this method is for differences in the premium due to utilization.

Q&A-7 also sets forth the method of valuing coverage under flexible spending arrangements that provide health benefits. See Q&A-7 of § 1.125-2 of the proposed regulation for the definition of a flexible spending arrangement. Such coverage is to be valued on the basis of its cost (in general, the premium required for the health coverage under the arrangement). As is the case with any valuation method, the fact that a premium is not paid does not affect the value of the

coverage so long as the coverage is provided.

Q&A-8 of the proposed regulation contains an explanation of the treatment of salary reduction contributions under the nondiscrimination tests of section 89. Salary reduction contributions generally are defined as elective, pre-tax contributions under a cafeteria plan. TAMRA '88 contains a provision allowing, in certain cases, salary reduction contributions to be taken into account as employer contributions in performing the 90 percent/50 percent eligibility test. In addition to this provision, the proposed regulation describes circumstances in which certain salary reduction contributions by highly compensated employees must be taken into account as employer contributions and circumstances in which certain salary reduction contributions by nonhighly compensated employees must be treated as after-tax employee contributions. This mandatory treatment of salary reduction contributions applies to testing years beginning after 1989.

Q&A-9 sets forth the method by which excess benefits provided under a discriminatory employee benefit plan are to be calculated.

Q&A-10 contains guidance relating to the effective dates of the nondiscrimination and qualification requirements. Generally, the requirements apply to plans for plan years that commence on or after January 1, 1989. With respect to health plans, a special rule applies if the designated plan year of such a plan begins later in calendar year 1989 than the plan year for such health plan began in 1988.

Section 89 provides a later effective date that may apply with respect to collectively bargained plans. In the case of a plan maintained pursuant to a collective bargaining agreement ratified before March 1, 1986, the rules under section 89 do not apply to employees covered by such agreement in years beginning before the earlier of January 1, 1991, or the date on which the last collective bargaining agreement relating to the plan expires (determined without regard to any extension thereof after February 28, 1986). Thus, such a collectively bargained plan is not subject to section 89 before the date determined under the preceding sentence, and collectively bargained employees under such a plan may be treated as excludable employees until such date for purposes of applying section 89 to those other plans of the same type of the employer that are subject to section 89. The proposed regulation provides that the employer may elect to take all such otherwise excludable collectively bargained employees under a plan into account and, in so doing, to accelerate the effective date with respect to the collectively bargained plan for purposes of the nondiscrimination tests.

3. Qualification Requirements Under Section 89(k)

Unless statutory employee benefit plans and certain other plans meet the requirements of section 89(k) employer-provided benefits received under such plans are includible in an employee's gross income, notwithstanding the fact that the employer-provided benefits are otherwise excludable under the Code. The term "benefit" for purposes of the section 89(k) qualification requirements, in contrast to the definition of the term "benefit" for purposes of the nondiscrimination tests, means the value of the payments, reimbursements, services and products provided under the plan.

In order to meet the requirements of section 89(k), a plan must be in writing, legally enforceable, maintained for the exclusive benefit of employees, and established with the intent that it will be maintained for an indefinite period of time. In addition, an employer must provide those who are eligible to participate in the plan with reasonable notice of benefits available under the plan.

Section 89(k) applies to statutory employee benefit plans and certain other types of plans maintained by an employer. Section 89(k) generally applies to the following types of plans, regardless of whether such plans are subject to nondiscrimination testing under section 89(a): Accident and health plans; group-term life insurance plans; dependent care assistance programs; qualified tuition reduction programs; cafeteria plans; fringe benefit programs providing no-additional-cost services, qualified employee discounts, or employer-operated eating facilities, the benefits from which are otherwise excludable from the gross income of the beneficiary; and plans to which section 505 applies. The list of specific kinds of plans contained in the proposed regulation that are of a type to which section 89(k) applies is not intended to be exhaustive.

The proposed regulation contains several special rules with respect to accident or health plans. In general, an accident or health plan is not subject to section 89(k) unless the employer-provided benefits under the plan are (or are intended to be) excludable from gross income under section 105(b) or (c). Thus, for example, sick pay and disability plans are generally not subject to the rules of section 89(k).

Because coverages under accidental death and dismemberment (AD&D plans) plans and business travel accidental death plans are eligible for the exclusion under section 106, benefits provided pursuant to such coverages are excludable under sections 101 and 105(c). Thus, such plans are subject to the provisions of section 89(k). The coverages and benefits under these plans, like other accident or health plans the coverage of which is excludable (or of a kind that is excludable) under section 106, may not be excluded under section 132. If a death benefit under an AD&D plan is not conditioned on the accidental death of the employee, that benefit is not part of an AD&D plan.

The proposed regulation states that a plan that is a part of an organization described in section 501(c)(9) or 501(c)(17) must meet the requirements of section 89(k) and that, to the extent that the plan provides benefits of the type provided by statutory employee benefit plans, such benefits must be considered in nondiscrimination testing under section 89. If a plan does not meet the requirements of section 89(k), the related organization is not exempt from tax under section 501(a). Section 89 applies to the plan that is part of a voluntary employees' beneficiary association (VEBA) even if the VEBA is a collectively bargained VEBA as described in section 505(a)(2).

Section 89(k)(1)(A) provides that a plan must be in writing. The proposed regulation provides that all of the material terms of a plan must be contained in a single written document. However, the document may incorporate material terms by reference to other documents rather than setting forth such terms in full. The proposed regulation also clarifies that a single written document may satisfy the writing requirement for several plans. Similarly, material terms contained in one document related to several plans may be incorporated in each of the single written documents for such plans. These rules have been included to give employers the flexibility to group their plans in written documents in various ways so long as all of the coverage is in fact in writing.

Both the proposed regulation and section 89 require that an employer's elections with respect to nondiscrimination testing be in writing. If any such election is not in writing it is waived. For example, if no testing year is designated in writing with regard to any health plan, all health plans must be tested on the calendar year. The

nondiscrimination testing elections are not required to be in the single written document. Consequently, the failure to make an election in writing does not cause a plan to fail to meet the writing requirement.

The proposed regulation provides that a plan must be in writing prior to the first day on which coverage or benefits are available under the plan. There is a transition rule under which a plan is not required to meet the writing requirement of section 89(k) before the later of the beginning of the first day of the second plan year beginning after December 31, 1988, and the end of the 12-month period beginning on the first day of the first plan year that the plan is subject to section 89.

Section 89(k)(1)(B) provides that a plan must be legally enforceable. The intent of this provision is to ensure that the employer cannot exercise excessive discretion. Therefore, the proposed regulation provides that, in general, the conditions required for an employee to participate in or obtain a benefit under a plan must be definitely determinable and the employee must be able to compel the coverage or payment of benefits described in the plan. Except in certain circumstances, a plan fails the enforceability requirement if coverage or a benefit available under the plan is subject to the discretion of the employer, either in operation or under the terms of the plan. Nevertheless, the proposed regulation permits employer discretion relating to certain administrative acts. In addition, an employer generally may expand coverage on a retroactive basis if the employer memorializes such expansion in writing, provides notice of such expansion, and meets the permanence requirements of section 89(k) with regard to the expanded coverage. The fact that such limited employer discretion does not violate the enforceability requirement of section 89(k) does not mean that, under certain circumstances, such employer discretion would not cause the plan to fail the nondiscrimination tests of section 89, in particular the nondiscriminatory provisions test of section 89(d)(1)(C).

The proposed regulation contemplates that many cost containment features existing in the health care industry today do not violate the enforceability requirements of section 89(k). For example, a managed care program that allows an insurer to grant a benefit not otherwise available under the plan in lieu of a benefit described in the plan does not violate the enforceability requirement if the patient, the employer and the insurance company consent to such alternative, a physician recommends or concurs with such alternative, and the plan describes the possibility of such alternative as well as the general criteria under which such alternative is available and may be selected. Similarly, health benefits may be conditioned on a medical opinion of a physician.

The proposed regulation contains a transition rule with regard to the enforceability rules of section 89(k). A plan is not required to satisfy the enforceability rules outlined in the proposed regulation before the first day of the second plan year that the plan is subject to section 89.

Section 89(k)(1)(C) provides that employees must be provided reasonable notification of benefits available in a plan. The purpose of this requirement is to inform an individual who is eligible to participate in the plan of its essential features. Therefore, the proposed regulation requires that individuals eligible for coverage or benefits under a plan be provided with a summary explanation of these features, including directions concerning the method by which individuals may receive more information. Such notice must be given to an individual prior to the initial availability of coverage or benefits to such individual.

The proposed regulation states that the employer must provide the notice. In the case of a multiemployer plan, the plan administrator must provide the notice. Nevertheless, the notice requirements are satisfied if an insurance company or other health care insurer or provider (e.g., a health maintenance organization) provides the notice.

The proposed regulation provides a transition rule for the notice requirement for plan years commencing in 1989. Under this rule, an employer is not required to provide notice to employees for any such plan year until July 1, 1989. Thus, for example, an employer is first required to provide notice under section 89(k) with respect to a calendar year plan by July 1, 1989. Similarly, with respect to a plan that uses a September 1 through August 30 plan year, notice under section 89(k) is first required by September 1, 1989. The delay in the notice to employees under this rule does not preclude the transitional relief providing for a delay in the requirement that a plan be in writing.

The reporting, notification and written plan requirements under this regulation are in addition to, and not in lieu of, reporting, disclosure, notification and written plan requirements which may otherwise apply under Title I of the Employee Retirement Income Security Act of 1974 or any other law.

Section 89(k)(1)(D) provides that a plan must be maintained for the exclusive benefit of employees. The purpose of the exclusive benefit requirement is to preclude an employer from extending its plan to individuals who have no current or prior employment-type relationship with the employer. The proposed regulation provides, in general, that a plan must be maintained for the exclusive benefit of those employees who are described in the plan as eligible to participate. A plan may fail this requirement by its terms or through its operation.

The proposed regulation provides rules concerning who may participate under a plan. In general, only individuals who are or who are treated as employees (or former employees) of the employer or who otherwise perform services for the employer may participate under a plan of the employer. The proposed regulation does not have any effect on any other existing or future eligibility rule concerning who may participate in a plan. Thus, for example, a self-employed individual described in section 401(c)(1) cannot be a participant in a cafeteria plan even though such individual is treated as an employee for purposes of section 89(k).

There is a transition rule relating to the applicability of the exclusive benefit requirement. The proposed regulation provides that an employer is not required to meet the exclusive benefit requirement until the first day of the second plan year that the plan is subject to section 89.

Section 89(k)(1)(E) requires that a plan must be established with the intention that it will be maintained for an indefinite period of time. The proposed regulation focuses on the operation of the plan, as opposed to the plan terms, in determining whether the plan was intended to be maintained for an indefinite period of time. Accordingly, if a plan is materially amended or terminated and the coverage has been in effect for at least a consecutive 12-month period, the requirement of section 89(k)(1)(E) is satisfied, regardless of any terms of the plan which may provide that the employer has the right to change or terminate the plan. However, if a plan is materially amended or terminated before the coverage has been in effect for a consecutive 12-month period, the plan is considered to have been established with the intent of being temporary, unless the employer can demonstrate that there is a substantial business purpose for such termination or amendment.

The proposed regulation contains several rules relating to the sanction under section 89(k). In general, the proposed regulation provides that if a plan fails to satisfy the qualification requirements of section 89(k), the value of the employer-provided benefits received (rather than the value of the coverage provided), is not excludable from gross income. Thus, for example, the exclusions provided in sections 101 and 105 are generally not available with respect to benefits provided under an accident or health plan. All employees who receive benefits are subject to this sanction without regard to whether they are highly compensated employees within the meaning of section 414(q).

The proposed regulation contains a rule that allows correction of failures to comply with section 89(k) in certain circumstances. If there is a de minimis failure to comply with certain requirements, the employer may correct the failure within 90 days of its occurrence. If the employer timely corrects the failure, the plan does not fail section 89(k) merely because of such failure. A failure is not de minimis under this rule if correction requires the amendment of the plan document to reduce coverage on a retroactive basis to conform the document to the operation of the plan.

The proposed regulation clarifies the definition of a plan with respect to the sanction under section 89(k). In the case of a health plan, to the extent that the coverage providing the benefit taxable by reason of section 89(k) may reasonably be separated from other plan coverage, the proposed regulation permits the failed portion of the plan to be treated as a separate plan.

The proposed regulation provides for a limitation on the amount that must be included in the income of an employee as a result of section 89(k). The limitation is the sum of the following (dollar amounts are indexed in accordance with section 414(q)(1)(C)): 10 percent of the first $50,000 of the employee's compensation; 25 percent for amounts of such compensation in excess of $50,000 and up to $100,000; 75 percent for amounts of such compensation in excess of $100,000 and up to $150,000; and 100 percent of compensation in excess of $150,000. In addition, the Commissioner, through revenue rulings, notices or other publication of general applicability, is authorized to adjust the amounts of the sanction where such adjustment is appropriate and is not inconsistent with the purposes of section 89(k). Section 213 governs whether the amount includible in income as a result of section 89(k) is deductible.

If the sanction under section 89(k) is imposed with regard to a benefit under coverage that is determined under section 89(a) to discriminate in favor of a highly compensated employee, the proposed regulation provides for the coordination of the two sanctions. In general, the higher of the two taxable amounts must be included in the gross income of the highly compensated employee.

4. Miscellaneous Matters Relating to Section 125

Proposed § 1.125-2 contains seven questions and answers that supplement and, in part, update the questions and answers contained in proposed regulations under § 1.125-1 that were published on May 7, 1984 (49 FR 19321), and amended on December 31, 1984 (49 FR 50733). Q&A-1 of proposed § 1.125-2 provides that Q&A-2 through Q&A-6 of that section are generally effective in accordance with the effective date provisions of section 89 (generally plan years commencing after December 31, 1988). In addition, Q&A-1 provides that Q&A-7 of proposed § 1.125-2 (relating to flexible spending arrangements subject to sections 106 and 105) applies to plan years beginning after December 31, 1989.

Many of the questions and answers under § 1.125-2 clarify previously proposed § 1.125-1 as well as § 1.125-2T of the Temporary Regulations published on February 4, 1986 (51 FR 4318). To the extent the provisions of proposed § 1.125-2 clarify the provisions of proposed §§ 1.125-1 or 1.125-2T and are less restrictive, the Service will apply them as if contained in those regulations. However, consistent with the statement in the preamble to the May 7, 1984 Notice of Proposed Rulemaking, to the extent that the provisions of proposed § 1.125-2 clarify the provisions of proposed §§ 1.125-1 and 1.125-2T and are more restrictive, the Service will apply them only as set forth in Q&A-1 of proposed § 1.125-2.

Q&A-2 and Q&A-3 of the proposed regulation under § 1.125-2 restate the general requirements of section 125. Q&A-4 sets forth what benefits are treated as qualified benefits and what benefits constitute cash under a cafeteria plan. For example, Q&A-4 provides that a benefit that is taxable because it is determined to be an excess benefit under section 89(b) or because the plan fails to satisfy section 89(k) remains a qualified benefit under section 125. As a result of this provision a cafeteria plan may provide such taxable benefits.

The proposed regulation provides further guidance with regard to the rule that a cafeteria plan may not operate to defer compensation. Thus, under Q&A-5, to the extent that a benefit carries over to the following plan year, such benefit may not be offered under a cafeteria plan. For example, life or health insurance with a savings or investment feature (e.g., so-called whole-life or whole-health insurance) may not be offered in a cafeteria plan. Q&A-5 also contains a rule to determine the extent to which the inclusion of elective vacation days under a cafeteria plan operates to permit the deferral of compensation.

A cafeteria plan may permit employees to make elective contributions under a qualified cash or deferred arrangement described in section 401(k). Similarly, a cafeteria plan does not impermissibly allow the deferral of compensation merely because, as an option under the plan, employees may make after-tax employee contributions under a qualified plan that is subject to section 401(m). Finally, the deferred compensation prohibition does not prevent an employer from providing employer matching contributions subject to section 401(m) with respect to elective contributions under section 401(k) or after-tax employee contributions subject to section 401(m).

Q&A-6 clarifies and expands the rule contained in proposed § 1.125-1 concerning when an employee may revoke a benefit election and make a new election under a cafeteria plan. In general, Q&A-6 provides that a plan may allow such a revocation and subsequent election in the following circumstances: When a third-party health care insurer or provider significantly increases the cost to the employee of coverage or significantly curtails or ceases coverage; when the participant has a change in family status; or when the participant has separated from service. In addition, a cafeteria plan may provide that a benefit ceases if the participant has ceased making required premium payments. Finally, a cafeteria plan may allow a revocation or modification with respect to elective contributions subject to section 401(k) and after-tax employee contributions subject to section 401(m), to the extent such modification or revocation is permitted under section 401(k) or 401(m).

Q&A-7 contains special rules applicable to health plans that are flexible spending arrangements (FSAs). These rules are intended to protect the integrity of the distinction between the taxable treatment of personal medical expenses (subject to the rules of section 213) and the more favorable tax

treatment of employer-provided health plan coverage and benefits under section 106 or 105, including benefits received under employee-purchased accident or health coverage under section 104.

In general, if a health plan has a low maximum limitation on benefits and the amount of the premium for coverage is the same or similar to this limitation on benefits, there is a significant concern that the plan operates primarily to exclude from income amounts paid for personal medical expenses that would otherwise only be deductible under section 213 to the extent that they exceed 7.5 percent of adjusted gross income. This concern is greater if, with respect to such plan, there is no person, such as an employer or insurance company, who bears a risk of experience loss with respect to the health plan and thus has an interest in regulating the arrangement to minimize adverse selection and substantiate claimed expenses. In order to limit the extent to which health FSAs effectively operate to exclude amounts paid for personal medical expenses, Q&A-7 applies requirements to health FSAs that are similar to the requirements that an independent health insurer with a meaningful risk of loss would apply to protect against adverse selection and the inappropriate reimbursement of expenses. Thus, the requirements in the proposed regulation are consistent with those features that are commonly associated with arrangements that exhibit the basic risk-shifting and risk-spreading characteristics of insurance.

Q&A-7 clarifies that an employee's salary reduction contributions under a health FSA are payments of a premium by the employee for health coverage with respect to which the maximum reimbursement amount is the same or similar to the amount of the required premium. Therefore, health FSAs are bona fide plans and are not separate, employee-by-employee, health expense reimbursement accounts that operate in a manner similar to employee-funded, defined contribution plans. The maximum amount of reimbursement available under a health FSA at any particular time with respect to an individual cannot be based on the amount of premium that the individual has paid as of such time. Rather, the maximum reimbursement amount must be uniform throughout the coverage period. In addition, health FSAs cannot reimburse employees for premiums for other health coverage. Finally, because there is no party directly involved in an FSA with an interest in assuring that claims are bona fide, the proposed regulation imposes certain claims substantiation requirements for FSAs.

Under the proposed regulation, experience gains under health FSAs (i.e., premiums in excess of claims paid plus expenses) may be treated as gains under bona fide health plans. Thus, such gains may be available to pay reasonable and bona fide dividends or premium refunds to the premium payers. Similarly, experience gains may be used to reduce required premiums for coverage in future years. For example, experience gains for one year may be used in a second year to permit the health FSA to charge all eligible employees only a $490 premium for coverage with a $500 reimbursement maximum. In no case, however, may the treatment of experience gains under a health FSA have the effect, directly or indirectly, of reimbursing employees based on their individual claims.

Reliance on These Proposed Regulations

Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. Because these proposed regulations are generally effective for years beginning after December 31, 1988, the Service will apply these proposed regulations in issuing rulings and in examining returns with respect to taxpayers and plans after that date. If future regulations are more restrictive than these proposed regulations, such regulations will be applied without retroactive effect.

Special Analyses

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis is therefore not required. Although this document is a notice of proposed rulemaking which solicits public comments, the Internal Revenue Service has concluded that the regulations proposed herein are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, the proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Comments and Requests for Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Drafting Information

The principal authors of the proposed regulations are Felix Zech, David Munroe, and Steven Miller of the Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations). However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the proposed regulations on matters of both substance and style.

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List of Subjects in 26 CFR 1.61-1 Through 1.281-1

Deductions, Exemptions, Income taxes, Taxable income.

Proposed Amendments to the Regulations

The proposed amendments to 26 CFR Part 1 are as follows:

Income Tax Regulations

PART 1—[AMENDED]

Paragraph 1. The authority citation for Part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805 1.89(a)-1 and 1.89(k)-1 also issued under 26 U.S.C. 89(m).

Par. 2. New §§1.89(a)-1 and 1.89(k)-1 are added immediately after § 1.88-1 to read as follows:

§ 1.89(a)-1 Miscellaneous questions and answers relating to nondiscrimination rules for certain employee benefit plans.

The following is a list of the questions addressed in this section:

Q-1: What are the section 89 nondiscrimination rules?

Q-2: What transitional and special rules are available to health plans under section 89?

Q-3: Under what circumstances may employees be disregarded for purposes of section 89 when the employees receive health coverage from other employers or when employees do not have a family or have a family whose members receive health coverage from another employer?

Q-4: What is a health plan under the section 89 nondiscrimination rules and to what extent are health plans comparable or aggregated for purposes of such rules?

Q-5: What is the testing methodology for applying the nondiscrimination rules under section 89?

Q-6: What is the period for testing whether the nondiscrimination rules of section 89 are satisfied?

Q-7: For purposes of applying section 89 to an employer's health plan, what rules apply for determining the employer-provided benefits and calculating the excess benefits?

Q-8: How are salary reduction contributions treated for purposes of the section 89 nondiscrimination tests?

Q-9: How is an excess benefit under the section 89 nondiscrimination rules to be determined with respect to health plans?

Q-10: What are the effective dates of the section 89 nondiscrimination and qualification rules?

Q-1: What are the sectiion 89 nondiscrimination rules?

A-1: (a) *Nondiscrimination rules*—(1) *In general.* Section 89(a) provides that, notwithstanding any other provision of the tax law specifically excluding items from gross income (e.g., sections 79 and 106), the gross income of a highly compensated employee (as defined in section 414(q)) includes an amount equal to the employee's employer-provided benefit that is found to be discriminatory under the rules provided in this section. See paragraph (f)(3) of this Q&A-1 for the definition of "employer-provided benefit" for these nondiscrimination rules. The nondiscrimination requirements of section 89(a), however, do not affect the exclusion from gross income of death benefits under section 101(a) and accident and health benefits under sections 104 and 105.

(2) *Timing of inclusion and deduction.* The excess benefit for a testing year generally is treated as received on the last day of the testing year. Thus, the excess benefit for a testing year generally is included in a highly compensated employee's gross income for the employee's taxable year with or within which the testing year ends. Similarly, the excess benefit for a testing year generally is treated as paid by the employer on the last day of the testing year. Thus, the excess benefit for a testing year is deductible by the employer only for the taxable year of the employer with or within which the testing year ends. Also, for purposes of determining the deductibility of both employer-provided benefits that are not excess benefits and employer-provided benefits that are excess benefits, excess benefits are deemed to be attributable to the employer-provided benefits provided latest during the testing year. For purposes of determining the treatment of excess benefits under section 404, excess benefits are treated as paid under a plan or arrangement that defers the receipt of compensation or benefits to the extent that, under the rule of this paragraph (a)(2), the excess benefits are received after the end of the employer's taxable year in which the services creating the right to such compensation or benefits are performed. For these purposes, excess benefits are deemed to be attributable to employees' services performed latest in such testing year. Excess benefits are treated as paid under such a plan or arrangement even if they are received not more than a brief period (e.g., 2½ months) after the end of the employer's taxable year (see § 1.404(b)-1T) and even if the employer elects the rule of section 89(a)(2)(B) with respect to excess benefits. An employer's election of the rule of section 89(a)(2)(B) for a testing year must be made in writing by January 31 of the first calendar year following the calendar year in which the testing year ends. Such election, when made, must apply for all plans of the same type.

(b) *Discriminatory employee benefit plan*—(1) *In general.* A statutory employee benefit plan is a discriminatory employee benefit plan for a testing year unless, for such year, the plan satisfies the requirements of paragraphs (c) and (d) of this Q&A-1. Alternatively, in lieu of the requirements of paragraph (d) of this Q&A-1. an employer may elect to apply the requirements of paragraph (e) of this Q&A-1 to a statutory employee benefit plan. However, for testing years beginning in 1989, a statutory employee benefit plan is not treated as a discriminatory employee benefit plan for purposes of section 4976 if the excess benefits with respect to such plan are properly reported in accordance with section 89(1).

(2) *Disability coverage.* Generally, a plan (or portion thereof) that provides disability coverage is not subject to the requirements of paragraphs (c), (d) or (e) of this Q&A-1 for a testing year and, thus, may not be taken into account in determining whether any other accident or health plan satisfies the requirements of such paragraphs. For example, short-term sick pay, short-term and long-term disability plans, worker's compensation plans (as defined in paragraph (f)(1)((v) of this Q&A-I). plans described in section 104(a)(4) and (5) and similar wage continuation plans are not subject

to the requirements of paragraphs (c), (d) or (e) of this Q&A–1, even if there are significant employer-provided benefits with respect to such plans. This paragraph (b)(2) does not apply with respect to disability coverage the benefits of which are excludable from gross income under section 105(b) or (c).

(3) *No employer-provided benefit.* If there is no employer-provided benefit (other than by reason of coverage under such plan being considered excess benefit) for a testing year, with respect to a plan that is otherwise subject to the nondiscrimination rules of section 89. such plan is not subject to the requirements of paragraphs (c), (d) or (e) of this Q&A–1 for such testing year. See Q&A–7 of this section to determine a plan's employer-provided benefit. An employer cannot take into account a plan (or portion thereof) providing no employer-provided benefit in determining whether other plans meet the requirements of paragraphs (c), (d) or (e) of this Q&A–1.

(4) *Employers with only highly compensated employees.* A statutory employee benefit plan is not subject to the requirements of paragraphs (c), (d) or (e) of this Q&A–1 for a testing year if such plan is maintained by an employer that, for such year, only has employees who are highly compensated employees.

(c)*Nondiscriminatory provisions requirement*—(1) *In general.* A plan satisfies the requirement of this paragraph (c) and section 89(d)(1)(C) only if the plan does not contain any provision that (by its terms, operation, or otherwise) discriminates in favor of highly compensated employees. In making this determination, an employer must take into account all plans of the same type. For purposes of this requirement, an employer's election with respect to testing (e.g., designation of a testing day) is subject to the nondiscriminatory provisions requirement even though it is not required to be in the single written document required under section 89(k)(1)(A).

(2) *Waiting periods under core health plans.* If an employer has two or more core health plans with different waiting periods, the core health plans do not satisfy the nondiscriminatory provisions test of this paragraph (c) unless each plan satisfies the 50 percent eligibility test of paragraph (d)(3) of this Q&A–1 either on an individual basis or by inclusion in a group of comparable plans, under paragraph (b) of Q&A–4 of this section, that includes only one or more additional core health plans that have the same or shorter waiting periods. If a plan fails to satisfy this paragraph (c) by reason of this paragraph (c)(2), the excess benefit attributable to this failure is the employer-provided benefit under the plan that relates to the period of coverage that prevents the plan from being included in a group of comparable plans under the preceding sentence.

(3) *Examples.* The provisions of this paragraph (c) are illustrated in the following examples:

Example 1. Assume that an employer has 25 employees, 5 of whom are highly compensated employees. Two of the 20 nonhighly compensated employees have families. The employer provides employee-only health coverage with an employer-provided benefit of $2,000 to all employees, and provides the highly compensated employees with an additional plan providing employee-only coverage with an employer-provided benefit of $2,200. In addition, the employer provides family-only health coverage (with an employer-provided benefit of $2,000) to all of the nonhighly compensated employees, but makes such family-only coverage available to the highly compensated employees only if they pay the total cost of such coverage on an after-tax employee contribution basis. Thus, the highly compensated employees receive no employer-provided benefit with respect to such family-only coverage. The employer decides to treat all of its employees as having a family (see Q&A–3 of this section). The family-only coverage that is treated as received by employees without families may be used under the comparability rule of paragraph (c)(2) of Q&A–4 of this section to support the additional $2,200 employee-only coverage provided to highly compensated employees. Although after the application of the comparability rule, the $2,200 employee-only coverage for the highly compensated passes the 80 percent coverage test set forth in paragraph (e) of this Q&A–1, the nondiscriminatory provisions test is violated. This is because the coverage of 18 of the 20 nonhighly compensated employees is not meaningful because they are not in fact receiving benefits under the family-only coverage.

Example 2. A school district selects July 1 as its testing day. On that day, the school district has no part-time employees and only administrative personnel, regular faculty and maintenance personnel on its payroll. The designation of July 1 as the testing day does not constitute the designation of a testing day that is fairly representative of the employee pool and business operation of the school district and, therefore, such designation violates the nondiscriminatory provisions test.

Example 3. An employer that operates a department store selects July 1 as its testing day. Traditionally, the number of the employees employed by the employer on July 1 does not reasonably reflect the number of the employer's employees employed during most of its fiscal year. This designation violates the nondiscriminatory provisions test.

Example 4. Assume that an employer maintains numerous health plans (both core and noncore plans) for its 5,000 employees. All but one core health plan, Plan X, provides for a 3-month waiting period for new employees. Plan X provides coverage after 1 month of employment for certain executive personnel. This 1-month waiting period provision violates the nondiscriminatory provisions test of this paragraph (c) unless Plan X satisfies the 50 percent eligibility test of paragraph (d)(3) of this Q&A–1 either on an individual basis or by inclusion with another core health plan or plans with the same or shorter waiting periods in a group of comparable plans under paragraph (b) of Q&A–4 of this section. If the 1-month waiting period provision fails the nondiscriminatory provisions test of this paragraph (c), then the employer-provided benefit under Plan X that relates to coverage for the period between the first and third months of employment is treated as an excess benefit of each highly compensated employee eligible for coverage under Plan X after 1 month of employment.

(d) *Eligibility and benefit requirements*—(1) *In general.* A plan satisfies the requirements of this paragraph (d) only if the tests of paragraphs (d)(2), (d)(3), and (d)(4) of this Q&A–1 are satisfied.

(2) *90 percent/50 percent eligibility test.*—(i) *In general.* A plan satisfies this test only if at least 90 percent of all nonhighly compensated employees have available under all plans of the same type an employer-provided benefit that is at least 50 percent of the largest employer-provided benefit available under all such plans to any highly compensated employee. To the extent that an employee is eligible to be covered under two or more plans of different types (see paragraph (f)(2)(i) of this Q&A–1), but not fully under all such plans, the employee cannot be treated as eligible for the full employer-provided benefit of each plan for purposes of the 90 percent/50 percent test. Instead, the employer must use a reasonable, uniform, and nondiscriminatory allocation method to allocate to such employee only a reasonable portion of each plan's full employer-provided benefit. Whether a plan is available to an employee is determined under all of the facts and circumstances. For example, an HMO at a location distant from the location of the employer might not, under the facts and circumstances, be reasonably available to employees at the location of the employer. See Q&A–8 of this section for the treatment of salary reduction contributions under this test. Also, see Q&A–2 of this section for a transition rule for the 1989 testing year.

(ii) *Example.* The provisions of this paragraph (d)(2) are illustrated in the following example:

Example. An employer has 12 employees, 10 of whom are nonhighly compensated employees. The employer maintains two health plans. Plan A has an employer-

provided benefit of $1,000. It is available to 9 of the 10 nonhighly compensated employees and both of the highly compensated employees. Plan B, a dental plan, has an employer-provided benefit of $500. It is available only to the two highly compensated employees. The health plans meet the requirements of this paragraph (d)(2). This is the result since 90 percent of the nonhighly compensated employees (9 of 10) have available to them an employer-provided benefit of $1,000, which is more than 50 percent of $1,500, the largest employer-provided benefit available to any highly compensated employee. Note that the dental plan in this example fails the 50 percent eligibility test set forth in paragraph (d)(3) of this Q&A-1.

(3) *50 percent eligibility test*—(i) *In general.* A plan satisfies this test only if the plan satisfies the requirement of either paragraph (d)(3)(ii) or paragraph (d)(3)(iii) of this Q&A 11. An employee is eligible to participate in a plan only if, under all of the facts and circumstances, the employee is reasonably eligible to participate in such plan. See Q&A-4 of this section with respect to rules relating to the comparability and aggregation of health plans.

(ii) *50 percent eligibility.* A plan satisfies the requirement of this paragraph (d)(3)(ii) only if at least 50 percent of the employees eligible to participate in the plan are nonhighly compensated employees.

(iii) *Nondiscriminatory ratio.* A plan satisfies the requirements of this paragraph (d)(3)(iii) only if the highly compensated eligibility percentage does not exceed the nonhighly compensated eligibility percentage. The highly compensated eligibility percentage is the percentage determined by dividing the number of highly compensated employees eligible to participate in the plan by the total number of highly compensated employees. The nonhighly compensated eligibility percentage is the percentage determined by the same method substituting nonhighly compensated employees for highly compensated employees.

(iv) *Example.* The provisions of this paragraph (d)(3) are illustrated in the following example:

Example. An employer maintains a plan providing for medical diagnostic examinations to a group of management personnel. Of this group, 10 percent are nonhighly compensated employees. Unless the plan can be treated as part of a group of comparable plans that passes the 50 percent eligibility test (see paragraph (b) of Q&A-4 of this section), the plan fails the tests described in this paragraph (d)(3).

(4) *75 percent benefits test*—(i) *In general.* A plan satisfies the test of this paragraph (d)(4) only if the average employer-provided benefit actually received under all plans of the same type by nonhighly compensated employees is at least 75 percent of the average employer-provided benefit actually received under all plans of the same type by highly compensated employees. See paragraph (f)(2)(ii) of this Q&A-1 for a rule under which, in certain circumstances, plans that are not of the same type may be treated as plans of the same type for purposes of this paragraph (d)(4). Also, see Q&A-2 of this section for transition rules for the 1989 and 1990 testing years.

(ii) *Example.* The provisions of this paragraph (d)(4) are illustrated in the following example:

Example. An employer has 5 highly compensated employees and 15 nonhighly compensated employees. The employer maintains only one health plan with an employer-provided benefit of $1,500. All of the highly compensated employees and 10 of the nonhighly compensated employees participate in the plan. The employer's health plan does not meet the requirements of this paragraph (d)(4) since the average employer-provided benefit of the nonhighly compensated employees is only $1,000 ((10 x $1,500)/15), and this amount is less than 75 percent of the average employer-provided benefit of the highly compensated employees, which is $1,500 ((5 x $1,500)/5). In order to meet the requirements of this paragraph (d)(4), the average employer-provided benefit of the nonhighly compensated employees must be at least $1,125 (75 percent of $1,500) or the average employer-provided benefit of the highly compensated employees must be no more than $1,333.33 ($1000 is 75 percent of $1333.33).

(e) *80 percent coverage test.* A plan that is a health plan or a group-term life insurance plan satisfies the requirements of this paragraph (e) only if at least 80 percent of the nonhighly compensated employees are covered under such plan and the plan meets the requirements of paragraph (c) of this Q&A-1 (the nondiscriminatory provisions test). Plans of the same type may pass the 80 percent test separately or together (e.g., by reason of health plans being comparable). See Q&A-4 of this section with respect to rules relating to comparability and aggregation. If any of an employer's plans of the same type are tested under this paragraph (e), all plans of the same type must be tested under the requirements of this paragraph (e). The employer must elect in writing to use this 80 percent test.

(f) *Definitions*—(1) *Statutory employee benefit plan*—(i) *In general.* The term "statutory employee benefit plan" means an accident or health plan (within the meaning of sections 106 and 105) or a group-term life insurance plan (within the meaning of section 79). Also, under section 89(i)(2), an employer may treat certain other plans as statutory employee benefit plans.

(ii) *Health plan.* In general, the term "health plan" means an accident or health plan under section 105 or 106, except to the extent the plan is a disability plan (see paragraph (b)(2) of this Q&A-1). In addition, a plan that provides payments for accidental death and dismemberment, or business travel accident insurance, is an accident or health plan because coverage under such plan is eligible for the exclusion under section 106. Furthermore, plan that provides for medical diagnostic procedures or physical examination is an accident or health plan because the plan is eligible for the exclusion under section 106.

(iii) *Church plans.* The term "statutory employee benefit plan" does not include a plan maintained by a church (as defined in section 3121(w)(3)(A)), including a qualified church-controlled organization within the meaning of section 3121(w)(3)(B)), if the plan is maintained exclusively for clergy and church employees, and their spouses and dependents.

(iv) *Plans maintained by governments.* A plan does not fail to be a statutory employee benefit plan merely because it is maintained by a state or local government or political subdivision or instrumentality thereof, by the District of Columbia, or by the Federal government or a political subdivision or instrumentality thereof.

(v) *Worker's compensation.* The term "statutory employee benefit plan" does not include a worker's compensation plan that pays amounts from a sickness and disability fund maintained for employees under the laws of the United States, a state or the District of Columbia (i.e., a fund maintained pursuant to a worker's compensation act or statute in the nature of a worker's compensation act, the benefits from which are excludable under. section 104(a)(1)). Thus such a plan is not subject to the nondiscrimination requirements of section 89. An employer may not take into account a worker's compensation plan (or portion thereof) in determining whether other plans meet the requirements of paragraphs (c), (d) or (e) of this Q&A-1. However, accident or health plans maintained by a government (as defined in paragraph (f)(1)(iv) of this Q&A-1) that provide benefits that are excludable from the income of the employee solely by reason of section 105(b) or (c) are not worker's compensation plans within the meaning of the first sentence of this paragraph (f)(1)(v) and thus are subject to the

nondiscrimination requirements of section 89.

(2) *Plans of the same type*—(i) *In general.* Two or more plans are treated as plans of the same type if all of such plans are included in only one of the following categories: accident or health plans (sections 106 and 105); group-term life insurance (section 79); qualified group legal services plans (section 120); educational assistance programs (section 127); or dependent care assistance programs (section 129).

(ii) *Election.* For purposes of applying the requirements of paragraph (d)(4) of this Q&A-1 (the 75 percent benefits test) to plans of the same type other than health plans for a testing year, an employer may elect in writing to treat all plans of the types specified in the election as plans of the same type. Although this election is not available for purposes of determining whether the health plans of the employer satisfy the 75 percent benefits test, if such plans satisfy the 75 percent benefits test they may be taken into account in determining whether plans of the same type (e.g. group-term life insurance plans), other than health plans, satisfy such test. For any testing year, if an employer elects to take health plans into account in determining whether two or more plans of another type or types satisfy the 75 percent benefits test, all of the employer's health plans must be taken into account with all other plans of the type or types subject to the election. Thus, for example, if an employer elects to take its health plans into account in testing its group-term life insurance plans and dependent care assistance programs for purposes of the 75 percent benefits test, all such plans must be tested on an aggregated basis under the 75 percent benefits test.

(3) *Employer-provided benefit.* In the case of any health or group-term life insurance plan, the employer-provided benefit for purposes of this section is the value of the coverage under the plan that is attributable to employer contributions. For example, in the case of a health plan, the employer-provided benefit is the employer-provided portion of the value of the entitlement to receive payment on account of personal injury or sickness including medical care or reimbursements of specified medical expenses or other medical benefits, subject to various conditions and limits, rather than the value of the reimbursements, products, services and other benefits received pursuant to the health coverage. See Q&A-7 of this section for guidance relating to the value of health coverage. See section 89(g)(3)(C) for rules with respect to the value of coverage under a group-term life insurance plan. In the case of any other statutory employee benefit plan, an employee's employer-provided benefit under section 89 is the employer-provided portion of the value of the reimbursements, products, services and other benefits provided under the plan (rather than the value of the coverage or the entitlement to such benefits).

(4) *Highly compensated employee.* The term "highly compensated employee" is defined as that term is defined in section 414(q). For purposes of determining who is a highly compensated employee under section 89, the testing year is the determination year.

(5) *Nonhighly compensated employee.* The term "nonhighly compensated employee" is defined as each employee other than a highly compensated employee.

(6) *Employee*—(i) *In general.* The term "employee" generally means an individual who performs service for the employer maintaining the plan and who is either a common law employee of the employer, a self-employed individual treated as an employee under section 401(c)(1), or an individual who is treated as an employee with respect to the employer for purposes of the provision (e.g., section 106) that provides for the exclusion of the benefit being tested under section 89.

(ii) *Leased employees*—(A) *In general.* The term "employee" includes a leased employee who is treated as an employee of the employer-recipient pursuant to the provisions of sections 414(n)(1)(A) or 414(o)(2) and the regulations thereunder. In general, section 414(n) applies with respect to employee benefit plans covered by section 89 in the same manner as it applies with respect to qualified plans covered by section 401(a). Thus, the rule of section 414(n)(1)(B) permitting a recipient to take into account certain benefits provided by a leasing organization is available with respect to benefits subject to section 89. The safe harbor exception of section 414(n)(5), however, is not available with respect to section 89. In addition, the rule of § 1.414(n)-1(b)(10) regarding services performed on a "substantially full-time basis" is to be applied by appropriately adjusting the hour of service requirements to reflect the 6-month period of service requirement. Nevertheless, a leased employee may be disregarded by an employer-recipient when testing its health plans if the employer-recipient treats the health coverage received by the leased employee from the leasing organization as health coverage received from another employer and, on such basis, applies the rules of Q&A-3 of this section with respect to such leased employee. Notwithstanding the immediately preceding sentence, no leased employee described in this paragraph (f)(6)(ii) may be disregarded as having coverage from another employer unless the value of employer-provided core health benefits actually received by the leased employee from the leasing organization under its plan is at least 50 percent as valuable as the highest employer-provided core health benefit available to any highly compensated employee of the employer-recipient.

(B) *Authority to issue additional requirements.* The differing natures of employee benefit plans covered by section 89 and qualified plans covered by section 401(a) may require different rules in certain circumstances. The Commissioner may provide such rules, to the extent appropriate, through revenue rulings, notices, and other guidance of general applicability.

(iii) *Excluded employees.* In general, the term "employee" does not include employees who are excluded employees under section 89(h) and thus who are excluded from consideration in applying the nondiscrimination rules of section 89 with respect to other employees. For example, employees who are included in a unit of employees covered by a collective bargaining agreement are excluded employees only if there is evidence that the type of benefits provided under the plan being tested under section 89 was the subject of good faith bargaining and no employee in such collective bargaining unit of employees is eligible to receive or does receive any benefit under the plan or any plan of the same type.

(7) *Core health benefits.* Except as provided otherwise in this section, the terms "core health benefits," "core health coverage," and "core health plan" generally refer to coverage providing comprehensive major medical and hospitalization benefits and similar types of health benefits. Dental care, vision care, accidental death and dismemberment, and disability coverage are examples of health benefits that generally are not core health plans. Also, any health coverage provided through a flexible spending arrangement (as defined in Q&A-7 of § 1.125-2) is not a core health benefit.

(g) *Written election.* In general, unless specifically provided otherwise, an election required to be in writing under this section must be in writing by January 31 of the first calendar year following the calendar year in which

excess benefits for the testing year (without regard to whether there are such excess benefits for such year) would be treated as received under paragraph (a)(2) of this Q&A-1. However, if an employer makes an election under section 89(a)(2)(B) to delay the inclusion of excess benefits in income for one year, then any other written elections must be in writing by January 31 of the first calendar year following the calendar year in which excess benefits for the testing year (without regard to whether there are such excess benefits for such year) are treated as received under paragraph (a)(2) of this Q&A-1. See Q&A-1(a)(2) for the time for making the section 89(a)(2)(B) election. The elections must be written in a manner that will allow a reconstruction of the employer's method of testing.

Q-2: What transitional and special rules are available to health plans under section 89?

A-2: (a) *Transition rule for 75 percent benefits test*—(1) *In general.* With respect to the 1989 and 1990 testing years, an employer's health plans are deemed to satisfy paragraph (d)(4) of Q&A-1 of this section (the 75 percent benefits test) with respect to active employees for a testing year if the requirements of paragraphs (a)(2), (a)(3), and (a)(4) of this Q&A-2 are satisfied with respect to such testing year.

(2) *Testing years ending in 1989 and 1990.* The requirement of this paragraph (a)(2) is satisfied only if the testing year ends in either the 1989 calendar year or the 1990 calendar year. For purposes of this paragraph (a), a testing year that ends in 1989 is a 1989 testing year and a testing year that ends in 1990 is a 1990 testing year.

(3) *Employer election.* The requirement of this paragraph (a)(3) is satisfied only if the employer elects in writing the application of the transition rule in this paragraph (a) with respect to a testing year.

(4) *Includible coverage for applicable group of employees*—(i) *In general.* The requirement of this paragraph (a)(4) is satisfied for a testing year only if the employer provided benefits (including the portion attributable to salary reduction contributions) under all health plans of the employer received by the applicable group of employees for the testing year are treated as excess benefits for such testing year. If an employer makes an election under paragraph (a) of this Q&A-2, then in determining whether the requirements of paragraphs (d)(2) and (d)(3) of Q&A-1 of this section (the 90 percent/50 percent eligibility test and the 50 percent eligibility test, respectively) are met, the employer may treat benefits that are includible in gross income by reason of this paragraph (a)(4) as attributable to after-tax employee contributions.

(ii) *Applicable group of employees*—(A) *1989 testing year.* For a 1989 testing year, the applicable group of employees includes all active employees of the employer for such year who had more than a 5 percent ownership interest in the employer (determined in accordance with section 416(i)) at any time between January 1, 1988, and the end of the testing year, and the applicable number of the highly compensated active employees of the employer who receive the most compensation for the 1989 testing year. The applicable number for the preceding sentence is the number of employees representing 20 percent of the highly compensated active employees of the employer for the testing year, but in no event greater than 1,000 highly compensated employees and in no event less than 10 employees (or the total number of highly compensated employees of the employer if less than 10).

(B) *1990 testing year.* For a 1990 testing year, the applicable group of employees includes all highly compensated active employees of the employer for such year who had more than a 5 percent ownership interest in the employer (determined in accordance with section 416(i)) at any time between January 1, 1989, and the end of the testing year, and the applicable number of highly compensated active employees of the employer (or all highly compensated active employees if the employer has fewer than the applicable number of such employees) who receive the most compensation for the 1990 testing year. The applicable number for the preceding sentence is the number of employees representing 40 percent of the highly compensated active employees of the employer for the testing year, but in no event greater than 2,000 highly compensated employees and in no event less than 50 employees (or the total number of highly compensated employees of the employer if less than 50).

(C) *Compensation.* For purposes of identifying those highly compensated employees who receive the greatest amount of compensation, "compensation" means "compensation" as defined in section 414(q)(7). In the case of two or more employees with the same amount of compensation, the employer may decide which of such employees is to be treated as receiving more compensation.

(b) *Transition rule for 90 percent/50 percent eligibility test?* If an employer's health plans are deemed to satisfy paragraph (d)(4) of Q&A-1 of this section (the 75 percent benefits test) by reason of paragraph (a) of this Q&A-2 for a testing year ending in 1989, then, for such testing year, such employer may elect in writing to apply the 90 percent/50 percent eligibility test of paragraph (d)(2) of Q&A-1 of this section with respect to active employees for such testing year by substituting "80 percent" for "90 percent" and by substituting "66 percent" for "50 percent" (i.e., the test may be treated as an 80 percent/66 percent eligibility test). The rule of this paragraph (b) is not applicable for purposes of determining excess benefits under section 89(b).

(c) *Special rule for certain large employers*—(1) *In general.* An employer's health plans are deemed to satisfy the requirements of paragraph (d) of Q&A-1 of this section (the eligibility and benefit requirements) with respect to active employees for a testing year if all of the requirements of paragraphs (c)(2) through (c)(7) of this Q&A-2 are satisfied for such testing year. In applying the requirements of paragraphs (c)(2) through (c)(7) of this Q&A-2, only nonexcludable employees are taken into account and, for such purpose, the excluded employee rules of section 89(h)(1)(A), (B), (C), and (D) are to be applied without regard to the last sentence of section 89(h)(1) and without regard to sections 89(h)(2) and 89(h)(3). Thus, for example, differences in eligibility waiting periods do not result in the loss of an employee's status as an excludable employee to the extent that the period with respect to such employee does not exceed the maximum period allowed under section 89(h) (e.g., 6 months for core health coverage). The nondiscriminatory provisions test of paragraph (c) of Q&A-1 of this section does not apply to waiting periods under core health plans as discussed in paragraph (c)(2) of Q&A-1 of this section with respect to plans tested under this paragraph (c). The rules of this paragraph (c) are not applicable for purposes of determining excess benefits under section 89(b).

(2) *Employer election.* The requirement of this paragraph (c)(2) is satisfied with respect to a testing year only if the employer elects in writing the application of the rule of this paragraph (c) with respect to such testing year. If any of an employer's health plans are tested under this paragraph (c), all of such employer's health plans must be tested under this paragraph (c).

(3) *Minimum number of employees.* The requirement of this paragraph (c)(3) is satisfied for a testing year only if the employer employs at least 5,000 active

employees on at least 1 day in each quarter of such testing year.

(4) *Minimum Percentage of nonhighly compensated employees.* The requirement of this paragraph (c)(4) is satisfied only if at least 90 percent of the employer's active employees are nonhighly compensated employees.

(5) *Maximum percentage of highly compensated employees.* The requirement of this paragraph (c)(5) is satisfied only if fewer than 3/4 percent (0.75 percent) of the employer's active employees have annual compensation (within the meaning of section 414(q)(7)) in excess of 200 percent of the dollar amount in effect under section 414(q)(1)(C) for the testing year.

(6) *Health plan eligibility*—(i) *In general.* The requirement of this paragraph (c)(6) is satisfied only if both of the tests in paragraphs (c)(6)(ii) and (c)(6)(iii) are satisfied. For purposes of this paragraph (c)(6), the rules of paragraph (b) of Q&A–3 of this section are available. However, for purposes of this paragraph (c)(6), the comparability rules of paragraph (c) of Q&A–4 of this section are not availab1e.

(ii) *80 percent eligibility test.* This test is satisfied only if at least 80 percent of the employees eligible to participate in each health plan of the employer are nonhighly compensated employees. For purposes of this paragraph (c)(6)(ii) the comparability rules of paragraph (b) of Q&A–4(b) of this section and the family eligibility test rules of Q&A–3(b) of this section are available.

(iii) *80 percent/80 percent eligibility test.* This test is satisfied only if at least 80 percent of the nonhighly compensated employees of the employer have available to them under all health plans an employer-provided benefit that is at least 80 percent as valuable as the largest employer-provided benefit available under all such health plans to any highly compensated employee. The rules relating to the application of the 90 percent/50 percent eligibility test apply in making this determination.

(7) *Benefits test.* The requirement of this paragraph (c)(7) is satisfied only if at least 66 percent of the nonhighly compensated employees of the employer actually receive core health coverage with an employer-provided benefit that is at least 66 percent as valuable as the largest employer-provided benefit available under all health plans (including both core and noncore health coverage) to any highly compensated employee. In determining the largest employer-provided benefit available to a highly compensated employee, the rules applicable to the 75 percent benefits test apply, except that for this purpose salary reduction contributions are treated as employer contributions. For purposes of this paragraph (c)(7), the coverage rules of Q&A 3(c) of this section are available.

Q–3: Under what circumstances may employees be disregarded for purposes of section 89 when the employees receive health coverage from other employers or when employees do not have a family or have a family whose members receive health coverage from another employer?

A–3: (a) *In general.* For purposes of determining whether health plans providing coverage to the spouse and dependents (if any) of an employee (i.e., family-only coverage) satisfy the requirements of paragraph (d)(2) (the 90 percent/50 percent eligibility test) and paragraph (d)(3) (the 50 percent eligibility test) of Q&A–1 of this section, an employer may elect in writing to apply the rules of paragraph (b) of this Q&A–3. Also, for purposes of determining whether health plans satisfy the requirements of paragraph (d)(4) (the 75 percent benefits test) or paragraph (e) (the 80 percent coverage test) of Q&A–1 of this section, the employer may elect in writing to apply the rules of paragraph (c) of this Q&A–3.

(b) *Eligibility tests.* An employee who is eligible to receive family-only coverage under a health plan or would be eligible under the same terms and conditions as other eligible employees if the employee had a spouse and dependents may be treated as eligible to receive such family-only coverage without regard to whether the employee has a spouse and dependents. This is the case without regard to whether there is a requirement of an employee contribution or other employee election under the plan so long as any such election is uniformly available. If the employer applies the rule of this paragraph (b) with regard to any employee or any health plan, the employer must apply the rule uniformly with regard to all employees and health plans except to the extent such application would cause a plan to fail the nondiscriminatory provisions test of paragraph (c) of Q&A–1 of this section.

(c) *75 percent benefits test and 80 percent coverage test*— (1) *Separate testing.* Except as otherwise provided in this paragraph (c), an employer may elect in writing to apply the requirements of paragraph (d)(4) or (e) of Q&A–1 of this section for a testing year by testing its health plan or plans that provide employee-only coverage separately from the health plan or plans that provide family-only coverage. If the employer tests family-only coverage separately from employee-only coverage, all family-only coverage must be tested together under this paragraph (c). Therefore, an employer may not separately test coverage provided to a spouse from coverage provided to a dependent. Separate testing may be elected under this paragraph (c)(1) without regard to the fact that family-only coverage is not available as a separate option to employees (i.e., the employee-only and family-only coverages are available or provided only as a package to the employee). No amendment to a written plan document is required to test separately under this paragraph (c)(1).

(2) *Presumption of family status.* In applying the requirements of paragraph (d)(4) or (e) of Q&A–1 of this section for a testing year to a health plan that provides family-only coverage, an employee does not fail to be treated as receiving family-only coverage merely because the employee does not have a spouse or dependents. This is the case without regard to whether the employer has elected separate testing in accordance with paragraph (c)(1) of this Q&A–3. Thus, for example, if an employer automatically provides an employee with family-only coverage (i.e., such coverage is provided on a nonelective, noncontributory basis) or automatically provides an employee with family-only coverage if the employee purchases employee-only coverage and the employee does purchase such employee-only coverage, the employee may be treated as having received the family-only coverage even though the employee does not have a spouse or dependents. However, see paragraph (c) of Q&A–1 of this section with respect to the application of the nondiscriminatory provisions test to certain plans that provide family-only coverage.

(3) *Other core health coverage*—(i) *Employer does not elect separate testing.* If an employer does not elect to test plans providing employee-only coverage separately from plans that provide family-only coverage (as permitted under paragraph (c)(1) of this Q&A–3), an employee who has a family (as determined under this paragraph (c)) may be disregarded for purposes of applying the requirements of paragraphs (d)(4) and (e) of Q&A–1 of this section if either of the following two requirements are met. First, such employee and family members (if any) all receive core health coverage from another employer or from the spouse's or a dependent's employer. Second, if the employer does not provide a health plan that includes employer-provided family-only coverage, then the employee must receive core health coverage from

another employer or from the spouse's or a dependent's employer.

(ii) *Employer elects separate testing.* If an employer elects to test employee-only coverage separately from family-only coverage (as permitted under paragraph (c)(1) of this Q&A-3), an employee may be disregarded for purposes of applying the requirements of paragraphs (d)(4) and (e) of Q&A-1 of this section with respect to the family-only coverage if such employee does not have a family (as determined under this paragraph (c)) or if such employee has a family and the family members all receive core health coverage from another employer or from the spouse's or a dependent's employer. Similarly, for purposes of applying the requirements of paragraphs (d)(4) and (e) of Q&A-1 of this section with respect to the employee-only coverage, an employee may be disregarded if the employee receives core health coverage from another employer or from a spouse's or a dependent's employer. In testing only the health plan or plans that provide employee-only coverage, employees are taken into account without regard to whether they have families.

(4) *Sworn statements*—(i) *In general.* An employer may not elect the rules of paragraph (c)(3) of this Q&A-3 unless the employer obtains and maintains adequate sworn statements that satisfy the requirements of paragraph (c)(4)(ii) of this Q&A-3.

In the absence of an adequate sworn statement with respect to an employee or the application of paragraph (c)(4)(iii) of this Q&A-3, certain presumptions, set forth in section 89(g)(2)(C), are to be applied with respect to those facts that would otherwise have been provided on the sworn statement.

(ii) *Adequate sworn statement.* An adequate sworn statement must contain sufficient information to indicate whether the employee has a spouse or any dependents and, if so, the number of dependents and the current receipt by the employee and any spouse or dependents of core health coverage under a plan of another employer or the employer of the spouse or dependent. An employer cannot rely on sworn statements for testing years beginning after 1989 unless such statements are made under penalty of perjury and contain a designation of the employer-provided health coverage currently received by the employee under the employer's health plan or plans. In lieu of including information about the employer-provided health coverage being received by an employee under the employer's health plans, an employer may use any other reasonable method to enable it to determine, for each testing year, the extent to which an employee who is receiving core health coverage under a plan of another employer is also receiving employer-provided health coverage from the employer. A sworn statement is not required to be notarized or on a form approved in advance by the Commissioner. The rule of this paragraph (c)(4)(ii) is illustrated by the following example:

Example. As part of its open season on the selection of health plan coverage, an employer requests that an employee complete a form providing information about the employee's family status, number of dependents and whether the employee or the employee's spouse or dependents receive core health coverage through another employer or the employer of the spouse or a dependent. If the employee does receive other core health coverage, the form also requests the name of the other employer and, if applicable, the insurance company administering the program or providing the other coverage. At the bottom of the form, just above the signature block and date, is the following phrase: "Under penalties of perjury, I declare that the information I have furnished above, to the best of my knowledge and belief, is true, correct, and complete." This form satisfies the sworn statement requirement of section 89(g)(2)(B) and this Q&A-3 provided that the employer also is able to determine for each testing year, by other reasonable means, the extent to which employees who receive other core health coverage also receive health coverage from the employer.

(iii) *Exception.* If an employee is eligible to receive employee-only coverage under a core health plan of the employer with a substantial employer-provided benefit at no cost to the employee and such employee does not elect to receive any employee-only coverage under a core health plan of the employer, the employer may treat such employee as having completed an adequate sworn statement that the employee has core health coverage from another employer. Similarly, if an employee is eligible to receive family-only coverage under a core health plan of the employer with a substantial employer-provided benefit and at no cost, and such employee does not elect to receive any family-only coverage under a core health plan of the employer, the employer may treat such employee as having completed an adequate sworn statement that the employee has no family or has a family all the members of which receive other core health coverage. Even if a sworn statement is deemed to have been completed under this paragraph (c)(4)(iii), the employer must establish by other reasonable methods the extent to which employees described in this paragraph (c)(4)(iii) receive health coverage from such employer. For purposes of this paragraph (c)(4)(iii), the plan has a cost to the employee if the employee is required to make any after-tax or salary reduction contributions or to waive any other benefit (taxable or otherwise) in order to obtain the health coverage.

(iv) *Frequency of sworn statements.* An employer that elects to use sworn statements as permitted under this paragraph (c)(4) must obtain such statements on no less frequent a basis than once each 3-consecutive years. If the employer does not obtain sworn statements from substantially all of its employees or from a statistically valid random sample of all of its employees determined under statistical standards consistent with those in paragraph (d) of Q&A-5 of this section, the employer must obtain such sworn statements on an annual basis.

(5) *Certain highly compensated employees.* A highly compensated employee cannot be disregarded under paragraph (c)(3) of this Q&A-3 if such employee receives an employer-provided benefit under all health plans of the employer that is greater than 133⅓ percent of the average employer-provided benefit under all such health plans received by nonhighly compensated employees (after applying the rule of paragraph (c)(6) of this Q&A-3). The rule of this paragraph (c)(5) is applied separately with respect to employee-only coverage and family-only coverage if the employer elects under paragraph (c)(1) of this Q&A-3 to test such coverages separately.

(6) *Certain nonhighly compensated employees.* A nonhighly compensated employee may not be disregarded under paragraph (c)(3) of this Q&A-3 because of other core health coverage unless, at the time such other coverage ceases, such employee is eligible to elect coverage under any core health plan of the employer for which the employee was eligible (through election or otherwise) during the immediately preceding period in which the employee could have elected coverage (e.g. an open season). The election period for purposes of the rule in this paragraph (c)(6) must be no shorter than 30 days). This paragraph (c)(6) applies without regard to the reason for the cessation of the employee's other core health coverage and without regard to whether the employer's health plans otherwise permit employees to commence coverage at other than an open season. Similarly, a nonhighly compensated employee may not be disregarded as having no family or having a family with other coverage under paragraph (c)(3) of

this Q&A-3 unless such employee is eligible to elect (on the same conditions set forth in the preceding two sentences) family-only coverage, upon a change in family status in which the employee acquires a family or upon a loss of such other coverage for a member of the family. This paragraph (c)(6) does not require that an employee be eligible to participate under a plan for which the employee would not previously have been eligible. In addition, any otherwise applicable eligibility conditions that would have barred participation during the immediately preceding open season, such as insurability, may continue to be applied with respect to eligibility resulting under this paragraph (c)(6) but only if such conditions exist at the time the other core health coverage ceases and such conditions are applied on a uniform, consistent and nondiscriminatory basis. However, in no event may an employer impose conditions on eligibility that were not previously applicable to such employee during the immediately preceding open season. Conditions that were previously applicable may be applied with regard to the facts in existence either at the time of previous eligibility or at the time the other core coverage ceases, as long as such application is on a uniform, consistent and nondiscriminatory basis. This paragraph (c)(6) is applicable only for plan years beginning after December 31, 1990.

(7) *Eligibility requirement.* An employer may not disregard employees under paragraph (c)(3) of this Q&A-3 for purposes of applying paragraph (e) of Q&A-1 of this section (the 80 percent coverage test) unless paragraph (e) of Q&A-1 of this section would be satisfied without use of the rules contained in such paragraph on the basis of eligibility to participate instead of coverage received.

Q-4: What is a health plan under the section 89 nondiscrimination rules and to what extent are health plans comparable or aggregated for purposes of such rules?

A-4: (a) *In general.* Except as otherwise provided in this section, a health plan is a uniform entitlement provided to employees with respect to payments on account of personal injury or sickness, including specified medical claims, expenses, products or services. Any difference in entitlement creates separate health plans. In addition, any difference in cost to different groups of employees, including the fact that salary reduction contributions are required for coverage that is identical to coverage that is otherwise employer-provided, creates separate plans. Each option as to coverage is treated as a separate health plan for purposes of section 89. However, paragraphs (b) through (f) of this Q&A-4 provide testing rules under which comparable health plans may be treated as a single health plan, rules when two or more health plans must be aggregated and treated as a single plan, and rules when separate health plans may be restructured. These rules apply solely for purposes of testing and calculating discriminatory excess with respect to an employer's health plans under the section 89 nondiscrimination rules, and do not require that the single written document required by Q&A-3 of § 1.89(k)-1 relating to any of such plans be modified to conform to the testing status of such plans under these rules.

(b) *Comparable health plans for 50 percent eligibility test.* For purposes of applying paragraph (d)(3) of Q&A-1 of this section (the 50 percent eligibility test), two or more health plans included in a group of comparable plans may be treated as a single health plan. A group of plans is comparable if the smallest employer-provided benefit available to any employee in any plan in the group is at least 95 percent of the largest employer-provided benefit available to any employee in any plan in the group. See paragraph (d) of this Q&A-4 for mandatory aggregation rules that may be applicable before the application of this paragraph (b).

(c) *Comparable health plans for 80 percent coverage test*—(1) *In general.* Except as otherwise provided in this paragraph (c), for purposes of applying paragraph (e) of Q&A-1 of this section (the 80 percent coverage test), two or more health plans included in a group of comparable plans, may be treated as a single health plan. A group of plans is comparable if the smallest employer-provided benefit available to any employee in any plan in the group is at least 90 percent of the largest employer-provided benefit available to any employee in any plan in the group. See paragraph (e) of this Q&A-4 for mandatory aggregation rules that may be applicable before the application of this paragraph (c).

(2) *Alternative general comparability rule.* At the employer's written election, a group of plans is comparable for purposes of applying paragraph (e) of Q&A-1 (the 80 percent coverage test) if the smallest employer-provided benefit available to any employee in any plan in the group is at least 80 percent of the largest employer-provided benefit available to any employee in any plan in the group. This alternative general comparability rule is available only if the employer applies the requirements of paragraph (e) of Q&A-1 by substituting "90 percent" for "80 percent." Thus, this alternative general comparability rule applies only if at least 90 percent of the nonhighly compensated employees are covered under the health plan or group of comparable plans being tested.

(3) *Restriction on general comparability.* If a plan fails to satisfy paragraph (d)(3) of Q&A-1 of this section (the 50 percent eligibility test) (the failed plan), the failed plan may not be included with any other plan in a group of comparable plans under paragraphs (c)(1) or (c)(2) of this Q&A-4 unless the following two requirements are met. First, the employer-provided benefit of the group of comparable plans must be within at least 95 percent of the employer-provided benefit of the failed plan. Second, the failed plan and the group of comparable plans, considered together, must be comparable under paragraph (c)(1) or (c)(2) of this Q&A-4. The following example illustrates the rules of this paragraph (c)(3):

Example. Assume that an employer with 25 employees, 5 of whom are highly compensated employees, provides all nonhighly compensated employees with a health plan with an employer-provided benefit of $3,000. In addition, the employer provides a health plan with an employer-provided benefit of $3,750 only to its highly compensated employees. The employer tests its health plans under the 80 percent coverage test of paragraph (e) of Q&A-1 of this section. Because the additional $3,750 health plan is available only to highly compensated employees and thus fails the 50 percent eligibility test, such plan may not be aggregated with the $3,000 plan unless the employer-provided benefit under the $3,750 plan is reduced to $3,158 ($3,000 is 95 percent of $3,158) or the employer-provided benefit under the other plan is increased to $3,562 (95 percent of $3,750).

(4) *Deemed comparability rule*—(i) *Health plan outside comparability range.* A health plan (or a group of health plans treated as a single health plan) that is not otherwise included with another health plan in a group of comparable plans (determined under paragraph (c) (1) through (3) of this Q&A-4) may be included in such group if the employer-provided benefit under the former health plan (or group of health plans) is greater than the employer-provided benefit under the latter health plan (or group of plans); the former health plan's nonhighly compensated coverage percentage is at least 80 percent of the highly compensated coverage percentage; and, after the inclusion of the former plan in a group with the latter plan, the nonhighly compensated coverage

percentage remains at least 80 percent of the highly compensated coverage percentage for such group. No plan can be included under this rule if a plan with an employer-provided benefit smaller than the employer-provided benefit of the plan to be included has previously been included in the group of comparable plans under this rule. If the employer elects the alternative general comparability rule of paragraph (c)(2) of this Q&A–4, "90 percent" must be substituted for "80 percent" in the preceding sentence. If the deemed comparability rule of this paragraph (c)(4) is applied by treating a resulting group of comparable plans as a single health plan, the employer-provided benefit for such single health plan, except as provided in paragraph (c)(5)(i) of this section, is the largest employer-provided benefit of any plan included in the group.

(ii) *Coverage percentages.* For purposes of this paragraph (c)(4), a health plan's (or health plan group's) nonhighly compensated coverage percentage is the percentage determined by dividing the number of nonhighly compensated employees covered by the plan (or the group) by the total number of nonhighly compensated employees of the employer. A health plan's (or group's) highly compensated coverage percentage is the percentage determined in the same manner by reference only to highly compensated employees.

(iii) *Examples.* The following examples illustrate the application of the rules of this paragraph (c)(4):

Example 1. Assume that an employer maintains four health plans that constitute a group of comparable plans under the general comparability rule of paragraph (c)(1) of this Q&A–4. The employer also maintains another health plan that has too large an employer-provided benefit to permit it to be included in the group of comparable plans under the general comparability rule. Under this paragraph (c)(4), if the nonhighly compensated coverage percentage with respect to such plan is at least 80 percent of the highly compensated coverage percentage for such plan and if after inclusion of the plan with the group of four comparable plans, the resulting group of plans has a nonhighly compensated coverage percentage that is at least 80 percent of the highly compensated coverage percentage, then the plan may be included in the group of comparable health plans to form a new group of comparable plans.

Example 2. Assume the same facts as in Example 1, except that the other health plan has too small an employer-provided benefit to permit it to be included in a group of comparable plans under the general comparability rule of paragraph (c)(1) of this Q&A–4. If the nonhighly compensated coverage percentage for the group of comparable plans is at least 80 percent of the highly compensated coverage percentage for such group, and if, after inclusion of the other plan with the group of comparable plans, the resulting group of plans has a nonhighly compensated coverage percentage that is at least 80 percent of the highly compensated coverage percentage, then the group of comparable plans may be included with the other plan to form a new group of comparable plans.

(5) *Employee cost comparability*—(i) *In general.* Health plans may be treated as a group of comparable plans if such plans are available to all of the employees who are covered under any of such plans on the same terms and conditions and the difference in the annual employee costs between the plan in the group with the largest employee cost and the plan in the group with the smallest employee cost is not greater than $100 (adjusted for testing years beginning after 1989 in accordance with section 89(g)(1)(E)(v)). Two or more plans generally are not available on the same terms if the employee cost for one plan is in the form of after-tax employee contributions and the employee cost for another plan is in the form of salary reduction contributions. A health plan is available to an employee only if, under all of the facts and circumstances, the plan is reasonably available to such employee. The employer-provided benefit for a group of comparable plans determined under this paragraph (c)(5)(i) is deemed to be the largest employer-provided core health benefit of any plan included in the group under this paragraph (c)(5)(i). If both salary reduction contributions and after-tax employee contributions are required under each of the plans, the plans may be treated as comparable if the maximum total amount of such annual contributions under each plan does not differ from the maximum total amount of such contributions under any of the other plans by more than $100. The rules of this paragraph (c)(5)(i) are illustrated by the following examples:

Example 1. Assume that an employer maintains two health plans, Plan X and Plan Y. Plan X is provided to employees at no employee cost. Plan Y is available to employees under a cafeteria plan for $100 a year, to be paid through salary reduction contributions. These plans may not be treated as part of a group of comparable plans under an analysis that compares the after-tax employee contributions required for Plan X ($0) with the after-tax employee contributions required for Plan Y ($0) because Plan Y is not actually available for only $0 in after-tax employee contributions, but rather is available for $100 in salary reduction contributions. However, these plans may be treated as part of a group of comparable plans under an analysis that compares the salary reduction contributions of Plan X ($0) with the salary reduction contributions of Plan Y ($100) because the salary reduction contributions under each plan do not differ by more than $100 and neither plan has any required after-tax contributions.

Example 2. Assume that an employer maintains two health plans, Plan V and Plan W. Plan V is provided to employees for an after-tax employee contribution of $20 a year and a salary reduction contribution of $20 a year. Plan W is provided to employees for an after-tax employee contribution of $100 a year and a salary reduction contribution of $100 a year. These two plans may not be treated as part of a group of comparable plans under this paragraph (c)(5)(i) because the annual maximum total amount of after-tax and salary reduction contributions under Plan V ($40) differs from the maximum total amount of after-tax and salary reduction contributions for Plan W ($200) by more than $100.

(ii) *Coordination rule.* A health plan that is not included in a group of comparable plans under paragraph (c)(5)(i) of this Q&A–4 may be included with such group of comparable plans under the comparability rules of paragraphs (c)(1) through (c)(4) of this Q&A–4 if such plan and the group are otherwise comparable under such rules. The employer-provided benefit under the group of plans is to be determined under the rule of paragraph (c)(5)(i) of this Q&A–4.

(iii) *Special employee cost rule.* A health plan that is not otherwise included in a group of comparable plans may be included in a group with respect to an employee if the employer-provided benefit under the plan to be included is less than the employer-provided benefit of the plan within the group of comparable plans with the largest employer-provided benefit and, in the case of a nonhighly compensated employee, the employee is eligible on the same terms and conditions as other employees to participate in the plan in such group with the largest employer-provided benefit and the annual employee cost for the employee under the plan to be included is equal to or greater than the greatest employee cost for the employee under any plan in the group of comparable plans minus $100. Thus, the rule of this paragraph (c)(5)(iii) applies if a nonhighly compensated employee may choose a more expensive plan with a lesser employer-provided benefit than any plan in the group so long as the conditions of this paragraph (c)(5)(iii) are satisfied. A health plan is available to an employee only if, under all of the facts and circumstances, the plan is reasonably available to such employee. This paragraph (c)(5)(iii) may be applied with respect to a health plan and a group of comparable plans or with respect to two groups of comparable

plans otherwise determined under paragraph (c)(1) through (c)(3) or (c)(5) of this Q&A–4. In such case, the employer-provided benefit of the group of comparable plans is the largest employer-provided benefit of any plan (whether or not that plan is a core health plan) in such group and the lowest employee cost permitted within the group of comparable plans is equal to the employee cost for the plan in such group with the largest employee cost minus $100. The rules of this paragraph (c)(5)(iii) are illustrated by the following examples:

Example 1. Assume that an employer permits all of its employees to elect coverage under one of two health plans: Plan A (with an employer-provided benefit of $3,000 and an employee contribution of $300) and Plan B (with an employer-provided benefit of $2,200 and an employee contribution of $500). These two plans may form a group of comparable plans under this paragraph (c)(5)(iii) because Plan B's employer-provided benefit is less than Plan A's employer-provided benefit and Plan B's required employee contribution of $500 is greater than $200 (i.e., Plan A's required employee contribution minus $100).

Example 2. Assume that an employer permits all of its employees to elect coverage under any one of four health plans: Plan A (with an employer-provided benefit of $2,000 and an employee contribution of $125); Plan B (with an employer-provided benefit of $2,500 and an employee contribution of $225); Plan C (with an employer-provided benefit of $3,000 and an employee contribution of $200); and Plan D (with an employer-provided benefit of $2,500 and an employee contribution of $300). Plans A, B, and C may be included in a group of comparable plans under the rules of paragraph (c)(5)(i). Plan D may be included in such group under the rules of paragraph (c)(5)(iii) with respect to all employees because Plan D's employer-provided benefit of $2,500 is less than Plan C's employer-provided benefit of $3,000 and Plan D's required employee contribution of $300 is greater than $125 (i.e., Plan B's required employee contribution of $225 minus $100).

Example 3. Assume that an employer permits all of its employees to elect coverage under one of three health plans: Plan A (with an employer-provided benefit of $3,000 and an employee contribution of $500); Plan B (with an employer-provided benefit of $2,700 and an employee contribution of $350); and Plan C (with an employer-provided benefit of $2,500 and an employee contribution of $450). Plans A and B are included in a group of comparable plans determined under paragraph (c)(1) of this Q&A–4 (i.e., 90 percent of $3,000 is $2,700). Plan C may be included in such group under the rules of this paragraph (c)(5)(iii) because Plan C's employeer-provided benefit of $2,500 is less than Plan A's employer-provided benefit of $3,000 and Plan C's required employee contribution of $450 is greater than $400 (i.e., Plan A's required employee contribution of $500 minus $100).

(iv) *Employee cost.* For purposes of this paragraph (c)(5), the term "employee cost" refers to both the employee's after-tax employee contributions and salary reduction contributions that are required in order for the employee to receive coverage under the health plan. The de minimis employee cost comparability rule of this paragraph (c)(5) may be applied on the basis of either after-tax employee contributions or salary reduction contributions under a cafeteria plan, but not both. Thus, for example, health Plan X that is available for $50 in after-tax employee contributions and health Plan Y that is available for $100 in salary reduction contributions under a cafeteria plan may not be treated as comparable plans under this paragraph (c)(5).

(d) *Mandatory aggregation of plans for the 50 percent eligibility test.*—(1) *In general.* For purposes of applying paragraph (d)(3) of Q&A–1 of this section (the 50 percent eligibility test), if an employee may receive coverage under two or more health plans the rules of this paragraph (d) must be applied with respect to such plans. In addition, such plans may not be included in a group of comparable plans under paragraph (b) of this Q&A–4 with regard to such employee until the rules of this paragraph (d) have been applied with respect to such plans. Such health plans must be aggregated into an additional, single health plan that provides all of the coverage provided under any of the separate plans. The additional plan is treated as having an employer-provided benefit equal to the sum of the employer-provided benefits of each of the included plans (with an appropriate adjustment to eliminate the multiple inclusion of overlapping coverage). A nonhighly compensated employee is treated as eligible for both the additional plan and the separate plans. A highly compensated employee is treated as eligible only for the additional plan and is no longer treated as eligible for the separate plans.

(2) *Special rule for salary reduction contributions.* Any employer-provided benefit that is a non-core health benefit and is attributable to salary reduction contributions available to any nonhighly compensated employee that, after application of paragraph (d)(1) of this Q&A–4, exceeds the greater of $2,000 (adjusted for testing years beginning after 1989 in accordance with 89(g)(1)(E)(v)) or the employee's actual salary reduction contribution is not considered available to such employee. This paragraph (d)(2) is effective for plan years beginning after December 31, 1989.

(3) *Examples.* The provisions of this paragraph (d) are illustrated in the following examples:

Example 1. Assume that, under an employer's health program, an employee is permitted to elect coverage under one plan from among two health indemnity plans provided through insurance companies and two HMO plans.The indemnity and HMO plans are four alternative health coverages and thus an employer is not required to apply this paragraph (d).

Example 2. Assume the same facts as *Example 1.* In addition to electing one of the indemnity or HMO plans, an employee may also elect coverage under any one or more of the following plans: a dental plan, a vision plan and various levels of health coverage (up to and including $1000) under a health flexible spending arrangement (FSA). Under this paragraph (d), each of the indemnity and HMO plans must be aggregated with the 3 elective plans, before testing any of the plans under the 50 percent eligibility test.

Example 3. Employee X is a nonhighly compensated employee and may receive coverage under either Plan A or Plan B, each of which has an employer-provided benefit of $500, or under both Plans A and B. Under this paragraph (d), for Employee X, Plan A and Plan B must be aggregated to form an additional Plan AB for purposes of the 50 percent eligibility test. In addition, Plan AB is treated as having an employer-provided benefit equal to $1,000 (assuming no overlapping coverage). Thus, there are three health plans that each must pass the 50 percent eligibility test: Plan A ($500), Plan B ($500), and Plan AB ($1,000). Employee X is treated as eligible for all three plans.

Example 4. An employer maintains two health plans: Plan A ($500) and Plan B ($500). The following table illustrates all of the eligible employees for these two plans. In addition, HCE denotes a highly compensated employee and NCE denotes a nonhighly compensated employee.

Employee	Plan A	Plan B
HCE 1	500	500
HCE 2	500	Not elig.
HCE 3	Not elig	500
HCE 4	500	500
NCE 1	500	500
NCE 2	Not elig	500
NCE 3	500	Not elig.
NCE 4	500	Not elig.
NCE 5	Not elig	500

The following table reflects the plans after the application of this paragraph (d):

Employee	Plan A	Plan B	Plan AB
HCE 1	Not elig	Not elig	1000
HCE 2	500	Not elig	Not elig.
HCE 3	Not elig	500	Not elig.
HCE 4	Not elig	Not elig	1000
NCE 1	500	500	1000
NCE 2	Not elig	500	Not elig.
NCE 3	500	Not elig	Not elig.
NCE 4	500	Not elig	Not elig.

Employee	Plan A	Plan B	Plan AB
NCE 5	Not elig	500	Not elig.

After application of this paragraph (d), there are three plans that must satisfy the 50 percent eligibility test. Plan A and Plan B satisfy the 50 percent eligibility test, both as separate plans and as plans included in a group of comparable plans under paragraph (b) of this Q&A–4. However, Plan AB fails the 50 percent eligibility test. See Q&A–9 for rules relating to the determination of the excess benefit with respect to a plan that fails to satisfy the 50 percent eligibility test.

Example 5. An employer maintains two health plans: Plan A ($1,000) and Plan B ($500). The following table illustrates all of the eligible employees for these two plans.

Employee	Plan A	Plan B
HCE 1	$1,000	$500
HCE 2	$1,000	$500
NCE 1–100	$1,000	Not elig.

The following table reflects the plans after the application of this paragraph (d):

Employee	Plan A	Plan B	Plan AB
HCE 1	Not elig	Not elig	$1,500
HCE 2	Not elig	Not elig	$1,500
NCE 1–100	$1,000	Not elig	Not elig.

After application of this paragraph (d), there are three plans that must pass the 50 percent eligibility test. Plan A passes the 50 percent eligibility test. Plan B is no longer available to any employee and is not required to be tested under the 50 percent eligibility test. However, Plan AB fails the 50 percent eligibility test. Under Q&A–9, an excess benefit must be imputed to HCEs 1 and 2 so that Plan AB may be included in a group of comparable plans under paragraph (b) of this Q&A–4.

(e) *Mandatory aggregation of plans for the 80 percent coverage test*—(1) *In general.* For purposes of applying paragraph (e) of Q&A–1 of this section (the 80 percent coverage test), if an employee receives coverage under two or more health plans the rules of this paragraph (e) must be applied with respect to such plans. In addition, such plans may not be included in a group of comparable plans under paragraph (c) of this Q&A–4 with regard to such employee until the rules of this paragraph (e) have been applied with respect to such plans. Such health plans must be aggregated into an additional, single health plan that provides all of the coverage that is provided under any of the separate plans. The additional plan is treated as having an employer-provided benefit equal to the sum of the employer-provided benefits of each of the included plans (with an appropriate adjustment to eliminate the multiple inclusion of overlapping coverage). A nonhighly compensated employee is treated as covered under both the additional plan and the separate plans. A highly compensated employee is treated as covered under the additional plan and not covered under the separate plans.

(2) *Exception.* This paragraph (e) does not apply with respect to two or more health plans if at least 90 percent of the nonhighly compensated employees eligible for coverage under each plan are eligible for coverage under all of such plans on the same terms and conditions as other employees, and each plan (prior to application of the comparability rules of paragraph (c) of this Q&A–4) satisfies the 80 percent coverage test.

(3) *Examples.* The provisions of this paragraph (e) are illustrated by the following examples:

Example 1. Assume that an employer maintains two health plans, Plan A and Plan B. Each has an employer-provided benefit of $500. Also, each plan covers 45 percent of the employer's nonhighly compensated employees who are not covered by the other plan. Employee X, a highly compensated employee, and Employee Y, a nonhighly compensated employee, are covered by both Plan A and Plan B. Plan A and Plan B must be aggregated to form an additional single health plan because the exception of paragraph (e)(2) of this Q&A–4 does not apply. Thus, there are three health plans: Plan A ($500), Plan B ($500), and Plan AB ($1,000). The plans fail the 80 percent coverage test because Plan AB may not be included with Plan A and Plan B under any of the comparability rules of paragraph (c) of this Q&A–4. Thus, the employer-provided benefit under Plan AB must be reduced to $526 with respect to Employee X for all plans to pass the 80 percent coverage test.

Example 2. Assume that an employer maintains two health plans, Plan A and Plan B. Each has an employer-provided benefit of $500. Each plan is available on the same terms to all employees of the employer and covers over 80 percent of the employer's nonhighly compensated employees. Because these plans qualify for the exception of paragraph (e)(2) of this Q&A–4, the employer is not required to aggregate the plans under this paragraph (e). Plan A and Plan B each satisfy the 80 percent coverage test.

Example 3. An employer maintains two health plans. Plan A has an employer-provided benefit of $1,000 and Plan B has an employer-provided benefit of $500. The following table illustrates all of the eligible employees for these two plans. HCE denotes a highly compensated employee and NCE denotes a nonhighly compensated employee.

Employee	Plan A	Plan B
HCE 1	$1,000	$500
HCE 2	$1,000	Not elig.
NCE 1	$1,000	$500
NCE 2–100	$1,000	Not elig.

The following table reflects the plans after the application of this paragraph (e):

Employee	Plan A	Plan B	Plan AB
HCE 1	Not elig	Not elig	$1,500
HCE 2	$1,000	Not elig	Not elig.
NCE 1	$1,000	$500	$1,500
NCE 2–100	$1,000	Not elig	Not elig.

After application of this paragraph (e), there are three plans that must be comparable in order for the plans to pass the 80 percent coverage test. The plans fail the 80 percent coverage test even though Plans A and B may be included in a group of comparable plans under paragraph (c)(3) because Plan AB may not be included in a group of comparable plans with Plan A and Plan B under any of the rules of paragraph (c) of this Q&A–4 for inclusion in a group of comparable plans with Plans A and B. It does, however, pass the 50 percent eligibility test, and therefore Plan AB's employer-provided benefit may be reduced to $1,111 ($1,000 is 90 percent of $1,111) and the health plans will be considered comparable.

(f) *Permissive plan restructuring.* For purposes of applying paragraphs (d)(3) and (e) of Q&A–1 of this section (the 50 percent eligibility test and the 80 percent coverage test, respectively) an employer may, in certain circumstances, restructure two or more health plans into two or more restructured health plans on the basis of the value of coverages under such plans. To the extent mandatory aggregation is applicable and if the employer decides to apply the comparability rules of this Q&A–4, such mandatory aggregation and comparability rules must be applied only prior to the application of the permissive restructuring rule of this paragraph (f). Pursuant to this rule, two or more health plans may be restructured into one health plan of common value and two or more plans of distinct values. In all cases, to the extent the values of any plans being restructured are equivalent, the values may be restructured into only one plan. In no case may the plan (or plans) with the lowest value be restructured into two or more plans with a lower value. Thus, for example, if an employer has three plans (after the application of the mandatory aggregation and the comparability rules of this Q&A–4), Plan A with an employer-provided benefit of $7,000, Plan B with an employer-provided benefit of $6,000 and Plan C with an employer-provided benefit of $4,000 the employer may restructure the three plans only in the following

manner: A plan providing employer-provided benefits of $4,000, $2,000 and $1,000 respectively.

(g) *Authority to issue additional requirements.* The Commissioner, in revenue rulings, notices and other publications of general applicability, may make any modification to, or issue such additional requirements for the application of, the rules contained in this Q&A-4 as may be necessary to ensure proper compliance with the intent of such rules and section 89(g)(1).

Q-5: What is the testing methodology for applying the nondiscrimination rules under section 89?

A-5: (a) *In general.* Except as otherwise provided in this Q&A-5, the determination of whether a statutory employee benefit plan is a discriminatory employee benefit plan for a testing Year is made on the basis of all of the applicable facts with respect to the employees of the employer as of the testing day included within such testing year. Such facts generally are to be treated as in existence for the entire testing year.

(b) *Adjustments to facts on the testing day*—(1) *Changes in plan terms.* If the employer-provided benefit (actually provided or made available) of an employee who is taken into account on the testing day changes during the testing year (either before or after the testing day) in connection with any change in plan terms, the amount taken into account as such employee's employer-provided benefit for such testing year must be adjusted to reflect the employer-provided benefit for the portions of the testing year both before and after such change.

(2) *Election changes by highly compensated employees*—(i) *In general.* If the employer-provided benefit (actually provided or made available) of a highly compensated employee for a testing year who is taken into account on the testing day changes during the testing year (either before or after the testing day) solely on account of an election of the employee. the amount taken into account as such employee's employer-provided benefit for such testing year must be adjusted to reflect the employer-provided benefit for the portions of the testing year both before and after such change.

(ii) *Special rule for the first quarter of each testing year.* An employer must make the adjustments otherwise required under this paragraph (b)(2) for election changes during the first quarter of a testing year only for those election changes by employees who were highly compensated employees for the immediately preceding testing year and employees who, for the current testing year, either are among the 100 highly compensated employees who receive the most compensation for the current testing year or are 5 percent owners of the employer (as determined under section 416(i)).

(3) *Distinction between changes in plan terms and election changes.* A change in an employee's employer-provided benefit is treated as an election change only if such change is exclusively attributable to an election change by the employee that is not in connection with or otherwise related to any change in the terms of the plan or other plans of the same type available to the employee. Changes in an employee's employer-provided benefit are treated as attributable to changes in plan terms even if the changes are pursuant to an election of the employee that occurs in conjunction with any change in the terms of the plan (or of another plan of the same type available to such employee). Thus. for example, if during an open season or election period an employee elects to change health plan coverage and there is any change to any one or more of the health plans available to such employee during the open season, such employee's change in employer-provided benefit is treated as in connection with a change in plan terms even if the employee is not covered, either before or after the open season, by a health plan that changed. An increase or decrease in the after-tax employee contributions or employer contributions, including salary reduction contributions, is treated as a change in plan terms.

(4) *Taking required adjustments into account*—(i) *In general.* Adjustments taken into account under this paragraph (b) are to be taken into account as of the effective date of the change in the employer-provided benefit.

(ii) *Adjustment period rule—(A) In general.* If the requirements of paragraph (b)(4)(ii)(B) and (C) of this Q&A-5 are satisfied, an employer may on a uniform and consistent basis treat employer-provided benefit changes as having become effective as of the first day of the applicable adjustment period or periods.

(B) *Adjustment period.* The requirement of this paragraph (b)(4)(ii)(B) is satisfied only if the employer uses at least 24 adjustment periods for its testing year. Adjustment periods must be regular, uniform periods throughout the testing year. For example, an employer may use each 2-week pay period as an adjustment period.

(C) *Applicable adjustment periods.* The requirement of this paragraph (b)(4)(ii)(C) is satisfied only if, in the case of a nonhighly compensated employee, the lowest employer-provided benefit of such employee on any day during an adjustment period is taken into account for at least either the current adjustment period (i.e., the period during which the change in employer-provided benefit occurred) or the adjustment period immediately following the effective date of the benefit change. In the case of a highly compensated employee, the highest employer-provided benefit of such employee on any day during an adjustment period must be taken into account for at least either the current adjustment period or the adjustment period immediately following the effective date of the benefit change.

(5) *Transition rule for 1989*— (i) *In general.* For any testing year that begins prior to July 1, 1989, the employer may apply the nondiscrimination rules of section 89 (including the rules of Q&A-2 of this section) with respect to its health plans for such testing year in accordance with the rules in paragraph (b)(5)(ii) through (iv) of this Q&A-5.

(ii) *Partial testing year.* The facts with respect to all employees of the employer as of the testing day for the testing year are to be treated as in existence for the entire partial testing year. The partial testing year begins on the earliest of July 1, 1989; the testing day for such testing year; or the first day of the calendar month beginning three months before the end of the testing year. The last day of the partial testing year is the last day of such testing year.

(iii) *Adjustments.* The employer-provided benefit (received or made available) of an employee determined as of the testing day is to be adjusted for the partial testing year as required under this paragraph (b) for elections and plan design changes occurring during the partial testing year as if the partial testing year were the entire testing year.

(iv) *Annualization of employer-provided benefit.* The employer-provided benefit (received or made available) of an employee for the partial testing year (determined after the application of the other rules in this paragraph (b)(5)) is multiplied by the applicable fraction for the testing year and such product is deemed to be the employer-provided benefit (received or made available) of the employee for the testing year for purposes of applying the section 89 nondiscrimination tests to such testing year. The numerator of the applicable fraction for a testing year is the total number of calendar months in the testing year and the denominator of

such fraction is the number of calendar months in the partial testing year.

(v) *Transition rule inapplicable with respect to certain plans*—(A) *Changes in plan terms.* The rule of this paragraph (b)(5) is not available with respect to a health plan that provides an employer-provided benefit for the partial testing year that is less, by more than a de minimis amount, than such plan's employer-provided benefit for the portion of the testing year that precedes the partial testing year. Thus, for example, the rule of this paragraph (b)(5) is not available if an employer amends its health plan to provide that employee contributions for coverage during the partial testing year are to be in the form of after-tax employee contributions rather than salary reduction contributions. See paragraph (c) of Q&A–1 of this section (the nondiscriminatory provisions test).

(B) *New plans.* The rule of this paragraph (b)(5) is not available with respect to a health plan that is first established, or coverage under a health plan that is first provided, on or after January 1, 1989, and that terminates or ceases to be provided before the end of the partial testing year. Also, such plan or coverage may fail to satisfy the requirement of section 89(k)(1)(E) (that a plan be established with the intention of being maintained for an indefinite period of time).

(C) *Certain discriminatory plans.* The rule of this paragraph (b)(5) is not applicable with regard to a plan unless, for the testing year, at least 25 percent of those employees eligible to participate in the plan are nonhighly compensated employees or such plan satisfies the alternative 50 percent eligibility test of paragraph (d)(3)(iii) of Q&A–1 of this section. The rules of Q&A–4 of this section are not available in determining whether a plan meets this 25 percent requirement.

(vi) *Example.* The rules of this paragraph (b)(5) are illustrated in the following example:

Example. Assume that an employer maintains several health plans, one of which has a plan year beginning on January 1, 1989. The employer elects to use a calendar year testing year for purposes of testing its health plans under section 89. Under this paragraph (b)(5), if the employer elects a testing day of July 1, 1989 (or any day after such date and before January 1, 1990), the employer may apply the testing day and benefit adjustment rules of section 89 to the period between July 1, 1989 and January 1, 1990 as if such period were the entire testing year. Thus, for example, only those benefit changes that occur during the partial testing year need to be taken into account under the rules of this paragraph (b). Then, employees' employer-provided benefits (received or made available) for the partial testing year are converted into employer-provided benefits for the full testing year by multiplying each of such benefits by two (i.e., 12/6, which is the applicable fraction, the numerator of which is the total number of calendar months in the testing year and the denominator of which is the number of calendar months in the partial testing year). The section 89 nondiscrimination tests are then applied with respect to such annualized employer-provided benefits.

(c) *Testing day.* The testing day is the single day within the testing year that is elected in writing as the testing day for purposes of applying the nondiscrimination tests of section 89 with respect to the testing year. The testing day is not required to be designated in the single written document required under section 89(k)(1)(A) (See Q&A–3 of § 1.89(k)(1). If a testing day is not elected in writing, the testing day is the last day of the testing year. All plans of the same type, and plans that are not of the same type but are treated as of the same type for nondiscrimination testing under section 89, must have the same testing day. The testing day for any testing year beginning after December 31, 1990, is the same testing day used for the immediately preceding testing year unless a change in such testing day is made with the consent of the Commissioner or is in accordance with such rules as the Commissioner may provide with respect to changes in testing days. The election of a testing day is subject to the requirements of the nondiscriminatory provisions test of paragraph (c) of Q&A–1 of this section. Thus, an employer's testing day must reasonably reflect the employee pool of the employer and the business of the employer throughout the year.

(d) *Sampling.* For purposes of determining whether a statutory employee benefit plan is a discriminatory employee benefit plan, an employer may elect in writing to apply the rules of paragraphs (d) and (e) of Q&A–1 of this section (the general eligibility and benefits tests and the alternative 80 percent coverage test, respectively), paragraph (c) of Q&A–2 of this section (the special rule for certain large employers), and paragraph (c)(4) of Q&A–3 of this section (relating to sworn statements) on the basis of a statistically valid random sample of the employer's employees. A sample is statistically valid for purposes of this paragraph (d) only if the statistical method and sample size result in at least a 95 percent probability that the results of the sample with respect to the applicable requirements have a margin of error not greater than 3 percent. Also, the statistical validity of the sample and statistical method and analysis must be confirmed in a written opinion of a qualified and independent third party.

Q–6: What is the period for testing whether the nondiscrimination rules of section 89 are satisfied?

A–6: (a) *Testing year*—(1) *In general.* An employer must apply the nondiscrimination tests of section 89 to its health plans and other statutory employee benefit plans on the basis of a testing year that begins on the first day of a calendar month and ends on the last day of a calendar month, regardless of the beginning of the plan year or years of such plans. Unless the employer elects otherwise in accordance with paragraph (a)(2) of this Q&A–6, the testing year for all statutory employee benefit plans is the calendar year.

(2) *Election of different testing year.* An employer may elect a uniform 12-month testing year other than the calendar year for purposes of applying the section 89 nondiscrimination tests to all plans of the same type. Thus, for example, an employer may elect to apply the section 89 nondiscrimination tests to all of its health plans on the basis of an April 1 to March 31 testing year. In addition, if the 75 percent benefits test is applied on an aggregate basis to plans of different types (e.g., health plans, group-term life insurance plans, and dependent care assistance programs) as though such plans were plans of the same type, the same testing year must be used with respect to all such plans.

(3) *Election.* An employer must make the election of a testing year described in paragraph (a)(2) of this Q&A–6 in writing prior to the commencement of the testing year to which the election relates. See paragraph (b)(3) of this Q&A–6 for a transition rule for 1989.

(b) *First testing year in 1989*—(1) *In general.* Notwithstanding paragraph (a) of this Q&A–6, for the first testing year applicable with respect to plans of the same type, the employer may elect to apply the section 89 nondiscrimination tests with respect to all plans of the same type on the basis of any 12-month period beginning on the first day of any calendar month beginning on or after January 1, 1989, but no later than the first day that any plan of such type first becomes subject to the section 89 nondiscrimination tests. The rule of this paragraph (b) is applicable even though not all of the plans of the same type are subject to the section 89 nondiscrimination tests for the entire first testing year. See paragraph (c) of this Q&A–6 for special rules applicable to the section 89 nondiscrimination tests

in such cases. The rule of this paragraph (b)(1) is illustrated in the following example:

Example. Assume that an employer maintains three health plans, Plan A, Plan B and Plan C. Plan A's plan year begins on March 1, Plan B's plan year begins on July 1, and Plan C's plan year begins on September 1. The section 89 nondiscrimination rules apply to plan years that begin after December 31, 1988. For these plans, the employer may elect as its first testing year under section 89 any 12-month period beginning on or after January 1, 1989, and on or before March 1, 1989. This is the case even though not all of the health coverage provided during any of these possible first testing years is subject to the section 89 nondiscrimination tests.

(2) *Short testing year.* An employer may elect to apply the section 89 nondiscrimination tests to its first testing year commencing in 1989 with respect to all plans of the same type on the basis of a first testing year that is shorter than 12 months in duration. However, if an employer applies the section 89 nondiscrimination tests on the basis of such a short first testing year, the second testing year for such employer for such plans must be 12 months in duration. In addition, in no case may any employer-provided benefit subject to the section 89 nondiscrimination tests either be excluded from consideration in a testing year or considered in more than one testing year. The rule of this paragraph (b)(2) is illustrated in the following example:

Example. Assume that an employer's first testing year in 1989 for its health plans commences on March 1, 1989. The employer may elect to use a first testing year of March 1, 1989, to December 31, 1989, for all of its health plans. In such case, the employer's second testing year must commence on January 1, 1990, and must be 12 months in duration.

(3) *Election*—(i) *First day.* An employer must elect the first day of the first testing year beginning in 1989 with respect to plans of the same type in writing prior to the earlier of the first day of the second testing year for such plans or January 1, 1990. If an employer fails to make an election by such required date with respect to plans of the same type, the first day of the first testing year beginning in 1989 for all plans of such type is January 1, 1989.

(ii) *Last day.* If an employer uses a short testing year for the first testing year beginning in 1989 with respect to plans of the same type, the employer must elect the last day of such year in writing prior to such last day. Thus, for example, if an employer decides to begin the first testing year for its health plans on March 1, 1989, and, after such date, decides to use a calendar year testing year beginning in 1990, the employer must, before December 31, 1989, elect December 31, 1989, as the last day of the first testing year.

(c) *Testing where not all plans are subject to section 89*— (1) *In general.* If, during a testing year with respect to plans of the same type, there is any employer-provided benefit that is not subject to the section 89 nondiscrimination rules for the entire testing year, the rules of this paragraph (c) apply for purposes of testing and excess benefit calculations.

(2) *Testing.* All employer-provided benefits available or provided during the first testing year applicable with respect to plans of the same type are taken into account in applying the nondiscrimination tests of section 89. This is the case even if such employer-provided benefits are provided under a plan that is not yet subject to section 89. The rule of this paragraph (c)(2) is illustrated in the following example:

Example. Assume that an employer maintains three health plans. Plan A's plan year begins on March 1, Plan B's plan year begins on July 1, and plan C's plan year begins on September 1. The section 89 nondiscrimination rules apply to plan years that begin after December 31, 1988. Assume further that the employer elects as its first testing year under section 89 the 12-month period beginning on March 1, 1989. For purposes of applying the nondiscrimination tests of section 89, all health coverage provided during this 12-month period, including coverage under Plans B and C from March 1, 1989, until July 1, 1989, and September 1, 1989, respectively, is taken into account.

(3) Excess benefit calculation—(i) *In general.* If, during a testing year with respect to plans of the same type, an employer-provided benefit under one plan is not yet subject to the section 89 nondiscrimination rules and another plan subject to section 89 fails to satisfy the nondiscrimination rules, the rules of this paragraph (c)(3) apply for purposes of calculating the amount of excess benefit (if any) that is attributable to employer-provided benefits subject to section 89 for such testing year. Plans that are not of the same type but are being tested under the 75 percent benefits test as if they were of the same type are to be treated as plans of the same type for purposes of this paragraph (c)(3).

(ii) *Total excess benefit.* The excess benefit for the testing year with respect to plans of the same type is calculated with regard to an employee under the generally applicable rules of section 89 as if all employer-provided benefits provided under such plans during such year were subject to section 89. See Q&A-9 of this section for rules governing the determination of excess benefits.

(iii) *Excess benefit subject to section 89*—(A) *Determination with respect to the 90 percent/50 percent eligibility and 75 percent benefits tests.* For purposes of determining excess benefit resulting from the failure of the employer to meet the requirements of paragraph (d)(2) or (d)(4) of Q&A-1 of this section, the portion of an excess benefit that is attributable to employer-provided benefits subject to section 89 for the testing year with respect to the plan or plans being tested is determined by multiplying the excess benefit determined under paragraph (c)(3)(ii) of this Q&A-6 by a fraction. The numerator of the fraction is the total employer-provided benefit for the highly compensated employee under the plan or plans being tested that are subject to section 89, and the denominator is the total employer-provided benefit for the highly compensated employee under the plan or plans being tested for the first testing year, whether or not they are subject to section 89. The rule of this paragraph (c)(3)(iii)(A) is illustrated by the following example:

Example. Assume that an employer maintains two health plans, Plan A and Plan B. The plan years for these plans and the effective dates for these plans for purposes of section 89 are January 1, 1989, and July 1, 1989, respectively. Plan A provides health coverage with an annual employer-provided benefit of $1,000, and Plan B provides health coverage with an annual, employer-provided benefit of $2,000. In each case, the employer provided-benefit for the 1989 year is the same as the benefit for the prior year. With regard to its health plans, the employer uses a 12-month testing year beginning on January 1, 1989. Thus, in applying the section 89 nondiscrimination tests, all health coverage under Plan B for this testing year must be taken into account. Assume that, for the 1989 testing year, the employer determines that a highly compensated employee who was in Plan A and Plan B for the entire testing year has an excess benefit of $500 for the testing period. The applicable fraction for this employee is $2,000/$3,000. The $2,000 numerator represents the annual employer-provided benefit of Plan A ($1,000) because it was subject to section 89 for the entire testing year plus ½ of the annual employer-provided benefit of Plan B ($2,000) because it was only subject to section 89 for ½ of the testing year. The denominator is the annual employer-provided benefit of Plans A and B. Thus, the employee is treated as having received an excess benefit in the amount of $333.33 (i.e., 66⅔ percent of $500).

(B) *Determination with respect to 50 percent eligibility and 80 percent coverage tests.* If an excess benefit with regard to a highly compensated

employee is attributable to a plan failing to meet the requirements of the 50 percent eligibility test or the 80 percent coverage test, then this paragraph (c)(3)(iii)(B) applies. The portion of an employee's excess benefit that is attributable to employer-provided benefits for the testing year with respect to the plan or plans being tested is determined by multiplying the excess benefit determined under paragraph (c)(3)(ii) of this Q&A-6 by a fraction. The numerator of the fraction is the number of months in the testing year that the plan or plans failing the applicable requirement is subject to section 89, and the denominator is the number of months that constitute such testing year. In the case of plans that have become subject to section 89 at different times during the testing year, which plans are aggregated under the mandatory aggregation requirements of paragraphs (d) and (e) of Q&A-4 of this section, the excess benefit is determined by calculating a weighted average for each of the originally separate plans in the aggregated plan and adding together such weighted averages. The weighted average for each plan is determined by multiplying the excess benefit by a fraction. The numerator of the fraction is the product of the total amount of the employer-provided benefit for the plan year (without regard to whether such coverage was subject to section 89 for the entire testing year) multiplied by the number of months that such plan has been subject to section 89. The denominator is the product of the total amount of the employer-provided benefit for all the plans in the aggregated plan (without regard to whether such coverage was subject to section 89 for the entire testing year) multiplied by the number of months in the testing year.

(d) *Changes in testing year*—(1) *In general.* Subject to paragraph (d)(2) of this Q&A-6, an employer may elect to change its testing year with respect to plans of the same type if such election is made in writing prior to the beginning of such new testing year. In no case may any such change result in any employer-provided benefit subject to the section 89 nondiscrimination tests not being included in any testing year or being included in more than one testing year. See also paragraph (b)(2) of this Q&A-6 (precluding changes in an employer's second testing year with respect to plans of the same type if the employer has elected a short first testing year for 1989).

(2) *Commissioner approval.* An employer's election to change its testing year with respect to plans of the same type subject to section 89 may be made without the prior approval of the Commissioner, provided that the first day of the new testing year is on or before January 1, 1991, such change otherwise meets the requirements of paragraph (d)(1) of this Q&A-6, and such change has no discriminatory effect. For all subsequent changes in testing years, the employer must obtain the prior approval of the Commissioner or must meet such requirements as the Commissioner may otherwise prescribe.

(3) *Example.* The provisions of this paragraph (d) are illustrated as follows:

Example. An employer is using the calendar year as its testing year for its health plans. On October 3, 1990, the employer designates the 12-month period beginning each December 1 as its new testing year, effective December 1, 1990. This is a permissible change in testing year. The result of this designation is that the employer's testing year beginning on January 1, 1990, is a short year ending on November 30, 1990.

Q-7: For purposes of applying section 89(a) to an employer's health plan, what rules apply for determining the employer-provided benefit and calculating the excess benefits?

A-7: (a) *In general.* For purposes of nondiscrimination testing under section 89, the employer-provided benefit under a health plan is the value of the health coverage under the plan that is attributable to employer contributions, determined in accordance with the rules in this Q&A-7. See paragraph (h) of this Q&A-7 for rules governing the determination of the excess benefit (if any) under section 89.

(b) *Reasonable valuation methods*—(1) *In general.* Prior to the effective date of procedures prescribed by the Secretary in accordance with section 89(g)(3)(B), employers may use any reasonable valuation method for valuing health coverage under each plan for purposes of applying the nondiscrimination tests of section 89. The employer must be able to demonstrate that its method for valuing such health coverage is actuarially reasonable. All features of a health plan must be taken into account under a reasonable method. However, unless the employer is using a reasonable cost method to value health coverage (in accordance with paragraph (c) of this Q&A-7), a reasonable valuation method may disregard those features that have a de minimis effect on the total value of the coverage under the plan and are not disproportionately available to highly compensated employees. The features that are disregarded cannot, in the aggregate, result in a more than de minimis effect on the total value of the plan. If a feature is disregarded as de minimis with respect to one health plan, it must be disregarded with respect to all health plans. An entitlement to a periodic medical diagnostic or physical examination, whether or not required as a condition of employment, is not considered to have a de minimis effect on the total value of the health coverage under the plan and thus the entitlement must be taken into account in valuing coverage even if the plan is available to nonhighly compensated employees on the same or a more favorable basis than it is to highly compensated employees and even for employees who do not actually undergo the covered examinations.

(2) *Presumption where value is substantially unrelated to cost.* If the employer is not using a cost method permitted under section 4980B to value health coverage (in accordance with paragraph (c) of this Q&A-7), a valuation method is presumed to be unreasonable if the relative values of the plans determined under such method do not reasonably reflect the relative values that would be determined for the plans using a cost method permitted under section 4980B. However, the fact that the relative values of the plans determined by the employer reasonably reflect the relative values of such plans under a cost method permitted under section 4980B does not mean that the valuation method is necessarily reasonable. The provisions of this paragraph (b)(2) are illustrated in the following example:

Example. Assume that an employer maintains three health plans for its employees and does not use a cost method permitted under section 4980B for purposes of determining the employer-provided benefits with respect to these plans. The applicable premiums under the cost method used under section 4980B(f)(4) for these plans are as follows: Plan A, $2,500; Plan B, $2,000; and Plan C, $2,100. Thus, Plan B's value under the cost method is 80 percent of Plan A's value, and Plan C's value, is 84 percent of Plan A's value. Under the employer's valuation method, the values of the plans are as follows: Plan A, $1,600; Plan B, $2,400; and Plan C, $400. Thus, under the employer's valuation method, Plan B's value is 150 percent of the value of Plan A, and Plan C's value is 25 percent of Plan A's value. These relative values do not reasonably reflect the relative values under the section 4980B cost method. Thus, the presumption of this paragraph (b)(2) applies, and unless the employer can demonstrate otherwise, its valuation method is not considered reasonable.

(3) *De minimis effect.* A feature does not have a de minimis effect on the total value of coverage unless it is demonstrably difficult to value such

feature and, if it were valued, the feature would be insignificant in value.

(4) *Disproportionate ratio.* A de minimis feature of a health plan is not considered to be disproportionately available to highly compensated employees if that feature, treated as a separate plan, meets the requirements of paragraph (d)(3) of Q&A-1 of this section (the 50 percent eligibility test). For purposes of this paragraph (b)(4), the availability of the feature is determined based on all health plans of the employer.

(c) *Reasonable cost method—(1) In general.* An employer is deemed to be using a reasonable valuation method that satisfies the requirements of paragraph (b) of this Q&A-7 if the employer is using a reasonable cost method as described in this paragraph (c) to value its health coverage. The employer must be able to demonstrate that its method for determining the cost of health coverage is actuarially reasonable. The method that the employer uses to determine the applicable premium for purposes of the continuation coverage requirements for group health plans in accordance with section 4980B(f)(4) is deemed to be a reasonable cost method. If a health plan is not subject to the requirements of section 4980B, the employer may calculate cost on the basis of a method permitted to be used for determining an applicable premium under section 4980B(f)(4) as if such plan were subject to that section. A cost method does not fail to be a reasonable valuation method for purposes of section 89 merely because the calculation of cost takes into account the average annual cost under section 4980B(f)(4) of substantially similar coverage for the immediately preceding two years or the immediately preceding year if two years' data are not available or if data for the two years would not be reasonable to use under the facts and circumstances of the case.

(2) *Certain permitted adjustments*—(i) *In general.* An employer may elect in writing to make certain adjustments to the cost of health coverage in determining the value of such coverage under a reasonable cost method. These adjustments are intended to eliminate cost differences that are unrelated to the relative value of health coverage. These adjustments may be made only to the extent they have not already been taken into account (if permitted) under the method of determining the applicable premium under section 4980B. If an employer makes an adjustment of the type described in this paragraph (c)(2) with respect to one health plan, the employer must make that same type of adjustment for all health plans. Thus, if an employer maintains two plans providing identical coverage at two geographic locations and elects to make the geographic adjustment permitted in paragraph (c)(2)(ii) with respect to such plans, the employer must make a geographic adjustment to all plans at all locations since the values of these plans are compared to one another under the various tests contained in section 89.

(ii) *Geographic adjustment.* Costs may be adjusted to eliminate differences in cost solely attributable to the employer's operation in significantly separate geographic locations.

(iii) *Demographic adjustment.* Costs may be adjusted to eliminate differences in cost solely attributable to the different demographic characteristics (other than family status) of the participants in the plans.

(iv) *Utilization adjustment.* Costs may be adjusted to eliminate differences in costs solely attributable to differences in the utilization of coverage features common to two or more separate health plans. This adjustment must be made by allocating the total cost for a common feature among all the plans with such feature on the basis of the number of employees covered by such feature under each of the plans. The adjustment under this paragraph (c)(iv) is to be made only after all other adjustments that are permitted in this paragraph (c).

(d) *Certain cost containment features.* A valuation method is not unreasonable if it fails to make adjustments for bona fide cost containment features, such as second opinion requirements or requirements for physician approval prior to referral for specialized medical care. In addition, a valuation method generally is not reasonable if it makes adjustments based on the method of health benefit delivery (e.g., traditional indemnity plans, health maintenance organizations and preferred provider organizations).

(e) *Consistency rule.* With the exception of certain multiemployer plans (see section 89(g)(3)(E)), an employer must use the same valuation method (including any permitted adjustment under this Q&A-7) to value all of the health plans that are tested together under section 89.

(f) *Health coverage under flexible spending arrangements.* In the case of a health plan provided under a flexible spending arrangement (FSA) (as defined in Q&A-7 of § 1.125-2), the value of the coverage for a year generally is equal to the total cost (i.e., required premium or payment) of the coverage for the year, whether or not such cost is paid through employer contributions, including salary reduction contributions, or after-tax employee contributions. If an employer is separately testing employee-only health coverage and family-only health coverage (in accordance with paragraph (c) of Q&A-3 of this section) and health coverage under an FSA is applicable to employees and their family members, the employer may elect to treat 40 percent of the value of the coverage under the health FSA as family-only coverage and 60 percent of such value as employee-only coverage. This election must apply with respect to all employees who have a spouse or dependent. The rule of this paragraph (f) is illustrated in the following example:

Example. Assume that an employer maintains a cafeteria plan under which an employee may elect to reduce his or her salary by any amount of compensation for a year, to a maximum of $2,000, for reimbursements for health expenses. Assume further that the maximum reimbursement for any particular employee under the arrangement for a year is equal to the amount the employee has elected to reduce his or her salary for the year. This arrangement is a health flexible spending arrangement (FSA). Each different amount by which an employee may elect to reduce his or her salary for a year is a separate health plan under the FSA. The salary reduction contributions are employee premium payments for the level of health coverage elected for the year. For purposes of the 90 percent/50 percent eligibility test (if salary reduction contributions are treated as employer contributions under the rules of Q&A-8 of this section), the health plan under the FSA with the largest employer-provided benefit is the plan with a $2,000 maximum reimbursement. Because all employees may elect any level of coverage under the health FSA, all of the health plans included in the health FSA satisfy the 50 percent eligibility test. For purposes of the 75 percent benefits test, if an employee elects to receive health coverage under the FSA providing for the reimbursement of up to $1,200 of health expenses for a year, the value of such coverage received for the year is $1,200. This is the case without regard to whether the employee actually pays the total required premium for the coverage, as long as the employee receives the coverage. Finally, for purposes of the 80 percent coverage test, each different level of coverage under the health FSA is a separate health plan with a value equal to the cost of such level of coverage.

(g) *Health coverage attributable to employer contributions*—(1) *In general.* The portion of the value of the health coverage of a plan that is attributable to employer contributions is determined by multiplying the value of the health coverage of the plan (determined under paragraphs (b) through (f) of this Q&A-7) by a fraction. The numerator of the fraction is the employer-paid cost of the health plan, and the denominator of the

fraction is the sum of the employer-paid cost and the employee-paid cost of the health plan. For this purpose, the cost of a health plan is its actual cost determined under the same method the employer uses to determine the applicable premium (for the same coverage) for health continuation coverage purposes under section 4980B(f)(4) without regard to any of the adjustments permitted in paragraph (c) of this Q&A-7 (other than the adjustment for utilization differences). If a health plan is not subject to the requirements of section 4980B, the employer may calculate cost on the basis of a method permitted to be used for determining an applicable premium under section 4980B(f)(4) as if such plan were subject to that section. For purposes of this Q&A-7, health coverage of a self-employed individual is deemed attributable to employer contributions to the extent that a deduction under section 162(m) is allowable with respect to the coverage. Also, the determination of the extent to which health coverage is attributable to employer or employee contributions is to be made without regard to whether an employee is permitted a deduction with respect to employee contributions under section 213.

(2) *Exception.* If, for a particular health plan, the employer-paid portion of the cost (treating salary reduction contributions as employer contributions) is less than or equal to 2 percent of the sum of the employer-paid cost and the employee-paid cost of such health plan, the employer may treat such health plan as providing no employer-provided benefit.

(3) *Salary reduction contributions.* See Q&A-8 of this section for the treatment of salary reduction contributions under a cafeteria plan as either employer or employee contributions.

(h) *Calculation of excess benefit.* The amount of a highly compensated employee's excess benefit under section 89(b) with respect to a health plan is the cost of the excess benefit based on its actual cost determined under the same method the employer uses to determine the applicable premium for the same coverage for health continuation coverage purposes under section 4980B(f)(4) without regard to any of the adjustments permitted in paragraph (c) of this Q&A-7 (other than the adjustment for utilization differences). This rule applies with respect to both highly compensated and nonhighly compensated employees. Thus, an employer must use the method it uses to determine the applicable premium for all coverage provided in making the determination of excess benefits. See Q&A-9 of this section for further guidance with respect to the determination of excess benefits.

Q-8: How are salary reduction contributions treated for purposes of the section 89 nondiscrimination tests?

A-8: (a) *Treatment of salary reduction contributions*—(1) *In general.* Except as otherwise provided (see, e.g., paragraphs (b) and (c) of this Q&A-8), salary reduction contributions are treated as employer contributions. Thus, for purposes of paragraph (d)(3) (the 50 percent eligibility test), paragraph (d)(4) (the 75 percent benefits test), and paragraph (e) (the 80 percent coverage test) of Q&A-1 of this section, the portion of the value of health coverage that is attributable to salary reduction contributions is treated as attributable to employer contributions and thus as an employer-provided benefit. See paragraph (d)(2) of Q&A-4 of this section for a special rule for the treatment of certain salary reduction contributions for purposes of the mandatory aggregation rule for the 50 percent eligibility test.

(2) *Definition of salary reduction contributions.* The term "salary reduction contributions" means all employer contributions that are excludable from the gross income of an employee by reason of section 125. Thus, all elective contributions under a cafeteria plan described in section 125 that are excludable from employees' gross incomes are salary reduction contributions, even if such amounts are available in cash or other taxable benefits only if the employee satisfies a specified condition under the plan (e.g., the completion of a statement that the employee has other health plan coverage). This is the case regardless of the manner in which such contributions are described under a plan. For example, amounts that are described as employer or company credits under a cafeteria plan are salary reduction contributions to the extent that such amounts are available to employees in cash or other taxable benefits under the plan, even if, for example, the plan defines salary reduction contributions as only those contributions that are directly and explicitly deducted from employees' regular salaries.

(b) *90 percent/50 percent eligibility test*—(1) *In general.* Except as provided in paragraphs (b)(2) and (c) of this Q&A-8, for purposes of paragraph (d)(2) of Q&A-1 of this section (the 90 percent/50 percent eligibility test), salary reduction contributions are treated as employee contributions (rather than employer contributions) in computing the employer-provided benefit available to any employee.

(2) *Election to treat as employer contributions*—(i) *In general.* An employer may elect in writing to treat all salary reduction contributions as employer contributions for purposes of paragraph (d)(2) of Q&A-1 of this section (the 90 percent/50 percent eligibility test). An employer may not elect to treat some, but not all, salary reduction contributions as employer contributions. An employer election under this paragraph (b)(2) applies with respect to all salary reduction contributions with regard to plans of the same type whether or not the plans are part of the same cafeteria plan.

(ii) *Requirements to qualify for election*—(A) *In general.* In order to make an election under this paragraph (b)(2), an employer must meet the requirements of paragraphs (b)(2)(ii)(B) through (b)(2)(ii)(D) of this Q&A-8.

(B) *Plan must be available on same terms.* This requirement is satisfied only if all of the benefits available under each cafeteria plan are available on the same terms and conditions to all employees eligible to participate under such plans.

(C) *Nonhighly compensated employees may not comprise a disproportionate portion of those eligible to participate.* This requirement is satisfied only if the nonhighly compensated eligibility percentage for each cafeteria plan does not exceed the highly compensated eligibility percentage for each such plan. The nonhighly compensated eligibility percentage is the percentage determined by dividing the number of nonhighly compensated employees eligible to participate in the cafeteria plan by the total number of nonhighly compensated employees, and the highly compensated eligibility percentage is the percentage determined in the same manner by reference only to highly compensated employees.

(D) *No highly compensated employee with benefits outside cafeteria plan.* This requirement is satisfied only if no highly compensated employee eligible to participate in a cafeteria plan is eligible to participate in any other statutory employee benefit plan that is of the same type as a plan available under the cafeteria plan unless such other statutory employee benefit plan (whether inside or outside of a cafeteria plan) is available on the same terms and conditions to all nonhighly compensated employees that are eligible to participate in the cafeteria plan.

(c) *Mandatory treatment of salary reduction contributions*—(1) *In general.* Notwithstanding paragraphs (b)(1) and (b)(2) of this 0&A–8, if certain conditions set forth in paragraph (c)(2) or (c)(3) of this Q&A–8 are satisfied, an employer is required to treat some or all salary reduction contributions available to highly compensated employees as employer contributions, some or all salary reduction contributions available to nonhighly compensated employees as employee contributions, or both. Paragraphs (c)(2) and (c)(3) of this Q&A–8 are applied separately. This mandatory treatment applies only for purposes of applying the 90 percent/50 percent eligibility test of paragraph (d)(2) of Q&A–1 of this section (including the 80 percent/66 percent and 80 percent/80 percent eligibility test alternatives set forth in paragraphs (b) and (c)(6)(iii) of Q&A–2 of this section).

(2) *Highly compensated employees*—(i) *In general.* In computing the largest employer-provided benefit available to a high1y compensated employee (and for purposes of the excess benefit calculation under paragraph (e) of Q&A–9 of this section), core health coverage attributable to salary reduction contributions is treated as attributable to employer contributions (rather than employee contributions) to the extent that the portion of the core health coverage attributable to salary reduction contributions exceeds 100 percent of the portion of the core health coverage attributable to employer contributions (excluding salary reduction contributions). The rule of this paragraph (c)(2) applies only if the employer has not made the election described in paragraph (b)(2) of this Q&A–8.

(ii) *Examples.* The rule of this paragraph (c)(2) is illustrated by the following examples:

Example 1. Assume that a highly compensated employee may elect coverage under one of two health plans: Plan A has an employer-provided benefit of $4,000, which is attributable to non-salary reduction, employer contributions; and Plan B (a core health plan) has a total employer-provided benefit of $5,200 (i.e., $3,200 attributable to non-salary reduction, employer contributions and $2,000 attributable to salary reduction contributions). This paragraph (c)(2) does not require that any of the salary reduction contributions for Plan B be treated as employer contributions for purposes of determining the plan with the largest employer-provided benefit available to this highly compensated employee. Thus, for purposes of the 90 percent/50 percent eligibility test and assuming that the employer has not made the election under paragraph (b)(2) of this Q&A–8, Plan A is the plan with the largest employer-provided benefit available to this employee.

Example 2. Assume the same facts as Example 1, except that Plan B's total employer-provided benefit of $5,200 is comprised of $2,500 attributable to non-salary reduction, employer contributions and $2,700 attributable to salary reduction contributions. This paragraph (c)(2) requires that $200 of the salary reduction contributions for Plan B (i.e., the excess of the salary reduction contributions over the non-salary reduction, employer contributions) be treated as employer contributions for purposes of determining the plan with the largest employer-provided benefit available to this highly compensated employee. Thus, for purposes of the 90 percent/50 percent eligibility test, Plan B is treated as having an employer-provided benefit of $2,700. However, Plan A still is the plan with the largest employer-provided benefit available to this highly compensated employee.

Example 3. Assume the same facts as in Example 1, except that Plan B has a total employer-provided benefit of $8,000 (i.e., $3,500 attributable to non-salary reduction, employer contributions and $4,500 attributable to salary reduction contributions). This paragraph (c)(2) requires that $1,000 of the salary reduction contributions for Plan B (i.e., the excess of the salary reduction contributions over the non-salary reduction, employer contributions) be treated as employer contributions for purposes of determining the plan with the largest employer-provided benefit available to this highly compensated employee. Thus, for purposes of the 90 percent/50 percent eligibility test, Plan B is treated as having an employer-provided benefit of $4,500 and, accordingly, is the plan with the largest employer-provided benefit available to this highly compensated employee.

Example 4. Assume the same facts as in Example 3, except that the highly compensated employee also may elect health coverage under a flexible spending arrangement (FSA) providing for health expense reimbursements up to and including $5,000. Because hea1th FSAs are not core health plans, this FSA is disregarded in applying this paragraph (c)(2). Thus, the manner in which such health FSA, the employer-provided benefit of which is wholly attributable to salary reduction contributions, is taken into account for purposes of the 90 percent/50 percent eligibility test depends upon whether salary reduction contributions are generally disregarded or are generally taken into account as employer contributions for purposes of such test.

Example 5. Assume the same facts as Example 3, except that the highly compensated employee also has available Plan C, a dental plan not funded through salary reduction and with an employer-provided benefit of $500. Since the dental plan is not a core health plan, it is not considered in determining whether salary reduction contributions are treated as employer contributions under this paragraph (c)(2). However, the employer-provided benefit of the dental plan is added to the total employer-provided benefit available to the highly compensated employee in determining the largest employer-provided benefit available to any highly compensated employee.

(3) *Nonhighly compensated employees.* In computing the employer-provided benefit available to a nonhighly compensated employee, core health coverage attributable to salary reduction contributions is treated as attributable to employee contributions (rather than employer contributions) to the extent that the portion of the core health coverage attributable to salary reduction contributions exceeds 100 percent of the portion of the core health coverage attributable to employer contributions (excluding salary reduction contributions). The rule of this paragraph (c)(3) applies only if the employer has made the election described in paragraph (b)(2) of this Q&A–8.

(4) *Transition rule.* This paragraph (c) does not apply with respect to testing years beginning before January 1, 1990.

(d) *Certain part-time employees.* See section 89(g)(3)(D)(i) for the treatment of salary reduction contributions for employees described in section 89(j)(5).

Q–9: How is an excess benefit under the section 89 nondiscrimination rules to be determined with respect to health plans?

A–9: (a) *In general.* A highly compensated employee's excess benefit under a discriminatory employee benefit plan that is a health plan for a testing year generally is determined in accordance with the rules for applying the requirements of section 89 for the testing year and with the modifications set forth in this Q&A–9. Because the method for determining excess benefits thus differs from the method for applying the nondiscrimination tests of section 89, a statutory employee benefit plan that is a discriminatory employee benefit plan under the nondiscrimination tests may, in some circumstances, not have any excess benefit under this Q&A–9. Similarly, a statutory employee benefit plan is treated as not having an excess benefit under this Q&A–9 if such plan satisfies the applicable nondiscrimination tests of section 89 and thus is not a discriminatory employee benefit plan. See paragraph (b) of Q&A–1 of this section. This is the case even if such plan would be determined to have an excess benefit under the rules of this Q&A–9 if such rules were applicable to such plan. See paragraph (h) of Q&A–7 of this section for the requirement that, for purposes of determining the amount of excess benefit, the value of the benefit of all employees must be determined under the same method the employer uses for determining the

applicable premium for health continuation coverage purposes under section 4980B(f)(4) and the nondiscrimination tests reapplied on such basis. In addition, see paragraph (c) of Q&A-6 for rules relating to the determination of excess benefits for testing years beginning in 1989 if some, but not all, of the employer-provided benefits for such years are subject to the section 89 nondiscrimination rules.

(b) *Determination made under failed requirements*—(1) *In general.* A highly compensated employee's excess benefit under a discriminatory employee benefit plan is determined under the failed requirements of paragraphs (c), (d) and (e) of Q&A-1 of this section. Thus, for example, if each health plan satisfies the 50 percent eligibility test, but the health plans collectively fail to satisfy the 75 percent benefits test, excess benefits are to be determined only under the 75 percent benefits test. However, an employer may elect in writing to use the 80 percent coverage test to determine excess benefits without regard to whether it used that test in determining compliance with section 89. Similarly. the employer may elect in writing to use the tests described in paragraphs (c) and (d) of Q&A-1 of this section to determine excess benefits even if it initially used the 80 percent coverage test to determine whether its plans are discriminatory.

(2) *Failure of more than one requirement.* Where an employer's health plans of the same type fail to meet more than one requirement of Q&A-1 of this section, the excess benefit calculations for the failed requirements are to be made in the following order: The 50 percent eligibility test: the 90 percent/50 percent eligibility test; and the 75 percent benefits test. If a highly compensated employee is determined to have an excess benefit under the 50 percent eligibility test, then for purposes of determining such employee's excess benefit (if any) under the 90 percent/50 percent eligibility test, such employee's employer-provided benefit for purposes of the 90 percent/50 percent eligibility test excess benefit calculation is first reduced by the amount of such employee's excess benefit determined under the 50 percent eligibility test excess benefit calculation. If a portion of the employer-provided benefit of the plan that failed the 50 percent eligibility test is attributable to salary reduction contributions, then the same portion of an employee's excess benefit with respect to such plan is treated as attributable to salary reduction contributions. For purposes of determining excess benefits under the 75 percent benefits test, a highly compensated employee's employer-provided benefit under the plan or plans that failed the 50 percent eligibility test or the 90 percent/50 percent eligibility test (or both) is first reduced by the amount of such employee's excess benefit with respect to such test or tests.

(c) *Highly compensated employees and the employer-provided benefit taken into account for purposes of determining excess benefit*—(1) *In general.* For purposes of making the excess benefit calculations under this Q&A-9, all highly compensated employees who receive employer-provided benefits for a testing year under a plan or plan's that fail the applicable nondiscrimination test are eligible to be treated as receiving excess benefits. This is the case even though such highly compensated employees were not taken into account for any reason on the testing day for such testing year. In addition, only employer-provided benefits that highly compensated employees actually receive for a testing year under a plan or plans that fail the applicable nondiscrimination test may be treated as excess benefits. Thus, for example, a highly compensated employee does not have an excess benefit with respect to a plan that fails the 50 percent eligibility test merely because such employee is eligible to receive, but does not actually receive, employer-provided benefits (e.g., health plan coverage) under such plan. Similarly, employer-provided benefits that highly compensated employees do not actually receive but were treated as having received under the rules providing for the annualization and adjustment of the employer-provided benefits for the testing day are not treated as excess benefits.

(2) *Special rule.* In the case of the first testing year beginning in 1989 of an employer that is using the transition rule included in paragraph (b)(5) of Q&A-5 of this section, the excess benefits (if any) for such testing year may be determined by reference to those employer-provided benefits that highly compensated employees actually receive for the partial testing year, annualized for the entire testing year as provided in paragraph (b)(5)(iv) of Q&A-5 of this section. If an employer elects to determine excess benefits in accordance with the preceding sentence, the employer must provide those highly compensated employees having excess benefits an opportunity to demonstrate that they actually received less employer-provided benefits during the portion of the testing year preceding the partial testing year than the deemed employer provided benefits under paragraph (b)(5) of Q&A-5 of this section. If an employee makes such a demonstration, the employer must recalculate such employee's excess benefit based on the employer-provided benefits actually received for the entire testing year and make any amendments to required reports relating to such employee (e.g., Form W-2). This special rule is not available with respect to a plan for which paragraph (b)(5) of Q&A-5 of this section is inapplicable.

(d) *50 percent eligibility test.* A highly compensated employee's excess benefit under a health plan that fails to satisfy the 50 percent eligibility test of paragraph (d)(3) of Q&A-1 of this section is equal to that portion of the employer-provided benefit actually received by such employee under the plan that is in excess of the maximum employer-provided benefit that such plan may have and be included in a group of comparable plans under paragraph (b) of Q&A-4 of this section that satisfies the 50 percent eligibility test. The rule of this paragraph (d) is illustrated as follows:

Example. An employer maintains two health plans, Plan A and Plan B. Plan A has an employer-provided benefit of $3,000 and is automatically provided to all employees of the employer other than those eligible for Plan B. Plan B has an employer-provided benefit of $4,000 and is available to all employees who earn more than $100,000. Plan B fails to satisfy the 50 percent eligibility test. As a result, each highly compensated employee who actually receives coverage under Plan B is treated as receiving an excess benefit with respect to such plan. The employer-provided benefit under Plan B must be reduced by $842 to $3,158 ($3,000 is 95 percent of $3,158), in order for Plan B to be included in a group of comparable plans with Plan A under paragraph (b) of Q&A-4 of this section. Thus, for a highly compensated employee who received a full $4,000 employer-provided benefit under Plan B, the amount of the excess benefit with respect to Plan B is $842.

(e) *90 percent/50 percent eligibility test.* A highly compensated employee's excess benefit under plans of the same type that fail to satisfy the 90 percent/50 percent eligibility test of paragraph (d)(2) of Q&A-1 of this section is equal to that portion of the employer-provided benefit actually received by such employee under such plans that is in excess of 200 percent of the largest amount of employer-provided benefit available to at least 90 percent of the employer's nonhighly compensated employees. For this purpose, benefits attributable to salary reduction contributions by nonhighly compensated employees are not treated as employer-

provided benefits, even if the employer has made the election provided under paragraph (b)(2) of Q&A-8 of this section. In addition, benefits with respect to highly compensated employees that are attributable to salary reduction contributions are not treated as employer-provided benefits except to the extent that such contributions are treated as employer contributions with regard to such employees under paragraph (c)(2) of Q&A-8 of this section. The rule of this paragraph (e) is illustrated as follows:

Example. Assume that an employer maintains numerous health plans for its employees. For a testing year, the largest employer-provided benefit available to any highly compensated employee, determined under the 90 percent/50 percent eligibility test, is $12,000. Because only 75 percent of the employer's nonhighly compensated employees have available to them an employer-provided benefit of at least $6,000, the employer's health plans fail to satisfy the 90 percent/50 percent eligibility test. As a result, the highly compensated employees who receive coverage under one or more health plans are treated as receiving an excess benefit. If, for this testing year, 90 percent of the employer's nonhighly compensated employees have available to them an employer-provided health benefit of at least $4,500, a highly compensated employee is treated as receiving an excess benefit to the extent such employee actually receives (rather than is eligible to receive) an employer-provided benefit under all health plans in excess of $9,000 (i.e., 200 percent of $4,500). If the largest amount of employer-provided benefit that is available to 90 percent of the employer's nonhighly compensated employees were $3,000 (instead of $4,500), a highly compensated employee's excess benefit would be the amount of such employee's employer-provided benefit that is in excess of $6,000. If no amount of employer-provided benefit is available to 90 percent or more of the nonhighly compensated employees, then all highly compensated employees have excess benefits equal to their total employer-provided benefits received for the testing year.

(f) *75 percent benefits test*—(1) *In general.* A highly compensated employee's excess benefit under plans of the same type that fail to satisfy the 75 percent benefits test of paragraph (d)(4) of Q&A-1 of this section is determined under the rules of this paragraph (f). If plans of different types are tested together under paragraph (f)(2)(ii) of Q&A-1 of this section, then such plans are treated as plans of the same type for purposes of this paragraph (f).

(2) *Reapply test.* The 75 percent benefits test is to be reapplied for the testing year with respect to those plans of the same type by taking into account, in accordance with paragraph (c) of this Q&A-9, all highly compensated employees of the employer and the employer-provided benefits that such employees actually received for the testing year. If upon such reapplication of the 75 percent benefits test, such test is satisfied, there are no excess benefits under section 89(b) with respect to such test.

(3) *Amount of excess benefit.* Excess benefits under the 75 percent benefits test are determined by reducing the employer-provided benefit of the highly compensated employee or employees with the highest amount of employer-provided benefit for the testing year, under the 75 percent benefits test as reapplied in accordance with this paragraph (f), until either such employee's employer-provided benefit is equal to the next highest amount of employer-provided benefit for any highly compensated employee or if no next highest such employee exists, until the employee no longer has any employer-provided benefit. This method of reduction is then applied with respect to additional highly compensated employees (beginning with highly compensated employees with the highest remaining amounts of employer-provided benefits) until the 75 percent benefits test is satisfied in accordance with this paragraph (f). A highly compensated employee's excess benefit is equal to the total amount of such employee's employer-provided benefit that is reduced under this paragraph (f).

(g) *80 percent coverage test*—(1) *In general.* A highly compensated employee's excess benefit under a plan that fails to satisfy the 80 percent coverage test of paragraph (e) of Q&A-1 of this section is equal to that portion of the employer-provided benefit received by such employee under the plan that is in excess of the maximum employer-provided benefit that such plan may have and be included in a group of comparable plans under paragraphs (c)(1) through (c)(4) of Q&A-4 of this section that satisfies the 80 percent coverage test.

(2) *Examples.* The rule of this paragraph (g) is illustrated in the following examples:

Example 1. An employer maintains numerous health plans. All but one of such employer's health plans are included in a group of comparable plans determined in accordance with paragraph (c)(5) of Q&A-4 of this section (employee cost comparability). Because over 80 percent of the employer's nonhighly compensated employees are covered by a plan included in the group of comparable plans, each of the plans in such group satisfies the 80 percent coverage test. The deemed employer-provided benefit for the group of comparable plans is $3,780. Plan F, which has an employer-provided benefit of $5,000, is not included in the group of comparable plans and thus such plan fails the 80 percent coverage test. If Plan F's employer-provided benefit were reduced by $800 to $4,200 ($3,780 is 90 percent of $4,200), it could be included in the group of comparable plans under the rules of paragraph (c)(1) of Q&A-4 of this section. Similarly, if Plan F's employer-provided benefit were reduced by $1,221 to $3,779, it could be included in the group of comparable plans under the rules of paragraph (c)(4) of Q&A-4 of this section. As a result, each highly compensated employee who receives coverage under Plan F is treated as receiving an excess benefit of $800 (the lesser of $800 and $1,221) with respect to such plan.

Example 2. Assume the same facts as Example 1 except that the plan that is not included in the group of comparable plans fails the 50 percent eligibility test of paragraph (b) of Q&A-4 of this section. Under paragraph (c)(3) of Q&A-4 of this section, the eligibility test must be satisfied before the plan may be included in a group of comparable plans in determining whether the 80 percent coverage test is satisfied. Thus, the excess benefit for Plan F must include the amount necessary to permit such plan to satisfy the 50 percent eligibility test. In this example, this would occur if Plan F's employer-provided benefit were reduced by $1,021 to $3,979 ($3,780 is 95 percent of $3,979).

Q-10: What are the effective dates of the section 89 nondiscrimination and qualification rules?

A-10: (a) *Effective date*—(1) *In general.* Except as otherwise provided in this Q&A-10, the nondiscrimination rules of sections 89 (a)-(j) and 89 (l)-(m) and the qualification rules of section 89(k) apply for plan years beginning after December 31, 1988.

(2) *Collectively bargained plans*—(i) *In general.* In the case of a collectively bargained plan that is adopted pursuant to one or more collective bargaining agreements ratified prior to March 1, 1986, section 89 does not apply to such plan with respect to employees included in a unit of employees covered by any of such collective bargaining agreements in years beginning before the earlier of January 1, 1991, or the date on which the last collective bargaining agreement relating to the plan expires (determined without regard to extensions after February 28, 1986).

(ii) *Definition of collectively bargained plan.* A collectively bargained plan is a plan covering only eligible individuals who are included in a unit of employees covered by an agreement that is a collective bargaining agreement entered into between employee representatives and one or more employers (as determined under section 7701(a)(46)). A plan that is maintained pursuant to two or more collective bargaining agreements is treated as two or more collectively bargained plans to

the extent that the employer-provided benefits provided pursuant to the agreements are not uniform. Thus, for example, if a multiemployer plan is maintained pursuant to three collective bargaining agreements, two of which provide for an identical benefit structure and one of which provides for a different benefit structure, the plan is treated as two separate, collectively bargained plans for purposes of this paragraph (a)(2).

(iii) *Plans benefiting non-collectively bargained employees.* If a plan provides employer-provided benefits to employees who are included in a unit of employees covered by a collective bargaining agreement and to employees who are not included in any such unit of employees (i.e., non-collectively bargained employees), the non-collectively bargalned employees are treated as covered by a plan that is not a collectively bargained plan for purposes of this paragraph (a)(2). Thus, the delayed effective date of paragraph (a)(2)(i) of this Q&A-10 is available only with respect to the portion of the plan that provides employer-provided benefits to the collectively bargained employees.

(iv) *Treatment of collectively bargained employees as excludable employees.* Unless the employer elects otherwise, employees who receive employer-provided benefits under a collectively bargained plan to which section 89 does not yet apply by reason of this paragraph (a)(2) are to be treated as excludable employees (i.e., as though they were described in section 89(h)) for purposes of applying the nondiscrimination tests of section 89 to plans that are subject to section 89. However, an employer may elect in writing not to treat such collectively bargained employees as excludable employees for purposes of applying section 89 to plans that are subject to section 89. Such an election must be made with respect to all collectively bargained employees, regardless of bargaining unit, and once made applies to all subsequent testing years. Such an election does not accelerate the otherwise applicable effective date with respect to the application of the qualification rules of section 89(k) to such collectively bargained plan or plans. However, if the employer makes an election under this paragraph (a)(2)(iv), then the nondiscrimination rules of section 89 are effective with respect to such plan or plans and thus a highly compensated employee within the group of otherwise excludable employees (i.e., nonexcludable by reason of such election), may have an excess benefit under section 89(b).

(v) *Examples.* The provisions of this paragraph (a)(2) are illustrated by the following examples:

Example 1. A collective bargaining agreement ratified in January 1986 is scheduled to expire on December 31, 1992. Such agreement provides for contributions by an employer to a multiemployer plan providing health coverage. Assuming that no employee who is included in the collective bargaining unit receives health coverage from the employer other than coverage under the multiemployer plan, the collective bargaining employees and their health coverage may be disregarded by the employer in applying the section 89 nondiscrimination tests for any period before January 1, 1991.

Example 2. Employer X maintains two health plans. Plan A (covering non-collectively bargained employees) and Plan B (covering collectively bargained employees). Plan B is a multiemployer plan that has an effective date for purposes of section 89 of January 1, 1991. Plan A is an insurance plan with a policy that expires on June 30, 1989. The collectively bargained employees receiving benefits under Plan B may be treated as excludable employees until January of 1991 and their health coverage may be disregarded by Employer X in applying the nondiscrimination tests of section 89 until that date. However, before that date, Employer X may elect to take such collectively bargained employees (and their employer-provided benefits) into account for purposes of testing Plan A for periods prior to January of 1991.

(b) *Definition of plan year*—(1) *In general.* Except as provided in paragraph (b)(2) or (b)(3) of this Q&A-10, for purposes of determining the applicable effective date of section 89 with respect to a plan, the plan year is the year that is designated as the plan year in the written plan. For plans other than health and group-term life insurance plans, if there is no such designation, the plan year is the calendar year. For purposes of this rule, the designation of a plan year solely for purposes of filing the Form 5500 is to be disregarded.

(2) *Certain health and group-term life insurance plans*—(i) *Insured plans.* If a health or group-term life insurance plan's plan year is not clearly ascertainable from a written plan document adopted and in existence on January 1, 1989, and the plan is provided under an arrangement through an insurance company, the policy year is the applicable plan year for effective date purposes. If there is no policy year, the employer may elect in writing either the limit/deductible year, the calendar year, or the employer's fiscal year as the applicable plan year for effective date purposes. If the employer does not make such an election, the applicable plan year is the calendar year. An arrangement is not provided through an insurance company for purposes of this paragraph (b) if the insurance company provides merely administrative services under the arrangement.

(ii) *Self-insured plans.* If a health or group-term life insurance plan's plan year is not clearly ascertainable from a written plan document adopted and in existence on January 1, 1989, and the coverage under such plan is not provided under an arrangement through an insurance company, the employer may elect in writing either the limit/deductible year, the calendar year, or the employer's fiscal year as the applicable plan year for effective date purposes. If the employer does not make such an election, the applicable plan year is the calendar year.

(iii) *Limit/deductible year.* The limit/deductible year is the year with respect to which the plan's benefit and deductible limits are applied, except that if different years are used for benefit limit purposes and for deductible limit purposes, it means the limit or deductible year that commences earlier in the calendar year.

(3) *Special rule to prevent delay of the section 89 effective date*—(i) *In general.* Notwithstanding paragraphs (b)(1) and (b)(2) of this Q&A-10, in the case of a health or group-term life insurance plan with respect to which the first day of the first plan year beginning after December 31, 1988 (determined under paragraphs (b)(1) and (b)(2)), is later during the calendar year than the first day of the first plan year (also determined under such paragraphs) beginning in 1988, the first plan year beginning after December 31, 1988, is deemed to begin on the day that is 12 months after the first day of the plan's first plan year beginning in 1988. Thus, section 89 becomes effective with respect to such plan on the first anniversary date of the plan's first plan year beginning in 1988. In addition, for purposes of this Q&A-10, a plan's last plan year beginning in 1988 is not treated as longer than 12 months in duration. Thus, for example, an agreement between an employer and insurance company to extend for longer than 12 months the last plan year of a health plan beginning in 1988 is not recognized for purposes of determining the applicable section 89 effective date with respect to such plan. Such plan is treated as commencing a new plan year on the day that is 12 months after the first day of the last plan year commencing in 1988.

(ii) *Exceptions*—(A) *In general.* Except as provided in paragraph (b)(3)(iii) of this Q&A-10, paragraph (b)(3)(i) of this

Q&A-10 does not apply to the extent that any of the tests described in this paragraph (b)(3)(ii) (B) through (D) are satisfied.

(B) *Three-month rule.* A plan is a health plan and the first day of the plan's first plan year beginning after December 31, 1988, is not more than 3 months later during the calendar year than the first day of the plan's first plan year beginning in 1988 and the selection of the new plan year was for bona fide business reasons unrelated to section 89 (e.g., by reason of a merger or acquisition).

(C) *New carrier rule.* A plan is a health plan and the health coverage for the plan's first plan year beginning after December 31, 1988, is provided through an insurance arrangement with an insurance company unrelated to any insurance company that provided health coverage under the plan for the first day of the plan's first plan year beginning in 1988 and such change in insurance carriers and the selection of the new plan year were for bona fide business reasons unrelated to section 89.

(D) *Uniform plan year.* The first day of the plan's first plan year beginning after December 31, 1988, is the same day during the calendar year on which commenced in 1988 the plan year or years of the plan or plans of the same type that provided, in the aggregate, at least 25 percent of the total employer-provided benefits provided under all plans of the same type during 1988 and the selection of the new plan year was for bona fide business reasons unrelated to section 89. This rule may be applied in the case of a merger or acquisition by treating such transaction as having occurred on December 31, 1987.

(iii) *Retroactive plan year changes.* This paragraph (b)(3) is to be applied by disregarding any change in a plan year that is made after the commencement of such plan year.

(iv) *Additional rules.* The Commissioner may, through revenue rulings, notices, and other guidance of general applicability, provide such additional exceptions to paragraph (b)(3)(i) of this Q&A-10 as are appropriate if such exceptions do not have the effect of permitting employers to delay significantly the effective date of section 89 with respect to their plans without any significant, independent business reason.

(4) *New plans.* For purposes of this Q&A-10, a plan is not treated as a new plan commencing in calendar year 1989, unless such plan provides coverage and benefits that are substantially different from the coverage and benefits previously provided by a plan in calendar year 1988.

(5) *Certain dispositions or acquisitions.* If a person becomes or ceases to be a member of a group described in section 414 (b), (c), (m) or (o) on or before December 31, 1988, the transitional rule of section 89(j)(8) is not applicable with respect to any plan of such person or of any member of such group unless the requirements of section 89 were met immediately before such change in the group. This determination is to be made as though section 89 (and this section) were effective with respect to all such plans of such person. Alternatively, for testing years beginning in 1989, the nondiscrimination rules of section 89 may be applied separately to the separate portions of the group under section 414 (b), (c), (m) and (o) involved in the change of the group as if such portions did not become part of the same group until December 31, 1989.

§ 1.89(k)-1 Qualification requirements for certain employee welfare benefit plans.

The following is a list of the questions addressed in this section.

Q-1: What is required under section 89(k)?

Q-2: What plans must meet the requirements of section 89(k)?

Q-3: What is required under the writing requirement of section 89(k)(1)(A)?

Q-4: When is a plan legally enforceable within the meaning of section 89(k)(1)(B)?

Q-5: What constitutes reasonable notification of employees under section 89(k)(1)(C)?

Q-6: How does an employer meet the exclusive benefit requirement of section 89(k)(1)(D)?

Q-7: How is it determined whether a plan is established with the intent of being maintained for an indefinite period of time?

Q-8: What are the sanctions for failure to meet the qualification requirements of section 89(k)?

Q-1: What is required under section 89(k)?

A-1: (a) *In general.* Section 89(k) imposes the following requirements on employers maintaining certain employee benefit plans as described in Q&A-2 of this section: The plan must be in writing; employees within the class of employees designated in the plan as eligible for participation must have a legally enforceable right to participate and, if covered under such plan, to receive benefits; employees who are eligible to participate must be provided reasonable notice of the benefits available under such plan; the plan must be maintained for the exclusive benefit of employees; and the plan must be established with the intent that it will be maintained for an indefinite period of time.

(b) *Definitions*—(1) *Benefit.* For purposes of section 89(k), the term "benefit" or "benefits" means those payments, reimbursements, products and services provided under the plan to a participant on account of such participant's claim, need or event that is covered under the plan. For example, the fair market value of the use of an on-site child care facility by a participant is the benefit under a dependent care assistance program described in section 129. Similarly, reimbursement of a participant's expense incurred for a covered surgical procedure is a benefit under a health plan. Another example of a benefit under a plan is the payment of a death benefit under a group-term life insurance plan to which section 79 applies.

(2) *Employer-provided benefit.* With respect to section 89(k), the term "employer-provided benefit" means that portion of the benefits received by an individual that is attributable to employer contributions, including salary reduction contributions under a cafeteria plan. See paragraph (f)(3) of Q&A-1 of § 1.89(a)-1 for a definition of "employer-provided benefit" for purposes of the nondiscrimination rules under section 89.

(3) *ERISA.* The term "ERISA" refers to the Employee Retirement Income Security Act of 1974, as amended.

(4) *Salary reduction contributions.* The term "salary reduction contributions" means elective contributions under a cafeteria plan described in section 125 that would be taxable to an employee, but for section 125, by reason of such employee's right to receive such amounts as cash or other taxable benefits. See paragraph (a)(2) of Q&A-8 of § 1.89(a)-1 for further guidance regarding the term "salary reduction contributions."

Q-2: What plans must meet the requirements of section 89(k)?

A-2: (a) *In general*—(1) *Types of plans subject to section 89(k).* In general, the following plans are subject to section 89(k): An accident or health plan (sections 106 and 105); a plan of an employer providing group-term life insurance (section 79); a dependent care assistance program (section 129(d)); a qualified tuition reduction program (section 117(d)); a cafeteria plan (section 125(c)); a fringe benefit program providing no-additional-cost services, qualified employee discounts, or employer-operated eating facilities, the benefits from which are excludable from the gross income of the beneficiary under section 132; and a plan of which

an organization covered by section 505 is a part. Section 89(k) applies to these plans without regard to whether they are statutory employee benefit plans subject to the nondiscrimination rules of section 89 and without regard to whether they are subject to Title I of ERISA. Also, section 89(k) applies to plans described in this paragraph (a)(1) even though they are maintained by employers that are state or local governments or by the federal government. Finally, except as provided in paragraph (f) of this Q&A-2, section 89(k) also applies to plans described in this paragraph (a)(1) even though they are maintained by organizations exempt from taxation under section 501(a).

(2) *Plans maintained by an employer.* For purposes of section 89(k), a plan "maintained by an employer" is any plan of, or subsidized by, an employer who employs participants in the plan. A plan is maintained by an employer even if the cost of such plan is borne by the employees through after-tax employee contributions, as long as the value of the coverage under the plan for any employee is greater than such employee's after-tax contributions. See section 79 and the regulations thereunder for rules relating to when a group-term life insurance plan is subject to section 79 and, therefore, to section 89(k). For purposes of this paragraph (a)(2), the term "employee" includes the spouse and dependents of an employee. See also Q&A-6 of this section with regard to individuals who may participate in a plan. In addition, plans of the type described in paragraph (a)(1) of this Q&A-2 that are maintained by one or more "employee organizations," as that term is defined in section 3(4) of ERISA, or that are maintained pursuant to one or more collective bargaining agreements, are maintained by one or more employers and must meet the requirements of section 89(k).

(b) *Special rules with respect to accident or health plans*—(1) *In general.* For purposes of section 89(k), an accident or health plan providing coverage that is excludable under section 106 must meet the requirements of section 89(k) if benefits under the plan are to be excludable under section 105 (b) or (c) or, in the case of a death benefit under a plan described in paragraph (b)(2) of this Q&A-2, under section 101. If employer-provided benefits under an accident or health plan are not excludable under section 105 (b) or (c) or section 101 (other than by reason of section 89), the plan is not required to comply with section 89(k). Thus, for example, employer-provided health plans (including plans that provide medical diagnostic examinations) must satisfy section 89(k) in order for the benefits thereunder to be excludable under section 105 (b) or (c). An accident or health plan the entire cost of which is borne by the employees on an after-tax contributory basis (as determined under Q&A-7 of § 1.89(a)-1) is not required to meet the requirements of section 89(k). Thus, if employees' required after-tax contributions for health coverage are equal to or exceed the applicable premium for such coverage within the meaning of section 4980B(f)(4), then the health plan does not have an employer-provided benefit (determined under Q&A-7 of § 1.89(a)-1) and thus is not subject to section 89(k).

(2) *Accidental death and dismemberment.* In order for the employer-provided benefit under an accidental death and dismemberment plan to be excludable under section 101 or 105, the plan must meet the requirements of section 89(k). For purposes of section 89, an accidental death and dismemberment plan is a plan that provides insurance type coverage attributable to employer contributions that are excludable under section 106 and that provides only benefits excludable from income under either section 105(c) or section 101 (where the benefits are payable on account of, and conditioned principally upon, the accidental death of the employee). If a plan provides for a general death benefit (described in § 1.79-1(a)(1)), it is not an accidental death and dismemberment plan.

(3) *Disability and other sick pay plans.* Sick pay plans and disability plans are subject to the requirements of section 89(k) only if employer-provided benefits under such plans are excludable from gross income upon receipt by the individual under section 105 (b) or (c).

(4) *Worker's compensation.* A worker's compensation plan that pays amounts from a sickness and disability fund maintained for employees under the laws of the United States, a state or the District of Columbia (i.e., a fund maintained pursuant to a worker's compensation act or a statute in the nature of a worker's compensation act, the benefits from which are excludable under section 104(a)(1)) is not subject to the requirements of section 89(k). However, accident or health plans maintained by the United States, a state or the District of Columbia that provide benefits that are excludable from the income of an employee solely by reason of section 105 (b) or (c) are not worker's compensation funds within the meaning of the preceding sentence and thus are subject to the requirements of section 89(k).

(5) *Section 401(h) accounts.* A section 401(h) account contained in a pension or annuity plan is subject to the requirements of section 89(k) with regard to benefits provided through such account.

(c) *Special rules relating to dependent care assistance programs, group legal services plans and educational assistance programs.* A dependent care assistance program (within the meaning of section 129(d)) must comply with section 89(k) without regard to whether the employer elects to treat such program as a statutory employee benefit plan as allowed under section 89(i)(2). Similarly, qualified group legal services plans (within the meaning of section 120(b)) and educational assistance programs (within the meaning of section 127(b)) must satisfy section 89(k) requirements, provided the applicable statutory provisions are in effect.

(d) *Plans to which section 505 applies.* A plan of which an organization covered by section 505 is a part must satisfy the requirements of section 89(k). Such plans include plans providing benefits through organizations described in sections 501(c)(9) or 501(c)(17). If section 120 is in effect, plans providing benefits through organizations described in section 501(c)(20) must satisfy the requirements of section 89(k). The requirements of section 89(k) must be met by a plan even if the related organization qualifies as an organization that is part of a plan maintained pursuant to a collective bargaining agreement as described in section 505(a)(2).

(e) *Multiemployer plans.* If a plan is otherwise subject to section 89(k) and is a multiemployer plan within the meaning of section 3(37) of ERISA, that plan is maintained by all contributing employers and is subject to the requirements of section 89(k).

(f) *Church plans.* Employee benefit plans of a type described in paragraph (a)(1) of this Q&A-2 that are maintained by organizations described in section 3121(w) (i.e., churches or church-controlled organizations) exclusively for their employees and clergy (including the spouse or dependents of employees or clergy) are not subject to the requirements of section 89(k).

(g) *Treatment of statutory employee benefit plans providing excess benefits.* A statutory employee benefit plan that provides any amount of employer-provided benefits is subject to the requirements of section 89(k) even though the plan fails to satisfy the nondiscrimination requirements of

section 89(a). Thus, for example, an employer-provided health plan that covers medical diagnostic examinations is subject to section 89(k) even if such health plan fails to satisfy the 50 percent eligibility test of section 89 and the entire value of the employer-provided coverage with respect to such plan is treated as an excess benefit under section 89(b).

(h) *Dispositions and acquisitions.* The rule of section 89(j)(8) does not apply with respect to the requirements of section 89(k). Thus, a plan that is subject to section 89(k) must continue to satisfy such requirements during the transition period (defined under section 89(j)(8)) without regard to the fact that the employer maintaining the plan has been involved in a merger, consolidation, or similar transaction.

(i) *Effective date.* Generally, see Q&A-10 of § 1.89(a)-1 for the effective date of the qualification requirements of section 89(k). However, the general effective date is subject to the transition rules set forth in this section.

(j) *Coordination with ERISA provisions.* The reporting, notification and written plan document requirements contained in this section are in addition to, and not in lieu of, any requirements otherwise imposed on employer-provided benefit plans by Title I of ERISA or any other provision of law. The rules contained herein apply for purposes of section 89(k) and no inference should be drawn therefrom regarding the requirements otherwise imposed by Title I of ERISA or any other law.

Q-3: What is required under the writing requirement of section 89(k)(1)(A)?

A-3: (a) *In general.* Section 89(k)(1)(A) requires a plan to be in writing. Generally, this means that all material terms of the plan must be contained, by direct inclusion, by incorporation by reference, or by a combination of these methods, in a single written document.

(b) *Requirement of a single written document*—(1) *In general.* The writing requirement of section 89(k) must be met with respect to a plan by a single written document. One such document may satisfy the writing requirement for more than one plan.

(2) *Incorporation by reference.* Written documents relating to the plan are treated as part of the single written document if they are specifically incorporated by reference in the single written document. Section 89(k)(1)(A) is satisfied with respect to a plan if the single written document with regard to such plan either contains all of the plan's material terms or, to the extent a material term is not contained in the single written document, incorporates by reference the document containing such term. Examples of documents which may be so incorporated in the single written document are: Contracts with insurance providers; contracts with any other provider of benefits under the plan; contracts with plan administrators of, or consultants to, the plan; documents creating a trust or other funding instrument related to the plan; resolutions of the employer's governing body relating to the creation, operation, maintenance or termination of the plan; collective bargaining agreements; pronouncements made by the employer, an agent of the employer, a plan administrator or other person relating to or concerning a material term in the plan; and all plan-related documents required to be provided to any employee or filed with any regulatory agency or instrumentality of any federal, state, or local governmental body by statute, rule, or regulation, including but not limited to the documentation required to be provided to employees by the notice requirement of section 89(k)(1)(C) (see Q&A-5 of this section). There is no limitation on the number of single written documents that may incorporate a document by specific reference.

(c) *Contents of single written document*—(1) *In general.* Certain minimum information must be included in the single written document in order for the plan to satisfy the writing requirement of section 89(k)(1)(A). All material terms of the plan must be included in the single written document. If a material term of an insured plan is not defined in the single written document of the plan or in a document incorporated therein by reference, and such term is stated in the insurance contract, the term has the meaning given it by the insurance company's usual practice. See paragraph (c)(4) of this Q&A-3 for the definition of a material term of a plan. Further, the provisions required to be included in the single written document by paragraphs (c)(2) and (c)(3) of this Q&A-3 are deemed to be material terms.

(2) *Recitation of certain qualification requirements.* The single written document must contain a recitation of the qualification requirements contained in section 89(k)(1)(B) and (D). Thus, the single written document must state that the employer intends that the plan terms, including those relating to coverage and benefits, are legally enforceable and that the plan is maintained for the exclusive benefit of employees.

(3) *Additional requirements under specific exclusion provision.* The single written document must include any information or term required by any other applicable provision of the Code or accompanying regulation.

(4) *Definition of a material term of a plan.* The phrase "material term of a plan" generally means a term relating to an employee's rights to be covered by, participate in, or benefit under a plan. The following are examples of material terms of a plan: the eligibility rules governing plan participation; terms relating to the periods during which coverage or benefits are provided; descriptions of available benefits; the procedures governing participants' elections under the plan, including the period during which an election may be made, the extent to which elections are irrevocable, and the periods with respect to which elections are effective; the manner in which employer contributions may be made under the plan, such as by salary reduction agreements between a participant and the employer and by nonelective employer contributions, as well as any maximum limitation on employer contributions on behalf of any participant; terms relating to the timing or amount of salary reduction or employee contributions to the plan; terms relating to deductibles, co-payments or similar requirements, including any dollar limit on any benefit; conditions precedent or subsequent with regard to a participant's qualification or continued qualification for any coverage or benefit, including any limitations or restrictions relating to benefits, such as a pre-existing condition limitation; provisions relating to the procedure under which claims are to be made and evaluated for reimbursement; provisions relating to health continuation coverage under section 4980B; and the procedures or circumstances under which the plan may be terminated, including a statement, if applicable, that the plan may be terminated at will by the employer.

(d) *Timing*—(1) *In general.* Except as set forth in paragraph (d)(2) or (d)(3) of this Q&A-3, the material terms of the plan, as well as any amendment, extension, or modification of any of such material terms of the plan, must be in writing prior to the first day for which coverage is provided under an insured or insurance-type plan, or benefits are available under any other type of plan, or prior to the effective date of any amendment, extension or modification of such material terms, as the case may be.

(2) *Certain plan modifications*—(i) *Clarifications of material terms.* Where a plan modification constitutes merely a clarification to a material term (i.e., if

the change merely clarifies an existing term in the plan and will have a de minimis impact on the individuals eligible or covered under the plan), the plan document need not reflect such modification until 120 days after the effective date of the modification or, if there is no separate effective date, until 120 days after the adoption of such amendment. A clarifying change generally includes a change in the plan language (either by addition or amendment) that reflects the previous intention of the employer with respect to a term of the plan. Whether the change is a clarifying change is to be determined not only by reference to the existing plan provisions and the notices provided to the employees, but also with regard to all of the facts and circumstances including, but not limited to, whether and the extent to which the amended language is consistent with the previous operation of the plan.

(ii) *Extension of time where notice provided.* If the employer provides reasonable notice satisfying the requirements of section 89(k)(1)(C) relating to the material terms of a plan to those entitled to notice under Q&A-5 of this section prior to the effective date of the plan or prior to the effective date of any addition or amendment to any material term of the plan (including any amendment to the terms contained in documents that are incorporated in the single written document by reference), then the time by which the single written document must meet the requirements of paragraph (d)(1) of this Q&A-3 to reflect such notice (or the related additions or amendments) is extended until 120 days after the effective date of the new plan or modification. However, this rule is available only if the notice contains a statement that the terms of the notice are legally enforceable.

(iii) *Certain retroactive modifications*—(A) *In general.* A modification to a material term of a plan does not fail to satisfy section 89(k)(1)(A) or this section merely because such modification applies retroactively to periods prior to the date of adoption of such modification if all of the conditions set forth in paragraph (d)(2)(iii) (B) through (F) are satisfied.

(B) *Expansion of coverage or benefits.* The modification must constitute an expansion of coverage or benefits under the plan (i.e., results in the plan having a larger value).

(C) *Notification.* Employees under the plan (including all employees covered under the plan for any portion of the period to which the retroactive coverage applies, regardless of whether they are currently covered) must be reasonably notified (within the meaning of Q&A-5 of this section determined without regard to the last sentence of paragraph (g)(2) of Q&A-5) of the modification within 60 days after its adoption.

(D) *Plan amendment.* The single written document must be amended to reflect the modification no later than 120 days after the adoption of the modification.

(E) *Duration.* The modification must continue in effect with respect to all eligible individuals with respect to the plan from the effective date of the modification until 12 months after the date of adoption.

(F) *Nondiscrimination.* The modification must not discriminate in favor of highly compensated employees.

(iv) *Nonmaterial terms.* Modification to any term contained in the single written document that is not a material term must be incorporated in the document no later than 120 days after the effective date of the modification or, if there is no separate effective date, no later than 120 days after the adoption of such amendment. Thus, to the extent that the single written document includes nonmaterial terms of the plan, such writing must accurately reflect such nonmaterial terms and any modifications thereto must be incorporated in the single written document within the time set forth in the preceding sentence.

(v) *Examples.* The requirements of this paragraph (d) are illustrated by the following examples:

Example 1. A plan is amended to change the level of employee contributions required to participate. This constitutes an amendment to a material term of the plan. If the employer properly notifies the employees prior to the amendment being effective, the single written document need not be amended to reflect such change until 120 days after the effective date of such change as long as the notice contains a statement that its terms are legally enforceable.

Example 2. An administration agreement incorporated by reference in the plan document is amended to change the timing of fees paid to the plan administrator. Unless the circumstances indicate that this is a material term, no amendment to the plan document is required until 120 days after the effective date of the new fee agreement. In such case, the single written document must be amended to reflect by specific reference (by an addendum or otherwise) the date of execution of the new fee agreement.

(3) *Exception for certain on-site medical and eating facilities.* Certain on-site medical and eating facilities are exempt from the requirements of section 89(k)(1)(A). An on-site medical facility is described in this paragraph (d)(3) if it is located and operates exclusively on a work-site of the employer and there is no physician care provided at the site at any time. A wellness program sponsored by the employer may be considered an on-site medical facility. A medical facility is not described in this paragraph (d)(3) unless access to the facility is available on the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of highly compensated employees. An eating facility is described in this paragraph (d)(3) if it is described in and meets the requirements of section 132(e)(2).

(4) *Transition rule.* A plan is not required to meet the writing requirement of section 89(k)(1)(A) with respect to the first plan year beginning in 1989. For the subsequent plan year, a plan is not required to meet the writing requirement of section 89(k)(1)(A) before the later of the first day of such plan year, and the day following the end of the 12-month period beginning on the first day of the first plan year in 1989 that the plan is subject to section 89. For purposes of this transition rule, the extension of time due to a notice that is described in paragraph (d)(2)(ii) of this Q&A-3 is not available.

Q-4: When is a plan legally enforceable within the meaning of section 89(k)(1)(B)?

A-4: (a) *In general.* A plan is considered legally enforceable only if the conditions required for an employee to participate, receive coverage and obtain a benefit are definitely determinable under the terms of the plan and an employee satisfying such conditions is able to compel such participation, coverage and benefit.

(b) *Employer discretion*—(1) *Impermissible discretion*—(i) *In general.* A plan generally is not considered legally enforceable if a decision as to whether to grant or deny participation, coverage or a benefit is discretionary with the employer either pursuant to the terms of the plan or through the operation of the plan. Thus, except as provided in paragraph (b)(2) of this Q&A-4, a plan that permits the employer, either directly or indirectly, through the exercise of discretion, to grant or deny an employee the right to participate, receive coverage or obtain a benefit under the plan for which the employee is otherwise eligible or ineligible (but for the employer's exercise of discretion) violates the requirement of section 89(k)(1)(B). An employer is deemed to have exercised discretion in a manner inconsistent with section 89(k)(1)(B) if the employer imposes conditions or limitations on

eligibility for coverage that are not contained in the single written document comprising the plan and have not been included in the notice described in paragraph (d)(2)(ii) of Q&A-3 of this section. Likewise, except as provided in paragraph (c) of this Q&A-4, a plan violates section 89(k)(1)(B) if the employer waives an otherwise applicable condition, restriction or other term contained in the plan if the single written document does not contain objective, clearly ascertainable criteria and procedures under which such condition, restriction or term may be waived. Finally, a plan violates section 89(k)(1)(B) if participation, coverage or benefits under the plan are subject to objective conditions that are within the control of the employer.

(ii) *Employer.* For purposes of this Q&A-4, the term "employer" includes the plan administrator, fiduciary, trustee, actuary, independent third party, and other persons. Thus, if a plan grants any person the discretion to deny or limit the availability of a plan benefit for which the employee may otherwise be eligible under the plan (but for the exercise of such discretion), and such exercise is not provided for under the terms of the plan through objective criteria or otherwise permissible under this Q&A-4, then the plan violates section 89(k)(1)(B).

(2) *Permissible discretion*—(i) *In general.* A plan may permit discretion with respect to the administration of the plan, including the application of objective criteria specifically set forth in the plan. In addition, a plan does not fail to meet the requirements of this Q&A-4 merely because discretion is exercised in accordance with a qualified medical opinion of a physician. Also, if plan coverage or benefits are limited to those employees who satisfy certain objective conditions that are clearly set forth in the single written document and are not generally subject to the employer's discretion, an employer may exercise discretion to the extent reasonably necessary to determine whether the objective conditions have been met.

(ii) *Administrative discretion.* Administrative discretion means a determination by the employer with respect to participation in, or coverage or benefits under, a plan or with respect to the general operation of a plan to the extent the exercise of such discretion is based exclusively on clearly defined and ascertainable criteria contained in the single written document. The following provisions that permit limited administrative discretion are examples of provisions that do not violate section 89(k)(1)(B), provided that the provisions are described in the single written document prior to the date a claim is incurred by a participant who is affected by the administrative discretion and, when the provisions are made effective, they apply only to claims that have not yet been incurred: A provision allowing for the commencement of benefits under the plan as soon as administratively feasible after a stated date or event; a provision granting the employer authority to determine whether an employee has satisfied the age and service requirements of the plan or is an excludable employee under section 89(h); and a provision stating that the benefits under the plan are limited to an amount equal to the reasonable and customary charge for such services.

(iii) *Medical discretion*—(A) *In general.* A health plan does not fail to be legally enforceable merely because coverage or benefits under the plan are conditioned on a qualified medical opinion of a physician. For example, the following plan provisions do not violate the requirements of this Q&A-4: The requirement of a qualified medical opinion of a physician that treatment or benefits are medically necessary or appropriate prior to the provision of such treatment or benefits under a health plan; the requirement of a second opinion or other cost-containment feature of a health plan that is conditioned on a qualified medical opinion of a physician; and the inclusion under the plan of a managed care program. This is the case even if the qualified opinion is provided by a physician who is an employee of the employer.

(B) *Managed care programs.* A managed care program is a program that permits the provision of alternative medical care not otherwise available under a health plan for medical conditions that are covered under the plan. A managed care program must operate pursuant to conditions and procedures clearly ascertainable under the plan. That is, the availability of the program as well as a description of the types of cases that may qualify under the program must be contained in the single written document. Also, the provision of alternative medical care must be based on the consent of the employee and a qualified medical opinion of a physician. Such program may also be conditioned upon the consent of the employer.

(iv) *Certain benefit limitations.* A health plan does not include impermissible discretion merely because the plan limits certain benefits, such as reimbursements, for specified medical claims to those benefits that constitute the "prevailing" or "reasonable and customary" charge for the claim if such charge is determined in accordance with a reasonable, uniform, consistent and nondiscriminatory method. In addition, a health plan does not include impermissible discretion merely beoause such plan reimburses medical claims in excess of a "prevailing" or "reasonable and customary" charge if such reimbursements are authorized in accordance with reasonable, uniform, consistent, and nondiscriminatory claims review and reimbursement procedures set forth in the single written document.

(c) *Certain retroactive modifications in the plan.* A modification to a plan's material terms does not fail to satisfy section 89(k)(1)(B) merely because such modification applies retroactively to periods prior to the date of adoption of such modification if all of the conditions set forth in paragraph (d)(2)(iii) of Q&A-3 of this section are satisfied with respect to such modification.

(d) *Examples.* The requirements of this Q&A-4 are illustrated as follows:

Example 1. A plan does not fail to meet the requirements of section 89(k)(1)(B) because the employer grants benefits to an employee with a pre-existing medical condition in contravention of a specific plan term excluding coverage for any pre-existing conditions if the single written document is amended to reflect such expanded coverage, it is provided in a nondiscriminatory manner, and the expanded coverage continues in effect for a period of at least 12 continuous months from such amendment.

Example 2. A plan includes a managed care program which provides that upon the recommendation of the attending physician and the consent of both the insurer and the participant, the plan will reimburse alternative care (e.g., home health care expenses) instead of continued hospitalization. This program does not cause the plan to fail to meet the requirements of section 89(k)(1)(B).

Example 3. An employer maintains a health plan for former employees who retire from the employer on or after age 55 with at least 10 years of service if the employer consents to such employee's separation from service. Conditioning participation in this health plan on the employer's consent to the employee's separation constitutes impermissible discretion and violates section 89(k)(1)(B).

(e) *Transition rule.* A plan that is otherwise subject to the rules contained in section 89(k) is not required to comply with section 89(k)(1)(B) prior to the first day of the plan year following the first plan year beginning in 1989.

Q-5: What constitutes reasonable notification of employees under section 89(k)(1)(C)?

A-5: (a) *In general.* The employer or, if the plan is a multiemployer plan (within the meaning of section 3(37) of ERISA), the plan administrator must provide reasonable notice of the terms of a plan in order to satisfy section 89(k)(1)(C). Such reasonable notice must be provided to all eligible individuals (other than those individuals deriving their eligibility solely throuqh another individual, such as dependents who derive their eligibility in a health plan through an employee). An eligible individual is an individual who participates under the plan or is described in the plan as eligible to participate. An otherwise eligible individual is an eligible individual even if participation under the plan is conditioned upon an election not yet made by such individual or the passage of a waiting period required by the plan. For purposes of this paragraph (a), an eligible individual also includes an individual who is a qualified beneficiary (as defined in section 49808(g)(1)) under a health plan by reason of an occurrence of a qualifying event described in section 49808(f)(3)(A), (C) or (E). Thus, such a qualified beneficiary must receive notice separate from the employee through whom such beneficiary derived eligibility in the health plan. See paragraph (g) of this Q&A-5 for rules regarding the timing of notice.

(b) *Content of reasonable notice.* The notice must contain a fair and complete summary of the material terms of the plan that are reasonably likely to be of significance to an eligible individual. These terms include at least the following: A general description of who is eligible to participate in the plan; a general description of the coverage or coverages offered (including the general types of benefits provided under the plan, basic limitations on such benefits, and required deductibles and co-payments); the timing and method of any election to participate; the cost to the employee relating to the plan. whether by way of salary reduction or employee contributions; the method by which a copy of the plan may be obtained; and the name and means of contacting a person from whom to request further information about the plan.

(c) *Alternative form of compliance.* For any plan other than an accident or health plan, in lieu of a notice meeting the requirements of paragraph (b) of this Q&A-5, the employer (or plan administrator, if the plan is a multiemployer plan) may furnish each eligible individual with a copy of the single written document and all related documents that have been incorporated by reference. This alternative cannot be used unless the single written document complies in all material respects with the requirements of 29 CFR 2520.102-2 (style and format of summary plan description).

(d) *Specific rule as to dependent care assistance programs.* If a plan is a dependent care assistance program described in section 129, any notice to employees that is required for any plan year commencing on or after January 1, 1990, shall include a general description of the dependent care credit (under section 21), the relationship between the credit and participation in the dependent care assistance program, and the general circumstances under which the credit may be more advantageous to a taxpayer than the exclusion. If any other provision of law requires that a notice be provided to individuals eligible to participate in a dependent care assistance program, the requirements of this Q&A-5 are deemed satisfied to the extent such notice meets the requirements of this Q&A-5.

(e) *Maintenance of single written document.* The notice must contain a statement that the employer (or the plan administrator, if the plan is a multiemployer plan) shall make the single written document (including all related documents incorporated therein by reference) available for inspection upon reasonable notice. At a minimum, the following individuals shall be entitled to inspect and copy the single written document: any eligible individual; any other employee of the employer maintaining the plan; and any employee organization that represents employees of such employer. The document must be made available at no cost to the requesting individual at a reasonable time and place and, if a copy of the document is requested, a copy is to be provided at a cost no greater than that prescribed in § 601.702(f)(5)(iv)(B) of this Title.

(f) *Method of notification.* Notification to eligible individuals must be provided by the employer (or the plan administrator, if the plan is a multiemployer plan). For purposes of this paragraph (f), notice that otherwise meets the requirements of this Q&A-5 and is provided by an insurance company, health maintenance organization or other health care entity is considered to be provided by the employer. Notice must be provided to all eligible individuals (other than those individuals deriving their eligibility solely through another individual, such as dependents who derive their eligibility in a health plan through an employee). Except as otherwise stated in the final sentence of this paragraph (f), notice must be made in a manner consistent in all material respects with 29 CFR § 2520.104b-l(b)(1). If the employer elects to notify eligible individuals through the use of the alternative described in paragraph (c) of this Q&A-5, the notice must be provided to each such eligible individual either by hand or by mail with first class postage prepaid to the last known address of the eligible individual.

(g) *Timing of notice*—(1) *In general.* The notice required under section 89(k) must be provided prior to the first day on which coverage is provided under an insured or insurance-type plan or benefits are available under any other type of plan and prior to the effective date of any material amendment, extension or modification of such coverage or benefits, and no later than a reasonable time prior to the availability of any election with respect to participation under such plan. For purposes of this paragraph (g), the first date on which coverage is provided or benefits are available is the earliest date on which a claim may be incurred and be covered under coverage provided under a written document in existence on the date the claim is incurred.

(2) *Plan modifications.* If there is a modification to a material term of a plan (including any change in plan design that results in a modification of a material term), eligible individuals must be provided with notice of such modification no later than 60 days after the effective date of the modification. In addition, a notice of a retroactive modification will be treated as satisfying this paragraph (g)(2) if all of the conditions set forth in paragraph (d)(2)(iii) of Q&A-3 of this section are satisfied with respect to such modification.

(3) *New employees.* If an employee's participation in a plan is nonelective and begins within the employee's first 60 days of employment, the notice to such employee required under section 89(k)(1)(C) is not required prior to 60 days after the first day such employee is employed.

(4) *Transition rule.* With respect to a plan year beginning on or after January 1, 1989, a plan is not required to comply with this Q&A-5 prior to the later of July 1, 1989, or the first day of such plan year. The transition rule of this paragraph (g)(4) is solely for purposes of compliance with section 89(k)(l)(C). Use of the transition rule of this paragraph (g)(4) does not accelerate the first date by which the plan must meet the writing requirement of section 89(k)(1)(A).

(h) *Examples.* The requirements of this Q&A–5 are illustrated in the following examples:

Example 1. An employer has its open season relating to health plan selection from September 1 to October 1. Because the employer operates at several locations, employees are provided notice at different times. However, the employer ensures that all of its eligible individuals are notified during the period of time beginning 90 days before and ending on the first of September. The employer has notified eligible individuals on a timely basis.

Example 2. An election with respect to a plan is available on a continuous basis throughout the plan year. The employer provides the required notice to all eligible individuals 30 days prior to the beginning of the plan year. The employer has notified eligible individuals on a timely basis.

Example 3. A plan is amended effective June 1 to increase the maximum amount payable for a benefit provided under the plan. The amendment is adopted on May 1 and notice is provided to eligible individuals on that date. The amendment relates to a material term of the plan, and the employer has notified the eligible individuals on a timely basis.

Example 4. An employee begins employment on October 10. Under the terms of the employer's health plan, the employee becomes a participant in the plan as of the beginning of the next calendar month. If notice is provided to the employee no later than December 9, the employer has provided timely notice regardless of the fact that the employee becomes a participant on November 1.

Example 5. The facts are the same as in Example 4 except that the plan is elective. The notice is timely only if the employee is given notice prior to November 1.

Q–6: How does an employer meet the exclusive benefit requirement of section 89(k)(1)(D)?

A–6: (a) *In general.* A plan must be maintained for the exclusive benefit of those employees who participate in the plan. A plan may fail the requirement of this Q&A–6 by reason of its terms or operation. Whether this rule is satisfied is based on all of the facts and circumstances.

(b) *Requirements as to the individuals who may participate in a plan*—(1) *In general.* The exclusive benefit provisions are satisfied only if all of the participants in the plan or plans are common law employees of the employer or employers maintaining the plan. In the case of a voluntary employees' beneficiary association described in section 501(c)(9) (VEBA) that is part of a plan which must satisfy the requirements of section 89(k)(1)(D), those individuals who may participate in the plan include those who may be members of the VEBA under § 1.501(c)(9)–2(a).

(2) *Deemed common law employees.* An individual who is not a common law employee of an employer maintaining the plan and who receives coverage or benefits under such plan is deemed to be an employee for purposes of paragraph (b)(1) if the exclusion from gross income that is granted under the relevant provision of the Code (e.g., sections 79, 105, 106, 129 and 132) is available to such individual on the same basis that it is available to a common law employee. In addition, a qualified beneficiary, as defined in section 4980B(g)(1), is treated as a common law employee for purposes of paragraph (b)(1) of this Q&A–6 with respect to a health plan under which the qualified beneficiary receives continuation coverage.

(3) *Certain nonemployees*—(i) *In general.* An individual who is not a common law employee of the employer maintaining the plan, but who performs significant services for the employer in a capacity other than as an employee, and receives coverage or benefits under such plan may be disregarded in applying paragraph (b)(1) of this Q&A–6 if such individual pays for such coverage entirely on an after-tax basis. Thus, a nonemployee participant may be disregarded in applying paragraph (b)(1) of this Q&A–6 with respect to a health plan if the participant performs significant services for the employer and purchases the full coverage under the plan with after-tax contributions.

(ii) *Self-employed individuals.* A self-employed individual who is treated as an employee under section 401(c)(1) is treated as a common law employee of the employer for purposes of applying paragraph (b)(1) of this Q&A–6.

(4) *Examples.* The requirements of this paragraph (b) are illustrated by the following examples:

Example 1. Under section 132(f)(3), certain use of air transportation by a parent of an employee is treated as use by the employee for purposes of determining the excludability of the value of air transportation. The parent of the employee is deemed to be a common law employee for purposes of applying section 89(k)(1)(D) to a plan providing such air transportation because the air transportation provided to the parent is excludable from gross income under section 132.

Example 2. A health plan provides coverage with respect to the spouse and dependents of a common law employee-participant. Because the value of such coverage is excludable under section 106 and the benefits are excludable under section 105(b), the spouse and dependent children are deemed to be common law employees and the plan does not violate the exclusive benefit requirement of section 89(k) by reason of such coverage.

Example 3. An employer allows an independent contractor to purchase health care continuation coverage under section 4980B. The plan does not fail to meet the requirements of section 89(k) by reason of the participation of the independent contractor.

Example 4. A full-time life insurance salesman within the meaning of section 7701(a)(20) participates in an accident or health plan of an insurance company. Since this individual is treated as an employee for purposes of sections 105 and 106, the inclusion of such an individual in the plan does not violate the exclusive benefit requirement of section 89(k).

Example 5. A former employee of Employer X participates in Employer X's accident or health plan. Because this individual is treated as an employee of Employer X for purposes of sections 105 and 106, the former employee's inclusion in the plan does not violate the exclusive benefit requirement of section 89(k).

Example 6. An individual who is a leased employee with respect to the recipient under section 414(n) of the individual's services is treated as an employee of the recipient for purposes of sections 105 and 106, and thus, the inclusion of such leased employee in an accident or health plan of the recipient does not violate the exclusive benefit requirement of section 89(k).

Example 7. An individual who provides significant services to another person for a year but who is not a leased employee under section 414(n) of such person and is not otherwise an employee of such person is not treated as that person's employee for purposes of sections 105 and 106. However, the inclusion of such individual in an accident or health plan maintained by the employer does not violate the exclusive benefit requirement of section 89(k) if such individual's participation in such plan is fully paid for by such individual with after-tax contributions.

(c) *Multiemployer plans.* A multiple employer plan or a multiemployer plan maintained by two or more employers does not fail to satisfy the requirements of section 89(k)(1)(D) merely because employees of contributing employers participate in such plan or because the plan includes employees of an employee organization or of the plan.

(d) *Rules under other sections of the Code relating to the individuals who may participate in a plan.* Nothing in this Q&A–6 modifies any other section of the Code or the regulations specifically relating to who may participate in a plan. To the extent this Q&A–6 is more restrictive than another section of the Code or regulations, this Q&A–6 applies only for purposes of section 89. Notwithstanding the preceding sentence, the rules relating to who may participate in plans provided through organizations to which section 505 applies (i.e., organizations described in sections 501(c)(9) and 501(c)(17)) continue to be applicable to such

organizations. Similarly, in addition to the rules contained in this Q&A-6, the rule contained in section 125(c)(1)(A) remains applicable in determining who may participate in a cafeteria plan.

(e) *Example.* The provisions of this Q&A-6 are illustrated in the following example:

Example. A self-insured health plan is funded through a voluntary employees' beneficiary association (within the meaning of section 501(c)(9)) which accepts employee contributions.Under the plan, the experience gain for a year is used to fund a part of the cost of the program for the following year by reducing the employee cost of participation (i.e., employee premiums) for all participants. The provision does not violate the exclusive benefit rule of section 89(k).

(f) *Transition rule.* A plan that is subject to the rules contained in section 89(k) is not required to comply with section 89(k)(1)(D) prior to the first day of the plan year following the first plan year beginning in 1989.

Q-7: How is it determined whether a plan is established with the intent of being maintained for an indefinite period of time?

A-7: (a) *In general.* Whether a plan is established with the intent that it will be maintained for an indefinite period of time as required by section 89(k)(1)(E) is to be determined on the basis of all of the facts and circumstances. For purposes of section 89(k)(1)(E), a plan generally is treated as established with the intent that it will be maintained for an indefinite period of time if it is established and maintained for at least a consecutive 12-month period.

(b) *Plan modifications and terminations*—(1) *In general.* Generally, a plan does not fail the requirement of section 89(k)(1)(E) merely because the employer reserves the right to modify or terminate the plan or because the plan is not renewed pursuant to a specific plan provision or is terminated. However, in certain circumstances, significant modifications in the coverage or benefits under the plan or a termination of coverage or benefits raises a presumption that the plan was not established with the intent that it continue for an indefinite period of time. A plan is not considered to be modified or terninated merely because of a change in the insurance carrier or health care provider if the coverage and benefits under the plan are not substantially changed.

(2) *Coverage in effect for at least 12 consecutive months.* The requirement of section 89(k)(1)(E) is not violated by reason of a material modification or termination of a plan, if such material modification or ternination is effective on a prospective basis and the affected coverage (or substantially similar coverage) has been in effect for at least a consecutive 12-month period. This paragraph (b)(2) applies even if the plan contains a term specifying the intent of the employer to terminate the plan upon the expiration of a 12-month period.

(3) *Coverage in effect for less than 12 consecutive months.* For plan years beginning after December 31, 1989, special scrutiny will be given with respect to material modifications and terminations of a plan that occur before the terminated or modified coverage or benefits have been in effect for at least 12 consecutive months. Such a termination or modification will not violate the requirement of section 89(k)(1)(E) if the employer can demonstrate that there is a substantial, independent business reason for such termination or modification and that the termination or modification does not discriminate in favor of one or more highly compensated employees.

(4) *Certain modifications.* A retroactive modification to a plan does not cause the plan to fail to satisfy section 89(k)(1)(E) if all of the conditions set forth in paragraph (d)(2)(iii) of Q&A-3 of this section are satisfied with respect to such modification.

(c) *Examples.* The requirements of this Q&A-7 are illustrated in the following examples:

Example 1. An employer merges with another company. Pursuant to the merger and in order to consolidate operations, the surviving employer terminates the health coverage in mid-year for the merged company's employees and adds these employees to the plan maintained by the surviving company. The merger constitutes a valid business purpose for the termination of the health plan of the merged company and, thus, neither plan has failed the requirements of section 89(k)(1)(E).

Example 2. A dental plan is modified on July 1 to include coverage for certain orthodontic benefits. The plan year of the dental plan is the calendar year. The requirements of section 89(k)(1)(E) are not violated if the orthodontic benefits are eliminated from the plan on or after July 1 of the following year because the coverage would have been in effect for at least 12 consecutive months.

Example 3. An employer announces that employees who retire from the employer on or after age 55 with at least 10 years of service will receive employer-provided health coverage for 1 year after separation if such employees retire during a specified 2-month period. This plan does not fail to satisfy section 89(k)(1)(E) merely because the retirement window is only 2 months long, because such window is a coverage eligibility condition rather than a limitation on the period of coverage under the plan.

Example 4. A health plan with a broad range of coverage provided to all nonhighly compensated employees of an employer is in existence for only one day in a year. The employer designates this day as the testing day for its health plans. Under the facts of the case, a reasonable inference may be made that the intention of the employer in granting the coverage under the health plan in existence only on the testing day is to enhance the likelihood that the employer's other health plan will satisfy the nondiscrimination requirements of section 89. This plan fails the requirement of section 89(k)(1)(E). These circumstances may also result in a finding by the Commissioner that the plan or plans fail the nondiscriminatory provisions test of section 89(d)(1)(C).

Example 5. The requirement of section 89(k)(1)(E) may be violated if a plan is established under circumstances in which it is likely to benefit only one individual. For example, assume that a plan is adopted after an illness is diagnosed with respect to an individual and that the coverage provided relates to this illness. If the plan is terminated after the payment of these expenses, the plan may fail the permanency requirement. In this individual is a highly compensated employee these circumstances may also result in a finding by the Commissioner that the plan fails the nondiscriminatory provisions test of section 89(d)(1)(C).

(d) *Exception for fringe benefits constituting no-additional-cost services and qualified employee discounts.* The requirements of section 89(k)(1)(E) and this Q&A-7 do not apply to any plan providing no-additional-cost services as described in section 132(b) or to any plan providing qualified employee discounts as described in section 132(c).

Q-8: What are the sanctions for failure to meet the qualification requirements of section 89(k)?

A-8: (a) *In general*—(1) *Employer provided benefits.* If a plan subject to section 89(k) fails to satisfy any of the requirements of that section, the employer-provided benefits under the plan generally are not eligible for any exclusion from gross income under Part III, Subchapter B, Chapter 1, Subtitle A, of the Code. For purposes of this Q&A-8, such benefits are termed "nonexcludable benefits". Thus, for example, employer-provided benefits provided under a health plan that fails to satisfy the requirements of section 89(k) are not excludable under section 105. See, however, the limit on the amount of the nonexcludable benefits under paragraph (c)(4) of this Q&A-8. In addition, see section 6652(k) with respect to certain sanctions that may be imposed on the employer with respect to the employer's responsibilities under section 89.

(2) *Employee-provided benefits.* Employee-provided benefits are not subject to section 89(k) and continue to be subject to any applicable exclusion including, for example, the exclusion

provided in section 104(a)(3) with respect to accident and health plans.

(3) *Determination of includible benefit.* The includible benefit is determined by calculating the total amount of the benefits provided under the plan and then subtracting the amount of the employee-provided benefit. Determination of the amount of the employee-provided benefit must be made under the provisions of paragraph (d) of this Q&A–8 regarding the allocation of benefits.

(4) *Section 89(b) excess benefits.* Except as provided under paragraph (e) of this Q&A–8, benefits received under a plan that fails to satisfy section 89(k) include those benefits received under coverage that constitutes an excess benefit under section 89(b). That is, for example, sections 101 and 105 (b) and (c) are not applicable to benefits received under a discriminatory accident or health plan that also fails to satisfy section 89(k). In addition, a plan's failure to satisfy section 89(k) does not, in and of itself, affect the extent to which the coverage provided with respect to such plan (as opposed to the benefits under the plan) is eligible for an exclusion from gross income. Thus, for example, coverage under a health plan does not fail to be excludable under section 106 merely because the plan fails to satisfy section 89(k).

(b) *De minimis failures to comply with section 89(k)(1) (A) and (C)*—(1) *In general.* If a plan fails to satisfy the writing or notice requirements of section 89(k) and such failure constitutes a de minimis failure (as defined in paragraph (b)(2) of this Q&A–8), then the plan will be deemed to have complied with the requirements of section 89(k) with respect to the failed requirement, provided that such failure is corrected within 90 days after the employer has notice of such failure.

(2) *Definition of de minimis failure to comply*—(i) *In general.* A failure constitutes a de minimis failure to comply only if the failure meets all of the requirements of paragraph (b)(2)(ii) of this Q&A–8. Whether a failure to comply is described in paragraph (b)(2)(ii) of this Q&A–8 is determined under all of the facts and circumstances.

(ii) *Requirements for qualifying as a de minimis failure*—(A) *Good faith effort.* The employer must have acted in good faith and must have made a reasonable effort to comply with the applicable requirement.

(B) *No discriminatory effect.* The failure must not have had the effect of causing the plan to discriminate in favor of one or more highly compensated employees.

(C) *No retroactive reduction of coverage.* Correction of the failure cannot require that coverage be reduced under the single written document (as that plan existed at the time of the failure). That is, a failure is not a de minimis failure if its correction requires that the coverage described in the single written document be reduced with retroactive effect to conform to the previous operation of the plan.

(iii) *Examples.* The requirements of paragraph (b)(2)(ii) of this Q&A–8 are illustrated by the following examples:

Example 1. An employer provides notice to its employees regarding a health plan. Despite the employer's good faith and reasonable efforts to provide timely notice, the notice is 1 week late. The notice complies with all other requirements of section 89(k). Provided that no facts or circumstances suggest otherwise, this is a de minimis failure to comply. The correction occurred when the notice was provided.

Example 2. Despite the employer's good faith and reasonable efforts, an employer fails to give notice to its employees with respect to nonelective coverage under a dental plan that has been added to the employer's health program. The employer has no knowledge (constructive or otherwise) of such failure. Only one employee incurs a covered expense under the dental program and the employee submits a claim to the employer notwithstanding the fact that the employee is not sure whether the claim is covered. If within 90 days of receiving notice of the failure the employer follows the single written document, reimburses the expense, and gives notice relating to such coverage (including the effective date of the dental plan), then the employer has corrected the failure to comply with the notice requirements.

(3) *Correction.* The terms "correct" and "correction" mean, with respect to a de minimis failure to comply, that the employer performs all the necessary acts in order to comply with section 89(k) and places the affected employees in a financial position not worse than that in which they would have been if the employer had been in full compliance with section 89(k). If a subsequent notice is given to correct a de minimis failure, such notice must reflect the original effective date relating to the coverage, benefit or other material term that is the subject of the notice and must indicate that the employer will honor (and the employer must in fact honor) claims incurred after such effective date (including those prior to the date of such correcting notice). This paragraph (b)(3) is illustrated in the following example:

Example. Despite the good faith and reasonable efforts of the employer, a benefit is denied by a plan administrator in contravention of the written terms of the plan. If at a later date payment is made under the plan and the employer otherwise places the participant in a financial position no worse than if the employer had complied (e.g., by paying the benefit, interest if applicable and any fees incurred in compelling payment), then the failure is a de minimis failure and there has been correction. If the employee cannot be put in the same financial position as if the employer had complied, the failure cannot be corrected and the employer has failed to meet the requirements of section 89(k).

(c) *Determination of the amount of nonexcludable benefit*—(1) *In general.* The amount of a nonexcludable benefit with respect to an employee under a plan that fails to satisfy section 89(k) (including any insurance-type plan) is the value of the benefits (rather than the coverage) either received by the employee under the plan during the plan year or received thereafter but incurred under coverage in effect during the plan year. Thus, the calculation of the amount of the nonexcludable benefit under section 89(k) is based on the plan year of the failed plan and not, as is the case with the determination of excess benefit under section 89(b), on the testing year of the employer. To the extent that the single written document does not reflect a plan year, the determination of the plan year shall be based on paragraph (b) of Q&A–10 of § 1.89(a)–1. Nonexcludable benefits under section 89(k) are treated as received by an employee at the time such benefits are actually received or, but for the employee's election to defer the receipt of such benefits, first become available for receipt. In no case, however, will the amount of a nonexcludable benefit with respect to an employee exceed the limit for such employee determined under paragraph (c)(4) of this Q&A–8.

(2) *Definition of plan*—(i) *In general.* The nonexcludable benefits with respect to a plan that fails to satisfy section 89(k) include all benefits received under such plan. Unless the special definition of plan set forth in paragraph (c)(2)(ii) of this Q&A–8 applies, the nonexcludable benefits are those benefits described in the single written document that relates to the failure under section 89(k).

(ii) *Severable coverage.* To the extent that the failure of a plan to satisfy section 89(k) is directly and exclusively related to a specific portion or aspect of coverage provided in a plan, such portion or aspect of the coverage may be treated as a separate plan for purposes of determining the nonexcludable benefits under a plan that fails to satisfy section 89(k). In such a case, the coverage remaining under the single written document after the severance of the coverage providing nonexcludable

benefits does not fail to satisfy the requirements of section 89(k) solely by reason of the failure related to the severed coverage. This paragraph (c)(2)(ii) does not permit the severance of coverage of one individual from similar coverage provided to other individuals under the single written document.

(3) *Examples.* The requirements of paragraph (c) (1) and (2) of this Q&A–8 are illustrated by the following examples:

Example 1. An employer maintains a single health plan. During the plan year, the employer allows a claim for a pre-existing condition in direct contravention of a provision in the plan. If the plan is not modified in accordance with paragraph (d)(2)(iii) of Q&A–3 of this section and if no correction occurs, coverage for that benefit is deemed to constitute a separate plan and the benefit thereunder is nonexcludable. However, unless a pattern or practice indicates that this provision was intended to be a part of the employer's health plan (e.g., by continuous operation in a similar manner), benefits properly paid with respect to the plan are not taxable by reason of the above described failure.

Example 2. An employer fails to notify certain eligible individuals who are not highly compensated employees concerning their eligibility to elect to have coverage under a health plan. Certain of the individuals fail to receive coverage under the plan and incur medical expenses that are not reimbursed due to the fact that the insurance company refuses to retroactively cover these individuals. The plan relating to the notice fails to comply with section 89(k) and all benefits described in the single written document that relates to the failure are nonexcludable to the recipients.

Example 3. A health program contained in a single written document is terminated. The plan provided core coverage and dental care. The portion of the program containing dental coverage recently became effective and the termination with respect to such coverage fails to meet the permanence requirement of section 89(k)(1)(E). The failed coverage under the dental program can reasonably be severed from the balance of the program. Thus, the dental coverage is treated as a separate plan and the benefits that were provided under such plan are nonexcludable. Other benefits provided under the single written document which relates to the failed plan however, are not affected by such failure.

Example 4. A benefit is mistakenly granted to a participant in that the benefit amount exceeds the dollar limitation described in the single written document. Unless the plan is modified in accordance with paragraph (d)(2)(iii) of Q&A–3 of this section, the operation of the plan in a manner inconsistent with the single written document violates the writing requirement of section 89(k). The amount of the benefit in excess of the dollar limitation may be treated as severable coverage and thus be nonexcludable without adverse impact upon the balance of the program.

Example 5. An employer maintains a core health plan. A participant incurs an expense that is determined by the plan administrator to be incurred for a benefit not covered by the plan. The benefit is denied by the plan administrator in contravention of the terms of the plan. Coverage for such benefit is actually available under the terms of the insurance contract that describes medical benefits and coverage. However, if the employer is not able to correct the failure on a timely basis, all benefits described in the single written document that relates to the failure are nonexcludable because the coverage involved is not reasonably severable from the general core coverage under the plan.

Example 6. A notice sent to participants fails to satisfy section 89(k). The notice contains a modification of a material term relating to cosmetic surgical procedures coverage. If the failure is not corrected, benefits received under the coverage of the type described in the notice are nonexcludable.

Example 7. A notice is sent to employee participants failing to disclose a material term of the plan. The material term does not relate to a particular coverage or benefit, but rather applies to all benefits under the plan. All benefits provided under the single written document related to the notice are nonexcludable unless such failure is corrected on a timely basis.

(4) *Limit on nonexcludable amount.* Notwithstanding any other provision of this Q&A–8, the amount of the employer-provided portion (see paragraph (d)(2) of this Q&A–8) of the nonexcludable benefits received by an employee (and the employee's spouse and dependents) during a taxable year of the employee under one or more accident and health plans that fail to satisfy section 89(k) (but do not fail to be accident or health plans under section 105 and 106) shall not exceed the sum of the following 4 amounts: 10 percent of the employee's compensation (before inclusion of the employer-provided benefit) from the employer maintaining the plan for the employee's taxable year, up to and including the dollar amount in effect for such year under section 414(q)(1)(C); 25 percent of the employee's compensation in excess of such dollar amount up to and including 200 percent of such dollar amount; 75 percent of the employee's compensation in excess of 200 percent of such dollar amount up to and including 300 percent of such dollar amount; and 100 percent of the employee's compensation in excess of 300 percent of such dollar amount. The limitation under this paragraph (c)(4) is applied after the determination of the employer-provided portion of the nonexcludable benefits described in paragraph (d)(2) of this Q&A–8, but before the coordination of nonexcludable benefits with excess benefits as described in paragraph (e) of this Q&A–8. Compensation of an employee as used in this paragraph (c)(4) is compensation as determined under section 414(q)(7) and with respect to the taxable year of the employee in which the nonexcludable benefit is received. Thus, for example, if an employee with compensation from the employer of $25,000 for a calendar year also receives $20,000 in employer-provided benefits under a health plan that fails to satisfy section 89(k), the maximum amount of nonexcludable benefit for such employee for such year is $2,500 (i.e., 10 percent of $25,000). The remaining $17,500 in benefits under the plan that failed to satisfy section 89(k) may be excludable from gross income under section 105. Finally, this paragraph (c)(4) does not apply if, in addition to failing one or more of the requirements of section 89(k), a plan also fails to be an accident or health plan under sections 106 and 105.

(d) *Allocation between employer and employee contributions*—(1) *In general.* Section 89(k) generally eliminates the otherwise available exclusions only with regard to benefits attributable to the employer-provided portion of the benefits received. Thus, for example, if a portion of the coverage provided under a plan is attributable to after-tax employee contributions, an allocation of the benefits under such plan must be made on the basis of the relative cost to the employer and the employee for the plan. Allocation is permitted, however, only to the extent that a nonexcludable benefit is directly related to the portion of the coverage under the plan that is attributable to employee contributions.

(2) *Accident or health plans.* If coverage provided under an accident or health plan is partially attributable to after-tax employee contributions, an allocation of the benefits under such plan is made in accordance with a method set forth in paragraphs (c), (d) or (e) of § 1.105–1 and the method permitted to determine the applicable premium for a group health plan under section 4980B(f)(4) to determine the cost of a health plan. For purposes of this paragraph, coverage that is taxable by reason of being considered an excess benefit (as defined in section 89(b)) is not considered to be attributable to employee contributions to the plan. See paragraph (e) of this Q&A–8 for rules regarding coordination of sanctions.

(3) *Group-term life insurance plans.* The portion of coverage under a plan to which section 79 applies that is attributable to employee contributions must be computed in the manner set forth in § 1.79–3(e). In addition, the rule of paragraph (d)(1) of this Q&A–8 does not apply to certain benefits received

under a group-term life insurance program subject to section 79. Thus, while the table value of coverage over $50,000 is taxable without regard to section 89, such coverage is not attributable to employee contributions for purposes of the rule in this paragraph (d). Similarly, coverage that is taxable by reason of being considered excess benefit (as defined in section 89(b)) is not considered to be attributable to employee contributions to the plan. See paragraph (e) of this Q&A–8 for rules regarding coordination of sanctions.

(4) *Example.* The following example illustrates the rule contained in this paragraph (d):

Example. Employer A maintains a plan under which it pays two-thirds of the annual premium cost on individual policies of accident and health insurance for its employees. The remainder of each employee's premium is paid through after-tax payroll deduction from the wages of the employee. The annual cost of coverage determined by the method permitted to determine the applicable premium (as defined in section 4980B(f)(4) for plans to which that section applies) for Employee X is $240, of which $160 is paid by the employer. Thus, two-thirds (160/240) of all amounts received by Employee X under such insurance policy are attributable to the contributions of the employer and are nonexcludable if the plan fails to meet the requirements of section 89(k).

(e) *Coordination rules*—(1) *Relationship between statutory employee benefit plans that fail to meet the section 89(k) requirements and nondiscrimination tests.* The employer-provided benefit (as defined in § 1.89(a)–1 for purposes of the section 89 nondiscrimination tests) with respect to a statutory employee benefit plan must be taken into account for purposes of nondiscrimination testing under section 89 even though the plan has failed the requirements of section 89(k). That is, unless the coverage under a statutory employee benefit plan is purchased by the employee with after-tax employee contributions (or is treated as having been purchased with after-tax employee contributions), the coverage is subject to section 89 nondiscrimination testing. For the purposes of this paragraph (e), coverage that is taxable by reason of being an excess benefit under section 89(b) is not treated as purchased with after-tax employee contributions. Thus, employer-provided benefits (as defined in paragraph (b) of Q&A–1 of this section) that are attributable to such excess benefits are nonexcludable benefits if the plan also fails section 89(k). Also, a group-term life insurance plan subject to section 79 must be considered for purposes of section 89 without regard to the fact that the cost of coverage is currently taxable to the extent provided in section 79 (those amounts in excess of $50,000) or by reason of being considered excess benefit under section 89(b).

(2) *Coordination of sanctions where there is a failure of section 89(k) related to discriminatory coverage*—(i) *In general.* If an individual has a nonexcludable benefit by reason of section 89(k), the treatment of that benefit and the related excess benefit under section 89(b) are coordinated by limiting the taxable amount of any employee to the greater of either the nonexcludable benefit or the excess benefit.

(ii) *Nonexcludable benefit must be related to discriminatory coverage.* Coordination of sanctions with respect to a nonexcludable benefit under section 89(k) and a discriminatory excess benefit under section 89(b) is available only when the nonexcludable benefit under section 89(k) is related to the excess benefit that is taxable by reason of its being contained in a discriminatory employee benefit plan under section 89(c). For this purpose, a plan means any specific option under the health program. The determination of relatedness is made on the basis of all of the facts and circumstances. Generally, if an employee is treated as having received an excess benefit under section 89(b) and the excess benefit relates to a failure to meet the requirements of paragraph (d)(2) (the 90 percent/50 percent eligibility test) or (d)(4) (the 75 percent benefits test) of Q&A–1 of § 1.89(a)–1, there is a presumption that such excess benefit does not relate to a plan (or portion thereof) that fails section 89(k). Thus, for example, an employee who receives employer-provided coverage with a value of $2,500 under an indemnity plan and employer-provided coverage with a value of $750 under a dental plan and who is treated as receiving an excess benefit of $1,000 under section 89(b) because these health plans fail to meet the requirements of the 75 percent benefits test or the 90 percent/50 percent eligibility test, and a nonexcludable benefit of $600 because the dental plan fails section 89(k), the entire $1,000 excess benefit is treated as attributable to the indemnity plan and the total includible amount would be $1,600 ($1,000 plus $600). If the employee received an excess benefit of $3,000 under section 89(b), then $500 of such excess benefit would be allocated to the dental plan and the total includible amount would be $3,100. If the dental plan failed the 50 percent eligibility test, then $750 of the excess benefit or the higher of the excess benefit if less than $750 of the excess benefit related to the dental plan under Q&A–9 of § 1.89(a)–1 or the $600 nonexcludable benefit would be includible in the employee's gross income.

(iii) *Coordination where nonexcludable benefit received in taxable year other than the taxable year in which testing year ends.* If a nonexcludable benefit under section 89(k) is received in a taxable year of the employee other than that taxable year in which ends the testing year for which there is a related excess benefit under section 89(b) (including any additional time permitted by reason of an election under section 89(a)(2)(B)) and if the benefits otherwise qualify for the coordination described in this paragraph (e), the rules of this paragraph (e)(2)(iii) apply. If the testing year ends in a later taxable year of the employee than the taxable year in which the nonexcludable benefit is received, the amount of the excess benefit that is included in gross income for the later taxable year is reduced (but not below zero) by the amount of nonexcludable benefit included in gross income for the earlier taxable year. Similarly, where the nonexcludable benefit is received in a later taxable year of the employee than the taxable year in which the testing year ends, the amount of the nonexcludable benefit included in gross income for the later year is reduced (but not below zero) by the amount of the excess benefit included for the earlier taxable year to which the nonexcludable benefit relates.

(iv) *Examples.* The provisions of this paragraph (e)(2) are illustrated by the following examples:

Example 1. Assume that an employer's testing year under section 89(a) is the calendar year. Plan A has a plan year beginning on July 1 and has an employer-provided benefit, based on its annual applicable premium, of $2,000. Employee X receives a reimbursement under plan A on July 10 in the amount of $500. Assume that Plan A fails section 89(k). Assume further that Employee X has received $1,000 in excess benefit for the testing year, all of which relates to the total value of coverage under Plan A. For this calendar year, Employee X must include in gross income $1,000.

Example 2. Assume the same facts as in Example 1, except that the $500 reimbursement is $1,500. Employee X must include in income $1,500.

Example 3. Assume that an employer's testing year begins on July 1. Plan A has an applicable premium of $2,000 and its plan year is the 1991 calendar year. Employee X receives a reimbursement of $500 under Plan A on July 10, 1991. Assume that Plan A fails section 89(k). The employer determines that Employee X has $2,000 in excess benefit in

the testing year that begins July 1, 1991, related to Plan A. For 1991, Employee X must include $500 in gross income. However, for 1992, Employee X may use that $500 as an offset against the amount of excess benefit related to the coverage under which the benefit was granted. Thus, Employee X is only required to include $1,500 in gross income for 1992 ($2,000 – $500).

Example 4. Assume the same facts as Example 3, except that Employee X received the reimbursement on June 10, 1991. Unless other facts indicate otherwise, no offset is available since the reimbursement did not relate to excess benefit calculated with regard to the 1991 testing year.

(f) *Authority to limit nonexcludable benefits.* The Commissioner, in revenue rulings, notices and other publications of general applicability, may limit the nonexcludable benefit that would otherwise be determined under section 89(k) and this proposed regulation to the extent the facts and circumstances indicate that the elimination of the otherwise available exclusions from gross income would be inconsistent with the purposes underlying the requirements of section 89(k). Among the facts and circumstances to be taken into account are the relationship between the plan's failure under section 89(k) and the employee's receipt of benefits under such plan, the extent to which the plan's failure was attributable to a reckless or intentional disregard of the requirements of section 89(k), and whether the imposition of the full sanction under section 89(k) would impose a hardship on the employee that is not justified by the nature and degree of the plan's failure.

Par. 3. Proposed § 1.125–1 as published in the **Federal Register** on May 7, 1984 (49 FR 19321), and amended on December 31, 1984 (49 FR 50733), is amended by adding a new Q&A–30 at the end, to read as follows:

§ 1.125–1 Questions and Answers relating to cafeteria plans.

* * * * *

Q–30: Are there additional rules for cafeteria plans?

A–30: Yes. Additional rules for cafeteria plans are contained in § 1.125–2 and take effect as set forth in Q&A–1 of § 1.125–2. To the extent that § 1.125–2 and this § 1.125–1 are inconsistent, § 1.125–2 supersedes this § 1.125–1.

Par. 4. New § 1.125–2 is added to read as follows:

§ 1.125–2 Miscellaneous cafeteria plan questions and answers.

The following is a list of the questions addressed in this section.

Q–1: What are the effective dates of these cafeteria plan rules?

Q–2: What does section 125 of the Code provide?

Q–3: What is a cafeteria plan under section 125?

Q–4: What benefits constitute qualified benefits and what benefits constitute cash under a cafeteria plan?

Q–5: May a cafeteria plan include a benefit that defers the receipt of compensation?

Q–6: In what circumstances may participants revoke existing elections and make new elections under a cafeteria plan?

Q–7: How do the rules governing the tax-favored treatment of employer-provided benefits apply to plans that are flexible spending arrangements?

Q–1: What are the effective dates of these cafeteria plan rules?

A–1: Q&A–1 through Q&A–6 of this § 1.125–2 apply to plan years of cafeteria plans as set forth in Q&A–10 of § 1.89(a)–1 (regarding the effective date of section 89). Q&A–7 of this § 1.125–2 (relating to flexible spending arrangements) applies to plan years beginning after December 31, 1989.

Q–2: What does section 125 of the Code provide?

A–2: In general, an employee who has an election among nontaxable benefits and taxable benefits (including cash) must include in gross income any taxable benefits that the employee could have actually received pursuant to the employee's election. The amount of these benefits is included in the employee's income in the year in which the employee would have actually received the taxable benefits if the employee had elected such benefits. This generally is the result even if the employee's election between the nontaxable benefits and taxable benefits is made prior to the year in which the employee would have actually received the taxable benefits. However, section 125 provides that cash (including certain taxable benefits) provided under a nondiscriminatory cafeteria plan will not be included in a participant's gross income merely because the participant has the opportunity, before the cash becomes currently available to the participant, to choose among cash and the nontaxable benefits under the cafeteria plan

Q–3: What is a cafeteria plan under section 125?

A–3: A cafeteria plan is a plan maintained by an employer for the benefit of its employees that satisfies the requirements of section 89(k), under which all participants are employees, and under which each participant has the opportunity to choose among cash and qualified benefits. Additionally, a cafeteria plan satisfies the written plan document requirement of clause (v) of Q&A–3 of § 1.125–1 only if the plan describes the maximum amount of elective contributions available to any employee under the plan either by stating the maximum dollar amount or maximum percentage of compensation that may be contributed as elective contributions under the plan by employees or by stating the method for determining the maximum amount or percentage of elective contributions that employees may make under the plan. The meaning of "elective contributions" under a cafeteria plan is the same as the meaning of "salary reduction contributions" under a cafeteria plan. See also paragraph (a)(2) of Q&A–8 of § 1.89(a)–1.

Q–4: What benefits constitute qualified benefits and what benefits constitute cash under a cafeteria plan?

A–4: (a) *Qualified benefits*—(1) *In general.* A benefit is a qualified benefit under a cafeteria plan if the benefit does not defer the receipt of compensation and the benefit is not includable in an employee's gross income by reason of an express provision of Chapter 1 of the Code. In the case of insurance-type benefits, such as benefits provided under accident or health plans (sections 106 and 105) and group-term life insurance plans (section 79), the benefit is the coverage under the plan.

(2) *Items that constitute qualified benefits*—(i) *Accident or health plans.* Coverage under an accident or health plan is a qualified benefit to the extent that such coverage is excludable from income under section 106. Thus, for example, coverage under a long-term disability plan and coverage under an accidental death and dismemberment policy may be qualified benefits.

(ii) *Group-term life insurance.* Group-term life insurance coverage that is excludable from gross income under section 79 and group-term life insurance coverage that is includable in gross income solely because the death benefit payable thereunder is in excess of the dollar limit of section 79 are qualified benefits.

(iii) *Certain discriminatory benefits.* Accident or health plan coverage, group-term life insurance coverage, and benefits under a dependent care assistance program do not fail to be qualified benefits under a cafeteria plan merely because they are includable in gross income solely because of section 89 or any other applicable nondiscrimination requirement (e.g., section 129(d)).

(iv) *Certain dependent care assistance benefits.* Benefits under a dependent care assistance program that would have been excludable from gross income under section 129 but for the

elimination of overnight camp expenses from dependent care assistance under such section (effective January 1, 1988) or the reduction of the age limit on children qualifying as dependents under such section (effective January 1, 1989) do not fail to be qualified benefits merely because such changes in law cause such benefits to be taxable. However, the preceding sentence applies only if the benefits are provided under a program that otherwise qualifies as a dependent care assistance program under section 129, are taxable to the employee upon receipt, and are provided by the December 31 next following the effective date of the applicable change in law. After such date, such benefits will not constitute qualified benefits but may be treated as cash pursuant to paragraph (b) of this Q&A-4.

(b) *Currently taxable benefits treated as cash.* In general, a benefit is treated as cash if such benefit does not defer the receipt of compensation and an employee who receives such benefit purchases such benefit with after-tax employee contributions or is treated, for all purposes under the Code (including, for example, reporting and withholding purposes), as receiving, at the time that such benefit is received, cash compensation equal to the full value of such benefit at such time and then purchasing such benefit with after-tax employee contributions. Thus, for example, long-term disability coverage is treated as cash if the cafeteria plan provides that an employee may purchase the coverage under the plan with after-tax employee contributions, or provides that the employee receiving such coverage is treated as having received cash compensation equal to the value of the coverage and then as having purchased the coverage with after-tax employee contributions. Any taxable benefit that is not described in paragraph (a) of this Q&A-4 and is not treated as cash under this paragraph (b) may not be included in a cafeteria plan.

(c) *Qualified cash or deferred arrangements.* Elective contributions to a qualified cash or deferred arrangement (section 401(k)) are permitted under a cafeteria plan. In addition, after-tax employee contributions under a qualified plan subject to section 401(m) are permitted under a cafeteria plan. The right to make such contributions will not cause a plan to fail to be a cafeteria plan merely because, under the qualified plan, employer matching contributions are made with respect to elective or after-tax employee contributions.

(d) *Benefits that do not constitute qualified benefits or cash.* Benefits of the type described in section 117 or 132 do not constitute qualified benefits or cash and thus may not be included in a cafeteria plan regardless of whether any such benefit is purchased with after-tax employee contributions or on any other basis. Thus, for example, health diagnostic or examination plans are qualified benefits under a cafeteria plan because such plans are accident or health plans that are eligible for the exclusion under section 106 and are not, in any case, eligible for the exclusion under section 132.

Q-5: May a cafeteria plan include a benefit that defers the receipt of compensation?

A-5: (a) *In general.* A cafeteria plan may not include any plan that offers a benefit that defers the receipt of compensation. In addition, a cafeteria plan may not operate in a manner that enables employees to defer compensation. For example, a plan that permits employees to carry over unused elective contributions or plan benefits (e.g., accident or health plan coverage) from one plan year to another operates to defer compensation. This is the case regardless of how the contributions or benefits are used by the employee in the subsequent plan year (e.g., whether they are automatically or electively converted into another taxable or nontaxable benefit in the subsequent plan year or used to provide additional benefits of the same type). Similarly, a cafeteria plan operates to permit the deferral of compensation if the plan permits participants to use contributions for one plan year to purchase a benefit that will be provided in a subsequent plan year (e.g., life, health, disability, or long-term care insurance coverage with a savings or investment feature, such as whole life insurance). For example, a cafeteria plan operates to permit the deferral of compensation if the cafeteria plan includes a health plan that is a flexible spending arrangement (as defined in Q&A-7 of this section) and such health plan may reimburse participants' premium payments for other accident or health coverage extending beyond the end of the plan year. See Q&A-7 of this section for the treatment of experience gains under a health plan that is a flexible spending arrangement.

(b) *Exceptions.* A plan does not fail to be a cafeteria plan merely because the plan permits participants to make elective contributions under a qualified cash or deferred arrangement under section 401(k) or permits participants employed by certain educational institutions to purchase retiree group-term life insurance. Similarly, a cafeteria plan does not include a benefit that defers the receipt of compensation merely because the cafeteria plan provides the opportunity to make after-tax employee contributions subject to section 401(m) under a qualified plan. In addition, a cafeteria plan will not be treated as including a benefit that defers the receipt of compensation merely because, under the qualified plan, employer matching contributions (as defined in section 401(m)(4)(A)) are made with respect to such elective contributions or after-tax employee contributions. Finally, reasonable premium rebates or policy dividends paid with respect to benefits provided under a cafeteria plan do not constitute impermissible deferred compensation if such rebates or dividends are paid before the close of the 12-month period immediately following the plan year to which such rebates and dividends relate.

(c) *Treatment of paid vacation days under a cafeteria plan*—(1) *In general.* A cafeteria plan may include elective, paid vacation days by permitting participants to receive either additional or fewer paid vacation days than the employer otherwise provides to the employees on a nonelective basis, if the inclusion of elective vacation days under the plan does not operate to permit the deferral of compensation.

(2) *Ordering of elective and nonelective vacation days.* In determining whether a plan that provides for paid vacation days operates to permit the deferral of compensation, and thus fails to be a cafeteria plan, a participant is deemed to use nonelective vacation days (i.e., the vacation days with respect to which the employee had no election) before elective vacation days.

(3) *Cashing out unused elective vacation days.* A plan does not operate to permit the deferral of compensation merely because the plan permits a participant who has not used all elective, paid vacation days for a plan year to receive in cash the value of such unused days in exchange for such days if the participant receives the cash on or before the earlier of the last day of the plan year of the cafeteria plan or the last day of the employee's taxable year to which the elective contributions used to purchase the unused days relate.

(4) *Examples.* The following examples illustrate the rules of this paragraph (c):

Example 1. Assume that an employer provides an employee with 2 weeks of paid vacation for each calendar year and maintains a calendar year cafeteria plan that

permits the employee to "purchase," with elective contributions, an additional week of paid vacation. Assume further that Employee A, with a calendar tax year, purchases 1 additional week of vacation. If Employee A uses only 2 weeks of vacation during the year, the employee is treated as having used the 2 nonelective weeks and as having retained the 1 elective week. If the 1 remaining week (i.e., the elective week) may be carried over to the next year (or the value thereof used for any other purpose in the next year), the plan operates to permit the deferral of compensation and thus is not a cafeteria plan. However, the cafeteria plan may permit the employee to receive the value of the unused elective vacation week in cash before the end of the applicable calendar year.

Example 2. The facts are the same as set forth in Example 1, except that Employee A uses only 1 week of vacation during the year. Thus, Employee A is treated as having used 1 nonelective week and as having retained 1 nonelective week as well as 1 elective week of vacation. Because the nonelective vacation days are not part of the cafeteria plan (i.e., the employer or plan does not permit participants to exchange regular vacation days for other benefits), Employee A may be permitted to carry over the 1 nonelective week of vacation to the next year. In addition, under the terms of the cafeteria plan, Employee A must either forfeit the remaining elective vacation week or receive in cash the value of such unused days before the end of the applicable calendar year.

Q-6: In what circumstances may participants revoke existing elections and make new elections under a cafeteria plan?

A-6: (a) *In general.* A plan is not a cafeteria plan unless the plan requires that participants make elections among the benefits offered under the plan. In general, an election will not be deemed to have been made if, after a participant has elected and begun to receive a benefit under the plan, the participant is permitted to revoke the election during the period of coverage under the plan, even if the revocation relates only to the remaining portion of the coverage period with respect to the benefit and even if the revocation is in response to a change in the tax treatment of such benefit. However, in the circumstances specified in paragraphs (b) through (g) of this Q&A-6, notwithstanding Q&A-8 of § 1.125-1, the terms of a cafeteria plan may permit a participant to revoke an existing election and, in some cases, to make a new election with respect to the remaining portion of the period of coverage. If a new election is permitted under this Q&A-6, then such new election must be consistent with the reason that such change was permitted. In addition, a cafeteria plan may permit an election change to the extent required under paragraph (c)(6) of Q&A-3 of § 1.89(a)-1. Such election changes will not cause taxable benefits offered under the cafeteria plan to be treated as currently available to employees. See Q&A-7 of this section for certain additional limits on election changes that relate to certain flexible spending arrangements.

(b) *Significant cost or coverage changes*—(1) *Cost changes.* If the cost of a health plan provided by an independent, third party provider under a cafeteria plan increases or decreases during a plan year and under the terms of the cafeteria plan, employees are required to make a corresponding change in their premium payments, the cafeteria plan may, on a reasonable and consistent basis, automatically increase or decrease, as the case may be, all affected participants' elective contributions or after-tax employee contributions for such health plan. Alternatively, if the premium amount significantly increases, a cafeteria plan may permit participants either to make a corresponding change in their premium payments or to revoke their elections and, in lieu thereof, to receive on a prospective basis, coverage under another health plan with similar coverage. No elective adjustments of participants' contributions or revocations of participants' elections other than those provided for in the preceding sentence may be permitted under a cafeteria plan on account of changes in the cost of a health plan.

(2) *Coverage changes.* If the coverage under a health plan provided by an independent, third-party provider is significantly curtailed or ceases during a period of coverage, a cafeteria plan may permit all affected participants to revoke their elections of the health plan and, in lieu thereof, to receive on a prospective basis coverage under another health plan with similar coverage.

(c) *Certain changes in family status.* A cafeteria plan may permit a participant to revoke a benefit election during a period of coverage and to make a new election for the remaining portion of the period if the revocation and new election are both on account of a change in family status and are consistent with such change in family status. For purposes of this paragraph (d), examples of changes in family status for which a benefit election change may be permitted include the marriage or divorce of the employee, the death of the employee's spouse or a dependent, the birth or adoption of a child of the employee, the termination of employment (or the commencement of employment) of the employee's spouse, the switching from part-time to full-time employment status or from full-time to part-time status by the employee or the employee's spouse, and the taking of an unpaid leave of absence by the employee or the employee's spouse. Election changes are also permitted where there has been a significant change in the health coverage of the employee or spouse attributable to the spouse's employment. Benefit election changes are consistent with family status changes only if the election changes are necessary or appropriate as a result of the family status changes.

(d) *Separation from service.* A cafeteria plan may permit an employee who separates from the service of the employer during a period of coverage to revoke existing benefit elections and terminate the receipt of benefits for the remaining portion of the coverage period. However, in such case, the plan must prohibit the employee, if the employee should return to service for the employer, from making new benefit elections for the remaining portion of the period of coverage.

(e) *Cessation of required contributions.* A cafeteria plan may provide that a benefit will cease to be provided to an employee if the employee fails to make the required premium payments with respect to the benefit (e.g., employee ceases to make premium payments for health plan coverage after a separation from service). However, in such case, the plan must prohibit the employee from making a new benefit election for the remaining portion of the period of coverage.

(f) *Elective contributions under a qualified cash or deferred arrangement.* A cafeteria plan may permit a participant who has elected to make elective contributions under a qualified cash or deferred arrangement (within the meaning of section 401(k)) to modify or revoke the election as permitted under section 401(k). Similarly, a cafeteria plan may permit a participant who has elected to make after-tax employee contributions subject to section 401(m) to modify or revoke the election as permitted under section 401(m). Thus, for example, a cafeteria plan may include a benefit option providing for elective contributions under a qualified cash or deferred arrangement which requires that, as a condition of a hardship distribution, the employee receiving the distribution cease making elective contributions under the arrangement for a specified period.

Q-7: How do the rules governing the tax-favored treatment of employer-provided benefits apply to plans that are flexible spending arrangements?

A-7: (a) *In general.* Health plans that are flexible spending arrangements as

defined in paragraph (c) of this Q&A-7 (health FSAs) must conform to the generally applicable rules under sections 105 and 106 in order for the coverage and reimbursements under such plans to qualify for tax-favored treatment under such sections. Thus, health FSAs must qualify as accident or health plans. This means that, in general, while the health coverage under the FSA need not be provided through a commercial insurance contract, health FSAs must exhibit the risk-shifting and risk-distribution characteristics of insurance. Similarly, reimbursements under health FSAs must be paid specifically to reimburse the participant for medical expenses incurred previously during the period of coverage. Furthermore, a health FSA cannot operate under a cafeteria plan in a manner that enables participants to receive coverage only for periods for which the participants expect to incur medical expenses if such periods constitute less than a plan year. A reimbursement is not paid specifically to reimburse the participant for medical expenses if the participant is entitled to these amounts, in the form of cash or any other taxable or nontaxable benefit (including health coverage for an additional period), without regard to whether or not the employee incurs medical expenses during the period of coverage. A health FSA will not qualify for tax-favored treatment under sections 105 and 106 of the Code if the effect of the reimbursement arrangement eliminates all, or substantially all, risk of loss to the employer maintaining the plan or other insurer. These rules apply with respect to a health plan without regard to whether the plan is provided through a cafeteria plan. See Q&A-17 of § 1.125-1.

(b) *Special requirements*—(1) *In general.* A health FSA must satisfy the requirements set forth in this paragraph (b) in order for the employer-provided health coverage provided through the health FSA to qualify for the exclusion from income under section 106 and for the reimbursements and other benefits pursuant to the health FSA coverage to qualify for the exclusion from income under section 105.

(2) *Uniform coverage throughout coverage period.* The maximum amount of reimbursement under a health FSA must be available at all times during the period of coverage (properly reduced as of any particular time for prior reimbursements for the same period of coverage). Thus, the maximum amount of reimbursement at any particular time during the period of coverage cannot relate to the extent to which the participant has paid the required premiums for coverage under the health FSA for the coverage period. Similarly, the payment schedule for the required premiums for coverage under a health FSA may not be based on the rate or amount of covered claims incurred during the coverage period. Reimbursement will be deemed to be available at all times if it is paid at least monthly or when the total amount of the claims to be submitted is at least a specified, reasonable minimum amount (e.g., $50). If the employee revokes existing elections, the employer must reimburse the employee for any amount previously paid for coverage or benefits relating to the period after the date of the employee's separation from service regardless of the employee's claims or reimbursements as of such date. The following examples illustrate the rules of this paragraph (b)(2):

Example 1. Assume that an employee elects coverage under a health FSA providing coverage of up to $300 in medical expenses and the annual premium for a calendar year of coverage is $300. Assume also that the employee is permitted to pay the $300 premium through salary reduction of $25 per month throughout the coverage period. The employee must be eligible to receive the maximum amount of reimbursement of $300 at all times throughout the coverage period (reduced by prior reimbursements). Thus, if the employee incurs $250 of medical expenses in January, the full $250 must be available for reimbursement even though the employee has made only one premium payment. If the employee incurs another $50 in health expenses in February, the remaining $50 of the $300 maximum must be available for reimbursement. The employer or plan may not provide for an acceleration of the required premium payments based on the employee's incurred claims and reimbursements.

Example 2. Assume that an employee elects coverage under a health FSA with a maximum reimbursement limit of $500 for a calendar year of coverage and is required to pay the $450 premium for such coverage in two equal $225 installments, one at the beginning of the period of coverage and the second installment by the beginning of the sixth month of coverage. Assume further that the employee incurs a $400 medical expense in February and the FSA makes a $400 reimbursement to the employee in March. The employee does not incur any additional medical expenses before the end of June, at which time the employee separates from service. If the employee fails to make the second premium installment, the employee's coverage under the FSA may be terminated as of the end of June so that medical expenses incurred after June are not covered. If the employee pays the second premium installment, the employee's coverage under the FSA must continue, so that additional medical expenses (up to the remaining $100) incurred before the end of December are covered.

(3) *Twelve-month period of coverage.* The period of coverage under a health FSA must be 12 months or, in the case of a short first plan year or a short plan year of a cafeteria plan where the plan year is being changed, the entire short plan year. Election changes to increase or decrease the level of coverage under a health FSA during the 12-month period of coverage are not permitted with respect to health FSAs. However, a cafeteria plan may permit participants to make health FSA election changes for the remaining portion of the 12-month period of coverage on account of and consistent with certain family status changes. See Q&A-6 of this section. In addition, a cafeteria plan may provide that the period of coverage under a health FSA terminates if the employee ceases to make required premium payments; however, such employee may not be permitted to make a new health FSA benefit election for the remaining portion of the original coverage period. Also, a cafeteria plan may permit an employee who separates from the service of the employer during a period of coverage to revoke existing benefit elections and terminate receipt of benefits, including coverage under the health FSA. For the application of the health care continuation rules of section 4980B of the Code to health FSAs, see the regulations under section 4980B or its predecessor section 162(k) of the Code. The requirements of this paragraph (b)(3) are illustrated by the following example:

Example. Assume that an employee has elected a $300 calendar year health FSA, with monthly premium payments of $25 during the 12-month period of coverage. Such employee separates from service for the employer at the end of June and ceases to make additional premium payments. The cafeteria plan may provide that the FSA's period of coverage does not extend beyond June if the employee does not continue to make the required premium payments. However, if the employee makes the total premium payment for the 12-month period of coverage, the cafeteria plan may not terminate the FSA's period of coverage merely because the employee separated from service before the end of the coverage period.

(4) *Prohibited reimbursement.* A health FSA can only reimburse medical expenses as defined in section 213. Thus, for example, a health FSA cannot reimburse dependent care expenses. In addition, a health FSA may not treat participants' premium payments for other health coverage as reimbursable expenses. Thus, for example, a health FSA may not reimburse participants for premiums paid for other health plan coverage, including premiums paid for health coverage under a plan

maintained by the employer of the employee's spouse or dependent. (See also Q&A–5 of this section with respect to whether the reimbursement of other premiums constitutes impermissible deferred compensation.) This paragraph (b)(4) does not prevent premiums for current health plan coverage (including coverage under a health FSA) from being paid on a salary reduction basis through the ordinary operation of the cafeteria plan.

(5) *Claims substantiation.* A health FSA may reimburse a medical expense only if the participant provides a written statement from an independent third party stating that the medical expense has been incurred and the amount of such expense and the participant provides a written statement that the medical expense has not been reimbursed or is not reimbursable under, any other health plan coverage. Thus, for example, as with any other flexible spending arrangement, a health FSA cannot make advance reimbursements of future or projected expenses. In determining whether, under all the facts and circumstances, employees are being reimbursed for inadequately substantiated claims, special scrutiny will be given to other arrangements such as employer-to-employee loans that are related to the employee premium payments or actual or projected employee claims.

(6) *Claims incurred.* Medical expenses reimbursed under a health FSA must be incurred during the participant's period of coverage under the FSA. Expenses are treated as having been incurred when the participant is provided with the medical care that gives rise to the medical expenses, and not when the participant is formally billed or charged for, or pays for the medical care. Also, expenses are not treated as incurred during a period of FSA coverage if such expenses are incurred before the later of the date the health FSA is first in existence or the participant first becomes enrolled under the health FSA.

(7) *FSA experience gains.* If a health FSA has an experience gain with respect to a year of coverage, the excess of the premiums paid (e.g., employer contributions, including salary reduction contributions and after-tax employee contributions) and income (if any) of the FSA over the FSA's total claims reimbursements and reasonable administrative costs for the year may be used to reduce required premiums for the following year or may be returned to the premium payers (the participants for premiums paid by salary reduction or employee contributions) as dividends or premium refunds. Such experience gains must be allocated among premium payers on a reasonable and uniform basis. It is permissible to allocate such amounts based on the different coverage levels under the FSA received by the premium payers. However, in no case may the experience gains be allocated among premium payers based (directly or indirectly) on their individual claims experience. The requirements of this paragraph (b)(7) are illustrated in the following example:

Example. Assume that an employer maintains a cafeteria plan under which its 1,200 employees may elect one of several different annual coverage levels under a health FSA in $100 increments from $500 to $2,000. For a plan year, 1,000 employees elect levels of coverage under the health FSA. For such year, the FSA has an experience gain of $5,000 (i.e., premium payments for the year exceed reimbursed claims plus administrative costs by $5,000). The $5,000 may be allocated to all premium payers for the year, as a premium refund, on a per capita basis weighted to reflect the participants' elected levels of coverage. Alternatively, the $5,000 may be used to reduce the required premiums under the health FSA for all eligible employees for the next plan year (e.g., a $500 health FSA for the next year might be priced at $480) or to reimburse claims incurred above the elective limit in such year as long as such reimbursements are made in a nondiscriminatory manner.

(8) *Dependent care assistance.* Analogous rules to this paragraph (b), with the exception of paragraph (b)(2) relating to uniform coverage throughout the coverage period, are applicable to dependent care assistance provided under section 129. See Q&A–18 of § 1.125–1.

(c) *Definition of flexible spending arrangement.* A flexible spending arrangement (FSA) generally is a benefit program that provides employees with coverage under which specified, incurred expenses may be reimbursed (subject to reimbursement maximums and any other reasonable conditions) and under which the maximum amount of reimbursement that is reasonably available to a participant for a period of coverage is not substantially in excess of the total premium (including both employee-paid and employer-paid portions of the premium) for such participant's coverage. A maximum amount of reimbursement is not substantially in excess of the total premium if such maximum amount is less than 500 percent of the premium. A single FSA may provide participants with different levels of coverage and maximum amounts of reimbursement. However, for purposes of section 89, each different level of coverage under a FSA is a separate plan.

(d) *Effective date.* This Q&A–7 is effective for plan years beginning after December 31, 1989.

(e) *Authority to issue additional requirements.* The Commissioner, in revenue rulings, notices and other publications of general applicability, may make any modification to, or issue such additional requirements for the application of, the rules contained in this Q&A–7 as may be necessary to insure proper compliance with the intent of such rules.

(f) *Example.* The provisions of paragraph (c) of this Q&A–7 are illustrated by the following example:

Example 1. Assume that an employer with 1,000 employees maintains a cafeteria plan under which the employees may elect among several benefit options, including insured health plans and HMOs. The plan provides that the required premiums or contributions for the benefits are to be made by salary reduction. Even though the plan may characterize employees' premium payments and other contributions as flexible spending contributions or credits, the operation of a cafeteria plan to permit employees' contributions to be made on a salary reduction basis does not, standing alone, cause the plan (or any benefit thereunder) to be treated as a flexible spending arrangement.

Example 2. Assume that an employer with 1,000 employees maintains a cafeteria plan under which the employees may elect, among other benefits, a level of coverage under an arrangement that will reimburse medical expenses incurred during a year up to the specified amount elected by the employee. The maximum amount of reimbursement that can be deducted for a year is $5,000.

Each employee's premium for such coverage is equal to the maximum reimbursement amount selected by the employee. Such an arrangement is a health FSA.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 89–5136 Filed 3–2–89; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corporation

33 CFR Part 401

Seaway Regulations and Rules: Miscellaneous Amendments

AGENCY: Saint Lawrence Seaway Development Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Saint Lawrence Seaway Development Corporation and the St. Lawrence Seaway Authority of Canada publish joint Seaway Regulations and Rules. As a result of discussions with

the Authority, it has been determined that a number of existing regulations need clarification. In addition, certain amendments are proposed to meet existing conditions, such as a permanent change in the tie-up side at Lock 2 of the Welland Canal, or to permit realistic flexibility in Seaway operations, such as a discretionary permit for the transit of certain higher levels of explosive cargoes. Finally, the Corporation and the Authority are proposing a lower fee for tolls security deposits for vessels with a good payment record over a period of five years. Therefore, the Corporation proposes to amend 33 CFR Part 401, Subpart A.

DATES: The Corporation invites comments on the proposed revision to the Tariff of Tolls from any interested person or organization. Any party wishing to present views or data on the proposed revision may file comments with the Corporation on or before April 5, 1989.

FOR FURTHER INFORMATION CONTACT: Marc C. Owen, Chief Counsel, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-0091.

SUPPLEMENTARY INFORMATION: As a result of discussions with the Authority, the Saint Lawrence Seaway Development Corporation proposes to amend the Seaway Regulations and Rules as described in the following summary.

The first paragraph in § 401.12(a), will be amended to make it clear that mooring lines are to be available for securing on either side of a vessel.

Sections 401.19(a) and (b)(2) will be amended to include the popular names of the applicable Canadian and United States laws.

In § 401.22(a), the word "weight" will be replaced by the word "displacement", which is the more appropriate term for reference to a vessel.

The references to Canadian financial entities in § 401.26(a)(2) and (4) will be amended to reflect changes to the Canadian Bank Act.

Present § 401.26(d) will be redesignated as 401.26(e) and a new § 401.26(d) will be added to reduce the security for tolls required for a number of precleared vessels owned and controlled by the same individual or company and having the same representative if the individual, company, or representative has paid every toll account in the preceding five years in a timely fashion. The amount will be reduced from $2.55 per ton of the aggregate maximum tonnage of vessels within the Seaway at any one time to $1.50 per ton for the aggregate gross registered tonnage of the precleared vessels.

Section 401.28(a) will be amended to add a reference to § 401.27 to make it clear that the vessel traffic controller or any other officer will provide the instructions on what will be the appropriate speed in the conditions described in § 401.28(a).

Section 401.22 will be amended to change the reference to § 401.3(d) to 401.3 because vessels with dimensions other than any of those described in § 401.3. as a whole, not just other than those described in paragraph (d), may be allowed transit with the Corporation's or the Authority's approval.

Section 401.31(a) will be amended to state that the International Regulations for the Prevention of Collisions at Sea are now the source of the rules for vessels meeting and passing, superseding those presently cited in that subsection. In § 401.33, the reference to paragraph (d) of § 401.3. will be deleted. Since it is possible to allow transit of vessels of greater dimensions than those permitted under present paragraph (d), the amendment will allow this with the approval of the Authority and the Corporation.

Section 401.42(a) will be amended to add a new requirement for passing hand lines which now is necessary for upbound vessels at Locks 4 and 5 of the Welland Canal.

The Welland Canal Lock 2 table in § 401.43. will be amended to reflect a permanent change to the tie-up side at Lock 2 to starboard for upbound vessels and to port for downbound vessels.

In § 401.61, the descriptions of the designated areas for assigned frequencies 156.7 MHz, 156.65 MHz, 156.6 MHz, and 156.55 MHz will be amended to more accurately describe them.

A new § 401.65(c) will be added to require specific information on destination, departure, and the nature of the cargo for departing a port, dock, or anchorage for the system if it is carrying manifested dangerous cargo.

Section 401.68(b) will be amended to permit the Corporation and the Authority discretion in allowing the transit of certain levels of explosive cargoes that are above the maximum designated in paragraph (a) of that section.

Section 401.68(c) will be amended to specifically cite the relevant Canadian and United States laws applicable to Seaway Explosives Permits.

Section 401.73 will be amended to delete the word "cargo" before the word "tanks" in order to clarify that this rule concerning cleaning tanks is applicable to slop tanks, which are not cargo tanks.

Schedule III, Calling-In-Table, will be amended to require additional message content information under items 19 and 29 for vessels proceeding through the Welland Canal and to eliminate redundant transit information under tiems 21 and 30. In addition, a new item 55 will be added to require call-in information from vessels departing docks and harbors between mid-lake Ontario and Long Point to aid in transit planning and traffic information.

Regulatory Evaluation

This proposed regulation involves a foreign affairs function of the United States, and therefore, Executive Order 12291 does not apply. This regulation has also been evaluated under the Department of Transportation's Regulatory Policies and Procedures and the regulation is not considered significant under those procedures and its economic impact is expected to be so minimal that a full economic evaluation is not warranted.

Regulatory Flexibility Act Determination

The Saint Lawrence Seaway Development Corporation certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The St. Lawrence Seaway Regulations relate to the activities of commerical users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne by foreign vessels.

Environmental Impact

This proposed regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*) because it is not a major federal action significantly affecting the quality of human environment.

List of Subjects in 33 CFR Part 401

Hazardous materials transportation, Navigation (water), Radio reporting and recordkeeping requirements, Vessels, Waterways.

PART 401—[AMENDED]

Accordingly, the Saint Lawrence Seaway Development Corporation proposes to amend Part 401—Seaway Regulations and Rules (33 CFR 401) as follows:

1. The authority citation for 33 CFR 401 continues to read as follows:

Authority: 68 Stat. 93-96 (33 U.S.C. 981-990), as amended; Sec. 104, Pub. L. 92-340, 86

Stat. 424 (49 CFR 1.50a) (37 FR 21943), unless otherwise noted.

* * * * *

2. In § 401.12, paragraph (a) introductory text is revised to read as follows:

§ 401.12 Minimum requirements—mooring lines and fairleads.

(a) Minimum requirements in respect of mooring lines, which shall be available for securing on either side of the vessel, winches, and the location of fairleads on vessels are as follows:

* * * * *

3. In § 401.19, paragraphs (a) and (b) are revised to read as follows:

§ 401.19 Disposal and discharge systems.

(a) Every vessel not equipped with containers for ordure shall be equipped with sewage disposal system enabling compliance with the Garbage Pollution Prevention Regulations of Canada, the Great Lakes Seaway Pollution Prevention Regulations of Canada, the Clean Water Act of 1977 of the United States, and the River and Harbor Act of the United States.

(b) Garbage on a vessel shall be

(1) Destroyed by means of an incinerator or other garbage disposal device; or

(2) Retained on board in covered, leakproof containers, until such time as it can be disposed of in accordance with the provisions of the Garbage Pollution Prevention Regulations of Canada, the Great Lakes Sewage Pollution Prevention Regulations of Canada, the Clean Water Act of 1977 of the United States, and the River and Harbor Act of the United States.

* * * * *

4. In § 401.22, paragraph (a) is revised to read as follows:

§ 401.22 Preclearance of vessels.

(a) No vessel, other than a pleasure craft on 317.5 tonnes or less in displacement, shall transit until an application for preclearance has been made, pursuant to § 401.24 of this Part, to the Corporation or the Authority by the vessel's representative and the application has been approved by the Corporation or the Authority pursuant to § 401.25 of this Part.

* * * * *

5. In section 401.26, paragraphs (a)(2) and (a)(4) revised to read as follows:

§ 401.26 Security for tolls.

* * * * *

(a) * * *

(2) A deposit of money to the credit of the Corporation or the Authority with a bank in the United States or a member of the Canadian Payments Association or a local cooperative credit society that is a member of a central cooperative credit society having membership in the Canadian Payments Association;

* * * * *

(4) Furnishing to the Corporation or the Authority a letter of guarantee given by an institution referred to in paragraph (a)(2) of this section.

* * * * *

6. Section 401.26 is further amended by redesignating and revising the current paragraph (d) as (e) and by adding a new paragraph (d) as follows:

* * * * *

(d) Notwithstanding subsection (b), (c), and (e) of this section, where a number of vessels, for each of which a preclearance application has been approved, are owned or controlled by the same individual or company and have the same representative, the security for tolls may be provided in an amount equal to $1.50 per tonne for the aggregate gross registered tonnage of the vessels if the individual, company or representative has paid every toll account received in the preceding five years within the time set out in section 401.75 of this Part.

(e) Where, in the opinion of the Corporation or the Authority, the security provided by the representative is insufficient to secure the tolls and changes incurred or likely to be incurred by a vessel, the Corporation or the Authority may suspend the preclearance of the vessel.

* * * * *

7. In § 401.28, paragraph (a) is revised to read as follows:

§ 401.28 Speed limits.

(a) The maximum speed over the bottom for a vessel of more than 12 m in overall length shall be regulated so as not to adversely affect other vessels or shore property, and in no event shall such a vessel proceeding in an area between the place set out in column I of an item of Schedule II and the place set out in column II of that item exceed the speed set out in column III or column IV of that item, whichever is designated by the Corporation and the Authority from time to time in accordance with § 401.27 of this Part as being appropriate to existing water levels.

* * * * *

8. In § 401.31, paragraphs (a) and (b) are revised to read as follows:

§ 401.31 Meeting and passing.

(a) The International Regulations for Prevention of Collisions at Sea apply to the meeting and passing of vessels.

(b) No vessel shall meet another vessel within the caution signs at bridges or within any area that is designated as a "no meeting area" by signs erected by the Corporation or the Authority in that area.

* * * * *

9. Section 401.33 is revised to read as follows:

§ 401.33 Special instructions

Special instructions shall be applied for from the Corporation or the Authority in connection with the intended transit of vessels of unusual design, hulks, sections of vessels, large dredges, and all vessels in tow and vessels whose limits exceed the requirements or § 401.3 of this Part, and such vessels shall not transit except in compliance with such instructions.

10. Section 401.42 is amended by adding the following new paragraph (a)(4);

§ 401.42 Passing hand lines

(a) * * *

(4) Upbound vessels in Locks 4 and 5, Welland Canal, in excess of 218 m shall secure the hand line in the eye of No. 1 mooring wire by means of a bowline.

* * * * *

11. In § 401.43, the Welland Canal Lock 2 table is revised as follows:

§ 401.43 Mooring table.

* * * * *

WELLAND CANAL

Locks	1	2	3	4	5	6	7	Guard gate cut	8
Upb-	S	S	P	P	P	P	P		
									P
Dnb-	P	P	S	P	P	P	S		P

* * * * *

12. Section 401.61 is revised to read as follows:

§ 401.61 Assigned frequencies.

The Seaway stations operate on the following assigned VHF frequencies:

156.8 MHz (channel 16) Distress and Calling

156.7 MHZ (channel 14 Working (Canadian Stations in Sector 1 and the Welland Canal)

156.65 MHZ (channel 13 Working (U.S. Stations in Lake Ontario and Sector 4 of the River)

156.6 MHZ (channel 12 Working (U.S. Stations in Sector 2 of the River)

156.55 MHZ (channel 11 Working (Canadian Stations in Sector 3, Lake Ontario and Lake Erie)

13. Section 401.65 is amended by adding a new paragraph (c) to read as follows:

§ 401.65 Communication—ports, docks and anchorages.

* * * * *

(c) Every vessel shall, upon departing from a port, dock or anchorage, report to the appropriate Seaway station its destination and the expected time of arrival at the next check point and, if carrying manifested dangerous cargo, report the nature, quantity, IMO classification, and the storage location of the manifested dangerous cargo.

* * * * *

14. In § 401.68, paragraphs (b) and (c) are revised to read as follows:

* * * * *

§ 401.68 Explosives permit.

* * * * *

(b) When an explosive vessel is carrying quantities of explosives above the maximum mention in paragraph (a) of this section, a Seaway Explosives Permit shall be granted if the vessel demonstrates to the satisfaction of the Corporation and the Authority that the vessel shall present no danger to itself, other vessels or persons, and facilities located along the Seaway.

(c) A written application for a Seaway Explosives Permit certifying that the cargo is packed, marked, and stowed in accordance with the Canadian Regulations respecting the Carriage of Dangerous Goods, the United States Regulations under the Dangerous Cargo Act, and the International Maritime Dangerous Goods Code may be made to the Saint Lawrence Seaway Development Corporation, P.O. Box 520, Massena, New York 13662 or to the St. Lawrence Seaway Authority, 202 Pitt Street, Cornwall, Ontario, K6J 3P7.

* * * * *

15. In § 401.73 is revised as follows:

§ 401.73 Cleaning tanks—hazardous cargo vessels.

Cleaning and gas freeing of tanks shall not take place

(a) in a canal or a lock;

(b) In an area that is not clear of other vessels or structures; and

(c) Before gas freeing and tank cleaning has been reported to the nearest Seaway station.

16. All those portions of items 19, 21, 29, and 30 of Schedule III, Calling-In-Table, under Message Content are revised as follows:

SCHEDULE III—CALLING-IN-TABLE

C.I.P. and Check Point	Station to Call	Message Content
* * * * *		
19. * * *	* * *.....	1. Name of Vessel 2. Location 3. Manifested dangerous cargo —nature and quantity —IMO classification —location where dangerous cargo is stowed and, if prooceeding to Welland Canal, 4. Destination 5. Drafts, fore and aft 6. Cargo 7. Pilot requirement—Lake Erie
* * * * *		
21. * * *	* * *.....	1. Name of Vessel
* * * * *		
29. * * *	* * *.....	1. Name of Vessel 2. Location 3. ETA C.I.P. 16 or Port 4. Manifested dangerous cargo —nature and quantity —IMO classification —location where dangerous cargo is stowed and, if proceeding to Welland Canal, 5. Destination 6. Drafts, fore and aft 7. Cargo 8. Pilot requirement—Lake Ontario
* * * * *		
30. * * *	* * *.....	1. Name of Vessel .2. Location

16. Schedule III, Calling-In-Table, is amended further by adding a new heading and the following new item 55:

* * * * *

SCHEDULE III—CALLING-IN-TABLE

C.I.P. and Check Point	Station to Call	Message Content
* * * * *		
Upbound and Downbound Vessels.		
55. Vessels departing from ports between mid-lake Ontario and Long Point.	Appropriate Seaway station for sector.	1. Name of Vessel 2. Location 3. Destination 4. Manifested dangerous cargo —nature and quantity —IMO classification —location where dangerous cargo is stowed, and if proceeding to Welland Canal, 5. Drafts, fore and aft 6. Cargo 7. Pilot requirement—Lake Erie if upbound or Lake Ontario if downbound.

Issued at Washington, DC on February 28, 1989.

Saint Lawrence Seaway Development Corporation

James L. Emery,

Administrator.

[FR Doc. 89-5080 Filed 3-6-89; 8:45 am]

BILLING CODE 4910-61-M

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. 90114-9014]

Patent Term Extension for Animal Drug Products

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice of proposed rulemaking sets forth changes that the Patent and Trademark Office (PTO) is proposing to the rules directed to the extension of patent term. Pub. L. No. 100-670, signed November 16, 1988,

permits owners of patents relating to new animal drugs or veterinary biological products that are not biotechnology-generated to apply for extension of the terms of such patents in the same manner as owners of patents related to human drugs, medical devices, food additives, or color additives are permitted to do under 35 U.S.C. 156.

DATES: Written comments must be submitted on or before May 1, 1989. There will be no oral hearing.

ADDRESS: Address written comments to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231 marked to the attention of Charles E. Van Horn.

FOR FURTHER INFORMATION CONTACT: Charles E. Van Horn by telephone at [703] 557-4035 or by mail marked to his attention and addressed to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: Pub. L. No. 100-670 has made it possible for owners of patents directed to new animal drugs and veterinary biological products that are not biotechnology-generated to apply for extension of the term of such patents in a manner similar to the owners of patents directed to human drugs, food additives, color additives, and medical devices. A new animal drug or veterinary biological product is biotechnology-generated if it is primarily manufactured using recombinant DNA, recombinant RNA, hybridoma technology, or other processes including site specific genetic manipulation techniques. The primary purpose of the proposed rule change is to revise the present regulations contained in 37 CFR Part 1, Subpart F, to include the two additional categories of subject matter that can now form the basis of patent term extension. These regulations set forth procedures that govern the content and submission of applications for the extension of a patent term to the PTO, and procedures governing the extension determination and issuance of patent term extension certifiates by the PTO.

The proposed changes also correct some minor errors in the regulations as they now exist. Section 1.740(a)(9) is proposed to be amended to strike the requirement that the information to be provided in accordance with that section must be on a new page of the application for extension of patent term. Section 1.741(a)(2) is proposed to be amended to acknowledge that regulatory review of a product may have occurred under more than one Federal statute. Section 1.785 is proposed to be amended to indicate that in cases where the terms of two or more patents are sought to be extended based upon the same regulatory review period, an applicant may elect which term to extend among eligible patents; in the absence of an election by the applicant, an appropriate extension of patent term will be given to the patent with the earliest date of issuance.

Initial guidelines directed to the preparation and filing of applications for patent term extension as authorized by Pub. L. No. 100-670 were published as "Guidelines For Extension of Patent Term For New Animal Drugs or Veterinary Biological Products Under 35 U.S.C. 156 as Amended" in the Official Gazette. 1097 *Official Gazette* 63 (December 27, 1988). It is intended that those guidelines will continue in effect until the promulgation of final rules based on the proposed rule making.

The Secretary of Health and Human Services will publish regulations to give guidance concerning the handling of applications for patent term extension for a new animal drug in the Department of Health and Human Services.

The Secretary of Agriculture will publish regulations to give guidance concerning the handling of applications for patent term extension for a veterinary biological product in the U.S. Department of Agriculture (USDA).

Discussion of Specific Rules

Section 1.710(a), if amended as proposed, would specifically set forth the existing policy and practice relating to the eligibility of patents claiming a composition or formulation that includes the active ingredient. As noted in the final rule promulgation (53 FR 9386, March 24, 1987), a patent is considered to claim the product where it claims the active ingredient per se, or claims a composition or formulation which contains the active ingredient(s) and reads on the composition or formulation approved for commercial marketing or use.

Section 1.710(b), if amended as proposed, would revise the definition of human drug product in paragraph (b)(1) to make the definition conform to Pub. L. No. 100-670. A new paragraph (b)(2) would be added to expand the definition of "product" in § 1.710(a) to incldue a new animal drug and a veterinary biological product, but not ones that are primarily manufactured using recombinant DNA, recombinant RNA, hybridoma technology, or other processes including site specific genetic manipulation techniques. Present paragraph (b)(2) would be renumbered as paragraph (b)(3). It should be understood that the discussion here of new animal drugs and veterinary biological products is limited to the animal drugs and products defined in Pub. L. No. 100-670.

Section 1.720, if amended as proposed, would indicate in paragraph (e)(ii) that the conditions given therein concern a patent for a product other than one recited in § 1.710(b)(2) due to the exclusion of biotechnology-generated new animal drugs and veterinary biological products in Pub. L. No. 100-670. A new paragraph (e)(iii) would be added directed to the provision in 35 U.S.C. 156(a)(5)(c), which permits a patent directed to a new animal drug or veterinary biological product to be extended based on a second or subsequent approval of the active ingredient if the patent claims the drug or product, provided the drug or product is not covered by the claims in any other patent that has been extended ("covered by the claims" means that the drug or product would infringe a claim in the other patent), if the patent term was not extended on the basis of the regulatory review period for use in non-food-producing animals, and if the second or subsequent approval was the first permitted commercial marketing or use of the drug or product for administration to a food-producing animal. All conditions must exist before eligibility could be based on this provision of the statute, which is reflected in proposed new § 1.720(e)(iii). Paragraph (f), if amended as proposed, would add a new portion of the paragraph directed to the case where eligibility is to be based on 35 U.S.C. 156(a)(5)(C). In this latter case, the application must be field within 60 days of approval for administration to a food-producing animal.

Section 1.740(a), if amended as proposed, would have paragraph (a)(4) revised by (1) eliminating "human" as a modifier for "product," (2) adding the Public Health Service Act and the Virus-Serum-Toxin Act to the list of appropriate statutes, and (3) adding a requirement to indicate the use for which the product was approved. The first two proposed amendments are necessary to comply with terms of 35 U.S.C. 156 as amended, and the third proposed amendment is necessary to a determination of eligibility where the application is based on a second or subsequent approval of an active ingredient, but the first approval for administration to a food-producing animal. Paragraph (a)(9), if amended as proposed, would eliminate the requirement to set forth beginning on a new page the statement that the patent for which patent term extension is sought claims the approved product or a method of using or making same, and the required showing listing each applicable claim of the patent and demonstrating the manner in which each

applicable claim reads on the approved product or a method of using or making same; this change is proposed because the information required by this paragraph is within the province of PTO review and there is no need to have such information recited in a readily segregable section of the application. Paragraph (a)(10), if amended as proposed, will indicate that, as appropriate, the Secretary of Health and Human Services or the Secretary of Agriculture will determine the applicable regulatory review period. Paragraph (a)(10)(i), if amended as proposed, will recite also a Product License Application as a type of application that may be recited in an application for term extension of a patent claiming a human biological product. New paragraphs (a)(10)(ii) and (a)(10)(iii) are proposed to be added to set forth the type of tests or applications that are to be considered for determination of the applicable regulatory review period for patents claiming a new animal drug or a veterinary biological product. Present paragraphs (a)(10)(ii) and (a)(10)(iii) are proposed to be renumbered as paragraphs (a)(10)(iv) and (a)(10)(v), respectively. Paragraph (a)(10)(v) is also proposed to be amended to reflect that approval of a medical device could be made through the use of a product development protocol. Paragraph (a)(13), if amended as proposed, will indicate that the duty to disclose any information material to the determination of entitlement to the extension sought applies also to the Secretary of Agriculture where the regulatory review was conducted by the USDA.

Section 1.741(a)(2), if amended as proposed, will represent an acknowledgement that regulatory review may take place under more than one Federal statute and that each appropriate statute should be listed. This proposed amendment is intended to apply to a situation where a human biological product is tested under an investigational new drug application (IND) pursuant to the Federal Food, Drug, and Cosmetic Act, but is approved under the Public Health Service Act. The amendment is not intended to encompass a situation where approval is sought for use of a particular medical device with a specific drug product. The product that forms the basis of an application for patent term extension must be either a medical device or a drug product; it cannot be a combination of those separate products. See the file history of U.S. Patent No. 4,428,744 for an example of the application of this principle.

Section 1.741(a)(5), if amended as proposed, will recognize that the Secretary of Agriculture may determine the length of the regulatory review period where the regulatory review of the product takes place at the USDA. The section is further modified to point out that a determination of the length of the regulatory review period is made under 35 U.S.C. 156(g), and not the length of the patent term extension that is made by the PTO under 35 U.S.C. 156(c).

Section 1.765(a), if amended as proposed, will recite that a duty of candor and good faith is owed to the Secretary of Agriculture in patent term extension proceedings wherein the USDA is involved.

Section 1.775, if amended as proposed, will have its title recite that the section is directed to calculating patent term extension for human drug, antibiotic drug, and human biological products. Paragraphs (a), (b), (c), and (d), if amended as proposed, will indicate that the determinations are being made for any of a human drug, an antibiotic drug, or a hmuan biological product. Sections (c)(1) and (c)(2), if amended as proposed, will refer merely to a "product" rather than to a "human drug product" or a "drug product" in order to make the sections more clear.

Section 1.778, if added as proposed, would set forth the manner of calculation of the patent term extension for an animal drug product.

Proposed paragraph (a) would specify that the extension will run from the original expiration date of the patent as shortened by any terminal disclaimer.

Proposed paragraph (b) of § 1.778 would provide that the patent term would be extended by the regulatory review period for the product but reduced, where appropriate, by the time periods provided in proposed paragraph (d).

Proposed paragraph (c) defines how the regulatory review period is to be calculated. The period is determined by counting

(1) The number of days in the period beginning on the earlier of the dates a major health or environmental effects test was initiated on the drug or an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act became effective for the drug and ending on the date an application was initially submitted for the drug under section 512 of the Federal Food, Drug, and Cosmetic Act; and

(2) The number of days in the period beginning on the date the application was initially submitted for the approved drug under subsection (b) of section 512 of the Federal Food, Drug, and Cosmetic Act and ending on the date the application was approved under the section.

The added total of the days determined in subparagraphs (c)(1) and (c)(2) constitutes the regulatory review period, which is then reduced, where appropriate, by the time periods described in proposed paragraph (d).

Proposed paragraph (d) of § 1.778 would revise the term of the patent extension by indicating that

(1) The time period determined from proposed paragraph (c) would be reduced, where appropriate, by

(i) The number of days in the period of proposed paragraphs (c)(1) and (c)(2) of § 1.778 that were before the date on which the patent issued;

(ii) The number of days in proposed paragraphs (c)(1) and (c)(2) of § 1.778 during which it is determined under 35 U.S.C. 156(d)(2)(B) that applicant did not act with due diligence; and

(iii) The number of days equal to one-half the number of days remaining in proposed paragraph (c)(1) after the paragraph (c)(1) determination has been reduced in accordance with proposed paragraphs (d)(1)(i) and (d)(1)(ii) of § 1.778 (half days to be ignored for subtraction purposes);

(2) Adding the number of days determined in proposed paragraph (d)(1) to the original expiration date of the patent as shortened by any terminal disclaimer;

(3) Adding 14 years to the date of approval of the application under section 512 of the Federal Food, Drug, and Cosmetic Act;

(4) Comparing the dates obtained from paragraphs (d)(2) and (d)(3) with each other and selecting the earlier date;

(5) If the original patent issued after November 16, 1988, by—

(i) Adding 5 years to the original expiration date of the patent as shortened by any terminal disclaimer; and

(ii) Comparing the dates obtained from paragraphs (d)(4) and (d)(5)(i) with each other and selecting the earlier date;

(6) If the original patent issued before November 16, 1988, and

(i) If no major health or environmental effects test on the drug was initiated and no request was submitted for an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act before November 16, 1988, by—

(A) Adding 5 years to the original expiration date of the patent as shortened by any terminal disclaimer; and

(B) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(6)(i)(A) with each other and selecting the earlier date; or

(ii) If a major health or environmental effects test was initiated or a request for an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act was submitted before November 16, 1988, and the application for commercial marketing or use of the drug was not approved before November 16, 1988, by—

(A) Adding 3 years to the original expiration date of the patent as shortened by any terminal disclaimer; and

(B) Comparing the dates obtained from paragraphs (d)(4) and (d)(6)(ii)(A) with each other and selecting the earlier date.

Section 1.779, if added as proposed, would set forth the manner of calculation of the patent term extension for a veterinary biological product.

Proposed paragraph (a) would specify that the extension will run from the origanal expiration date of the patent as shortened by any terminal disclaimer.

Proposed paragraph (b) of § 1.779 would provide that the patent term would be extended by the regulatory review period for the product but reduced, where appropriate, by the time periods provided in proposed paragraph (d).

Proposed paragraph (c) defines how the regulatory review period is to be calculated. The period is determined by counting

(1) The number of days in the period beginning on the date the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act became effective and ending on the date an application for a license was submitted under the Virus-Serum-Toxin Act; and

(2) The number of days in the period beginning on the date an application for a license was initially submitted under the Virus-Serum-Toxin Act and ending on the date a license was issued.

The added total of the days determined in paragraphs (c)(1) and (c)(2) constitutes the regulatory review period, which is then reduced, were appropriate, by the time periods described in proposed paragraph (d).

Paragraph (d) of proposed § 1.779 would define the term of the patent extension by indicating that

(1) The time period determined from proposed paragraph (c) would be reduced, where appropriate, by

(i) The number of days in the periods of proposed paragraphs (c)(1) and (c)(2) that were on and before the date on which the patent issued;

(ii) The number of days in the periods of proposed paragraphs (c)(1) and (c)(2) during which it is determined under 35 U.S.C. 156(d)(2)(B) that the applicant did not act with due diligence; and

(iii) One-half the number of days remaining in the period defined by proposed paragraph (c)(1) after that period is reduced in accordance with paragraphs (d)(1)(i) and (d)(ii) (half days being ignored for purposes of subtraction);

(2) Adding the number of days determined in paragraph (d)(1) to the original terms of the patent as shortened by any terminal disclaimer;

(3) Adding 14 years to the date of the issuance of a license under the Virus-Serum-Toxin Act;

(4) Comparing the dates for the ends of the periods obtained pursuant to paragraphs (d)(2) and (d)(3) and selecting the earlier date;

(5) If the patent was issued after November 16, 1988, by—

(i) Adding 5 years to the original expiration date of the patent as shortened by any terminal disclaimer; and

(ii) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(5)(i) with each other and selecting the earlier date;

(6) If the original patent issued before November 16, 1988 and

(i) If no request for the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act was submitted before November 16, 1988, by—

(A) Adding 5 years to the original expiration date of the patent as shortened by any terminal disclaimer; and

(B) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(6)(i)(A) with each other and selecting the earlier date; or

(ii) If a request for the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act was submitted before November 16, 1988 and the commercial marketing or use of the Product was not approved before November 16, 1988, by—

(A) Adding 3 years to the original expiration date of the patent as shortened by any terminal disclaimer; and

(B) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(6)(ii)(A) and selecting the earlier date.

Section 1.785(b), if amended as proposed, will indicate that, in those instances where an applicant is seeking patent term extension for two or more patents based upon the same regulatory review period, the applicant will have the right to elect which patent is to have its term extended. In the absence of an election by applicant, the Commissioner will extend that patent having the earliest date of issuance.

Other Considerations

The proposed rule change is in conformity with the requirements of the Regulatory Flexibility Act (Pub. L. No. 96-354), Executive Orders 12291 and 12612, and the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

The General Counsel of the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration that the proposed rule change will not have a significant adverse economic impact on a substantial number of small entities [Regulatory Flexibility Act, Pub. L. 96-354]. The proposed rule change setting forth procedures allowing owners of patents directed to new animal drugs and veterinary biological products to apply for extension of patent term would not be expected to result in any adverse economic impact on small entities because patented drugs are generally not commercialized by small entities.

The PTO has determined that this rule change is not a major rule under Executive Order 12291. The annual effect to the economy will be less than $100 million. There will be no major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions. There will be no 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.

The PTO has also determined that this notice has no Federalism implications affecting the relationship between the National Government and the States as outlined in Executive Order 12612.

The proposed rule contains a collection of information subject to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* which has been submitted to the Office of Management and Budget for approval. Preparation of an application for patent term extension is estimated to take approximately 60 hours, including time for reviewing instructions, gathering and maintaining 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

the Office of Management and Organization, Patent and Trademark Office, Washington, DC 20231; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. (Paperwork Reduction Project 0651-0020)

List of Subjects in 37 CFR Part 1,

Administrative practice and procedure, Authority delegations (government agencies), Conflict of interest, Courts, Inventions and patents, Lawyers.

For the reasons given in the preamble and pursuant to the authority granted to the Commissioner of Patents and Trademarks by 35 U.S.C. 6 and 156, the PTO proposes to amend Title 37 of the Code of Federal Regulations as set forth below:

It is proposed to amend 37 CFR Part 1, Subpart F, as follows wherein removals are indicated by brackets and additions by arrows:

PART 1—[AMENDED]

Subpart F—Extension of Patent Term

1. The authority citation for 37 CFR Part 1, Subpart F, would continue to read as follows:

Authority: 35 U.S.C. 6 and 156.

2. Section 1.710 is proposed to be amended by revising paragraphs (a) and (b) to read as follows:

§ 1.710 Patents subject to extension of the patent term.

(a) A patent is eligible for extension of the patent term if the patent claims a product as defined in paragraph (b) of this section, ►either alone or in combination with other ingredients that read on a composition that received permission for commercial marketing or use,◄ or a method of using such a product, or a method of manufacturing such a product, and meets all other conditions and requirements of this subpart.

(b) The term "product" referred to in paragraph (a) of this section means—

(1) [A human drug product which means] the active ingredient of a new ►human◄ drug, antibiotic drug, or human biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act) including any salt or ester of the active ingredient, as a single entity or in combination with another active ingredient; or

►(2) The active ingredient of a new animal drug or veterinary biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Virus-Serum-Toxin Act) that is not primarily manufactured using recombinant DNA, recombinant RNA, hybridoma technology, or other processes including site specific genetic manipulation techniques, including any salt or ester of the active ingredient, as a single entity or in combination with another active ingredient; or◄

[(2)] ►(3)◄ Any medical device, food additive, or color additive subject to regulation under the Federal Food, Drug, and Cosmetic Act.

3. Section 1.720 is proposed to be amended by revising paragraphs (e)(2) and (f) and adding paragraph (e)(3) to read as follows. The introductory text of (e) is republished for the convenience of the reader.

§ 1.720 Conditions for extension of patent term.

* * * * *

(e) The product has received permission for commercial marketing or use and—

* * * * *

(2) In the case of a patent ►other than one directed to subject matter within 37 CFR § 1.710(b)(2)◄ claiming a method of manufacturing the product [which] ►that◄ primarily uses recombinant DNA technology in the manufacture of the product, the permission for the commercial marketing or use is the first received permission for the commercial marketing or use of a product manufactured under the process claimed in the patent, ►or◄

►(3) In the case of a patent claiming a new animal drug or a veterinary biological product that is not covered by the claims in any other patent that has been extended, and has received permission for the commercial marketing or use in non-food-producing animals and in food-producing animals, and was not extended on the basis of the regulatory review period for use in non-food-producing animals, the permission for the commercial marketing or use of the drug or product after the regulatory review period for use in food-producing animals is the first permitted commercial marketing or use of the drug or product for administration to a food-producing animal.◄

(f) The application is submitted within the sixty day period beginning on the date the product first received permission for commercial marketing or use under the provisions of law under which the applicable regulatory review period occurred; or in the case of a patent claiming a method of manufacturing the product which primarily uses recombinant DNA technology in the manufacture of the product, the application for extension is submitted within the sixty day period beginning on the date of the first permitted commercial marketing or use of a product manufactured under the process claimed in the patent; ►or in the case of a patent that claims a new animal drug or a veterinary biological product that is not covered by the claims in any other patent that has been extended, and has received permission for the commercial marketing or use in non-food-producing animals, the application for extension is submitted within the sixty day period beginning on the date of the first permitted commercial marketing or use of the drug or product for administration to a food-producing animal;◄

* * * * *

4. Section 1.740 is proposed to be amended by revising paragraphs (a)(4), (a)(9), (a)(10), and (a)(13) to read as follows:

§ 1.740 Application for extension of patent term.

(a) An application for extension of patent term must be made in writing to the Commissioner of Patents and Trademarks. A formal application for the extension of patent term shall include:

* * * * *

(4) In the case of a [human] drug product, an identification of each active ingredient in the product and as to each active ingredient, a statement that it has not been previously approved for commercial marketing or use under the Federal Food, Drug, and Cosmetic Act, ►the Public Health Service Act, or the Virus-Serum-Toxin Act,◄ or a statement of when the active ingredient was approved for commercial marketing or use (either alone or in combination with other active ingredients), ►the use for which it was approved,◄ and the provision of law under which it was approved.

* * * * *

(9) A statement [beginning on a new page] that the patent claims the approved product or a method of using or manufacturing the approved product, and a showing which lists each applicable patent claim and demonstrates the manner in which each applicable patent claim reads on the approved product or method of using or manufacturing the approved product;

(10) A statement beginning on a new page of the relevant dates and information pursuant to 35 USC 156(g) in order to enable the Secretary of Health and Human Services ►or the Secretary of Agriculture, as appropriate,◄ to

determine the applicable regulatory review period as follows:

(i) For a patent claiming a human drug ►, antibiotic, or human biological◄ product, the effective date of the investigational new drug (IND) application and the IND number; the date on which a new drug application (NDA) ►or a Product License Application (PLA)◄ was initially submitted and the NDA ►or PLA number◄ and the date on which the NDA was approved ►or the Product License issued◄;

(ii) For a patent claiming a new animal drug, the date a major health or environmental effects test on the drug was initiated and any available substantiation of the date or the date of an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act became effective for such animal drug; the date on which a new animal drug application (NADA) was initially submitted and the NADA number; and the date on which the NADA was approved;

(iii) For a patent claiming a veterinary biological product, the date the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act became effective; the date an application for a license was submitted under the Virus-Serum-Toxin Act; and the date the license issued;◄

[ii] ►(iv)◄ For a patent that claims a food or color additive, the date a major health or environmental effects test on the additive was initiated and any available substantiation of that date; the date on which a petition for product approval under the Federal Food, Drug, and Cosmetic Act was initially submitted and the petition number; and the date on which the FDA published the Federal Register notice listing the additive for use;

[iii] ►(v)◄ For a patent that claims a medical device, the effective date of the investigational device exemption (IDE) and the IDE number, if applicable, or the date on which the applicant began the first clinical investigation involving the device if no IDE was submitted and any available substantiation of that date; the date on which the application for product approval ►or notice of completion of a product development protocol◄ under section 515 of the Federal Food, Drug, and Cosmetic Act was initially submitted and the number of the application ►or protocol◄ ; and the date on which the application was approved ►or the protocol declared to be completed◄.

* * * * *

(13) A statement that applicant acknowledges a duty to disclose to the Commissioner of Patents and Trademarks and the Secretary of Health and Human Services ►or the Secretary of Agriculture◄ any information which is material to the determination of entitlement to the extension sought (see § 1.765);

* * * * *

5. Section 1.741 is proposed to be amended by revising paragraphs (a)(2) and (a)(5) to read as follows. The introductory text of (a) is republished for the convenience of the reader.

§ 1.741 Filing date of the application.

(a) The filing date of the application for extension of patent term is the date on which a complete application is received in the Patent and Trademark Office or filed pursuant to the "Certificate of Mailing" provisions of 37 CFR 1.8 or "Express Mail" provisions of 37 CFR 1.10.

* * * * *

(2) An identification of [the] ►each◄ Federal statute under which regulatory review occurred.

* * * * *

(5) Sufficient information to enable the Commissioner to determine under 35 U.S.C. 156 subsections (a) and (b) the eligibility of a patent for extension and the rights that will be derived from the extension and information to enable the Commissioner and the Secretary of Health and Human Services ►or the Secretary of Agriculture◄ to determine the ►length of the regulatory review◄ period [of the extension]; and

* * * * *

6. Section 1.765 is proposed to be amended by revising paragraph (a) to read as follows:

§ 1.765 Duty of disclosure in patent term extension proceedings.

(a) A duty of candor and good faith toward the Patent and Trademark Office and the Secretary of Health and Human Services ►or the Secretary of Agriculture◄ rests on the patent owner or its agent, or each attorney or agent who represents the patent owner and on every other individual who is substantively involved on behalf of the patent owner in a patent term extension proceeding. All such individuals who are aware, or become aware, of material information adverse to a determination of entitlement to the extension sought, which has not been previously made of record in the patent term extension proceeding must bring such information to the attention of the Office of the Secretary, as appropriate, in accordance with paragraph (b) of this section, as soon as it is practical to do so after the individual becomes aware of the information. Information is material where there is a substantial likelihood that the Office or the Secretary would consider it important in determinations to be made in the patent term extension proceeding.

* * * * *

7. Section 1.775 is proposed to be amended by revising the title and paragraphs (a), (b), (c), and (d) introductory text to read as follows:

§ 1.775 Calculation of patent term extension for a human drug ►, antibiotic drug or human biological ◄ product.

(a) If a determination is made pursuant to § 1.750 that a patent for a human drug►, antibiotic drug or human biological◄ product is eligible for extension, the term shall be extended by the time as calculated in days in the manner indicated by this section. The patent term extension will run from the original expiration date of the patent or any earlier date set by terminal disclaimer (§ 1.321).

(b) The term of the patent for human drug►, antibiotic drug or human biological◄ product will be extended by the length of the regulatory review period for the product as determined by the Secretary of Health and Human Services, reduced as appropriate pursuant to paragraphs (d)(1) through (d)(6) of this section.

(c) The length of the regulatory review period for a human drug►, antibiotic drug or human biological◄ product will be determined by the Secretary of Health and Human Services. Under 35 U.S.C. 156(g)(1)(B), it is the sum of—

(1) The number of days in the period beginning on the date an exemption under subsection (i) of section 505 or subsection (d) of section 507 of the Federal Food, Drug, and Cosmetic Act became effective for the approval [human drug] product and ending on the date application was initially submitted for such [drug] product under those sections or under section 351 of the Public Health Service Act; and

(2) The number of days in the period beginning on the date the application was initially submitted for the appoved [human drug] product under section 351 of the Public Health Service Act, subsection (b) of section 505 or section 507 of the Federal Food, Drug, and Cosmetic Act and ending on the date such application was approved under such section.

(d) The term of the patent as extended for a human drug►, antibiotic drug or

human biological◄ product will be determined by—

* * * * *

8. Section 1.778 is proposed to be added as follows:

►§ 1.778 Calculation of patent term extension for an animal drug product.

(a) If a determination is made pursuant to § 1.750 that a patent for an animal drug is eligible for extension, the term shall be extended by the time as calculated in days in the manner indicated by this section. The patent term extension will run from the original expiration date of the patent or any earlier date set by terminal disclaimer (§1.321).

(b) The term of the patent for an animal drug will be extended by the length of the regulatory review period for the drug as determined by the Secretary of Health and Human Services, reduced as appropriate pursuant to paragraphs (d)(1) through (d)(6) of this section.

(c) The length of the regulatory review period for an animal drug will be determined by the Secretary of Health and Human Services. Under 35 U.S.C. 156(g)(4)(B), it is the sum of—

(1) The number of days in the period beginning on the earlier of the date a major health or environmental effects test on the drug was initiated or the date an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act became effective for the approved animal drug and ending on the date an application was initially submitted for such animal drug under section 512 of the Federal Food, Drug, and Cosmetic Act; and

(2) The number of days in the period beginning on the date the application was initially submitted for the approved animal drug under subsection (b) of section 512 of the Federal Food, Drug, and Cosmetic Act and ending on the date such application was approved under such section.

(d) The term of the patent as extended for an animal drug will be determined by—

(1) Subtracting from the number of days determined by the Secretary of Health and Human Services to be in the regulatory review period:

(i) The number of days in the periods of paragraphs (c)(1) and (c)(2)) of this section that were on and before the date on which the patent issued;

(ii) The number of days in the periods of paragraphs (c)(1) and (c)(2) of this section during which it is determined under 35 U.S.C. 156(d)(2)(B) by the Secretary of Health and Human Services that applicant did not act with due diligence;

(iii) One-half the number of days remaining in the period defined by paragraph (c)(1) of this section after that period is reduced in accordance with paragraphs (d)(1)(i) and (ii) of this section; half days will be ignored for purposes of subtraction;

(2) By adding the number of days determined in paragraph (d)(1) of this section to the original term of the patent as shortened by any terminal disclaimer;

(3) By adding 14 years to the date of approval of the application under section 512 of the Federal Food, Drug, and Cosmetic Act;

(4) By comparing the dates for the ends of the periods obtained pursuant to paragraphs (d)(2) and (d)(3) of this section with each other and selecting the earlier date;

(5) If the original patent was issued after November 16, 1988, by—

(i) Adding 5 years to the original expiration date of the patent or any earlier date set by terminal disclaimer; and

(ii) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(5)(i) of this section with each other and selecting the earlier date;

(6) If the original patent was issued before November 16, 1988 and

(i) If no major health or environmental effects test on the drug was initiated and no request was submitted for an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act before November 16, 1988, by—

(A) Adding 5 years to the original expiration date of the patent or earlier date set by terminal disclaimer; and

(B) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(6)(i)(A) of this section with each other and selecting the earlier date; or

(ii) If a major health or environmental effects test was initiated or a request for an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act was submitted before November 16, 1988, and the application for commercial marking or use of the animal drug was not approved before November 16, 1988, by—

(A) Adding 3 years to the original expiration date of the patent or earlier date set by terminal disclaimer, and

(B) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(6)(ii)(A) of this section with each other and selecting the earlier date.

9. Section 1.779 is proposed to be added to read as follows:

►§ 1.779 Calculation of patent term extension for a veterinary biological product.

(a) If a determination is made pursuant to § 1.750 that a patent for a veterinary biological product is eligible for extension, the term shall be extended by the time as calculated in days in the manner indicated by this section. The patent term extension will run from the original expiration date of the patent or any earlier date set by terminal disclaimer (§ 1.321).

(b) The term of the patent for a veterinary biological product will be extended by the length of the regulatory review period for the product as determined by the Secretary of Agriculture, reduced as appropriate pursuant to paragraphs (d)(1) through (d)(6) of this section.

(c) The length of the regulatory review period for a veterinary biological product will be determined by the Secretary of Agriculture. Under 35 U.S.C. 156(g)(5)(B), it is the sum of—

(1) The number of days in the period beginning on the date the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act became effective and ending on the date an application for a license was submitted under the Virus-Serum-Toxin Act; and

(2) The number of days in the period beginning on the date an application for a license was initially submitted for approval under the Virus-Serum-Toxin Act and ending on the date such license was issued.

(d) The term of the patent as extended for a veterinary biological product will be determined by—

(1) Subtracting from the number of days determined by the Secretary of Agriculture to be in the regulatory review period:

(i) The number of days in the periods of paragraphs (c)(1) and (c)(2) of this section that were on and before the date on which the patent issued;

(ii) The number of days in the periods of paragraphs (c)(1) and (c)(2) of this section during which it is determined under 35 U.S.C. 156(d)(2)(B) by the Secretary of Agriculture that applicant did not act with due diligence;

(iii) One-half the number of days remaining in the period defined by paragraph (c)(1) of this section after that period is reduced in accordance with paragraphs (d)(1)(i) and (ii) of this section; half days will be ignored for purposes of subtraction;

(2) By adding the number of days determined in paragraph (d)(1) of this section to the original term of the patent as shortened by any terminal disclaimer;

(3) By adding 14 years to the date of the issuance of a license under the Virus-Serum-Toxin Act;

(4) By comparing the dates for the ends of the periods obtained pursuant to paragraphs (d)(2) and (d)(3) of this section with each other and selecting the earlier date;

(5) If the original patent was issued after November 16, 1988, by—

(i) Adding 5 years to the original expiration date of the patent or any earlier date set by terminal disclaimer; and

(ii) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(5)(i) of this section with each other and selecting the earlier date;

(i) Adding 5 years to the original expiration date of the patent or any earlier date set by terminal disclaimer; and

(ii) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(5)(i) of this section with each other and selecting the earlier date;

(6) If the original patent was issued before November 16, 1988 and—

(i) If no request for the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act was submitted before November 16, 1988, by—

(A) Adding 5 years to the original expiration date of the patent or earlier date set by terminal disclaimer; and

(B) Comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(6)(i)(A) of this section with each other and selecting the earlier date; or

(ii) If a request for the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act was submitted before November 16, 1988, and the commercial marketing or use of the product was not approved before November 16, 1988, by—

(A) Adding 3 years to the original expiration date of the patent or earlier date set by terminal disclaimer; and

(B) comparing the dates obtained pursuant to paragraphs (d)(4) and (d)(6)(ii)(A) of this section with each other and selecting the earlier date.◄

10. Section 1.785 is proposed to be amended to revise paragraph (b) to read as follows:

§ 1.785 Multiple applications for extension of terms of the same patent or of different patents for the same regulatory review period for a product.

* * * * *

(b) If more than one application for extension is filed by a single applicant which seeks the extension of the term of two or more patents based upon the same regulatory review peirod, and the applications are otherwise eligible for extension pursuant to the requirements of this subpart, ►in the absence of an election by applicant,◄ the certificate of extension of patent term, if appropriate, will be issued upon the application for extension of the patent term having the earliest date of issuance of those patents for which extension is sought.

Dated: January 13, 1989.

Donald J. Quigg,

Assistant Secretary and Commissioner of Patent and Trademarks.

[FR Doc. 89-5152 Filed 3-6-89; 8:45 am]

BILLING CODE 3510-16-M

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37 CFR Part 2

[Docket No. 81268-8268]

Amendments of Trademark Rules Governing Inter Partes Proceedings; Miscellaneous Amendments of Other Trademark Rules

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Proposed rulemaking.

SUMMARY: The Patent and Trademark Office proposes amendments to the rules of practice in trademark cases to revise and/or codify procedures for the examination of applications; appeals from final refusals of registration; and the institution and conduct of trademark interference, concurrent use, opposition, and cancellation proceedings. The proposed amendments will assist the orderly and prompt resolution of issues in proceedings before the Trademark Trial and Appeal Board.

DATE: Written comments must be submitted on or before May 1, 1989.

ADDRESS: Address written comments to Box 5, Trademark Trial and Appeal Board, Commissioner of Patents and Trademarks, Washington, DC 20231, marked to the attention of Janet E. Rice.

Written comments will be available for public inspection in Room 108, Crystal Square 5, 1755 Jefferson Davis Highway, Arlington, Virginia 22202.

FOR FURTHER INFORMATOIN CONTACT: Janet E. Rice by telephone at (703) 557-3551 or by mail marked to her attention and addressed to Box 5, Trademark Trial and Appeal Board, Commissioner of Patents and Trademarks, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: The Patent and Trademark Office (PTO) is proposing amendments to the rules of practice in trademark cases to revise, simplify, remove, or clarify existing rules or to codify in rules certain practices which are currently in effect. The rules involved include those relating to the requirements for concurrent use applications; the abandonment of trademark applications; appeals to the Trademark Trial and Appeal Board (Board) from the final refusal of registration in ex parte applications; the institution and conduct of interference, concurrent use, opposition, and cancellation proceedings before the Board; review by civil action of a decision of the Board; and allowing an assignee to take action with respect to the assigned application or registration.

Discussion of Specific Sections Proposed to be Changed

In this discussion, "Patent and Trademark Office" is abbreviated as "PTO" and "Trademark Trial and Appeal Board" is abbreviated as "Board."

Section 2.42(a) is proposed to be amended by removing the designation "(a)" [because § 2.42(b) is proposed to be removed] and by deleting the qualifying phrase "to the extent of his knowledge" from the requirement that an applicant for registration as a lawful concurrent user state in the application the area, the goods, and the mode of use for which registration is sought. This information obviously is within the knowledge of the applicant and is essential for purposes of examination and publication.

Section 2.42(b), which requires that the verification or declaration in an application for registration as a lawful concurrent user "be made with the stated exception," is proposed to be removed to simplify practice. The paragraph has been construed, in the form for an application for registration based on concurrent use, as requiring that that portion of the verification or declaration which normally reads, "to the best of his/her knowledge and belief no other person, firm, corporation or association has the right to use said mark in commerce," also include, after the word "association," the additional phrase "other than specified in the application." Because most applicants and/or their attorneys do not realize that this is the import of the paragraph, the examination process is often prolonged. Moreover, an applicant for registration based on concurrent use is required to list, in the statement portion of the application, the exceptions to applicant's right to exclusive use, so that it is clear that the verification or declaration is being made, in effect, with the stated exceptions. Therefore, the requirement for a verification or declaration which differs in form from that of an application for a geographically unrestricted registration is unnecessary.

Section 2.68 is proposed to be amended to indicate that the section applies only to the abandonment of an application during the ex parte prosecution thereof, i.e., an application not involved in an inter partes proceeding before the Board. [The abandonment of an application which is involved in an inter partes proceeding before the Board is governed by § 2.135.]

Section 2.91 is proposed to be amended by changing the title of the section from "Interferences." to "Declaration of interference." The proposed amendment is one of a series of amendments, involving §§ 2.91–2.93, intended to distinguish between the "declaration" of an interference by the Commissioner upon petition and the subsequent "institution" of the interference by the Board. *See* Sections 1208.04 and 1208.05 of the *Trademark Manual of Examining Procedure.*

Section 2.92 is proposed to be revised to specifically indicate what must happen before an interference which has been "declared" by the Commissioner upon petition can be "instituted" by the Board.

Section 2.93 is proposed to be amended by, inter alia, changing the title of the section from "Declaration of interference." to "Institution of interference.", and by revising the text of the paragraph to harmonize with §§ 2.91 and 2.92, as proposed to be amended.

Section 2.102(c) is proposed to be amended to change the specified time period from "120 days" to "four months". The proposed "four months" time period would be easier to calculate than "120 days."

Section 2.104 is proposed to be amended to redesignate the present paragraph as "(a)" and to add a new paragraph, designated "(b)," codifying the practice that oppositions to different applications owned by the same party may be joined in a consolidated oppostion, when appropriate, provided that the required fees are paid. The proposed new paragraph parallels present § 2.112(b).

Section 2.106(b)(1) is proposed to be amended to include a short description of the content requirements for an answer to an opposition, just as present § 2.104 describes the content requirements for an opposition. The proposed amendment parallels a proposed amendment to § 2.114(b)(1) concerning answers to petitions for cancellation. The proposed description of the content requirements for an answer is modeled after portions of Rule 8 of the Federal Rules of Civil Procedure.

Section 2.106(c) is proposed to be amended to codify the practice that an applicant's written consent to the withdrawal of an opposition after answer may be signed by the applicant or by the applicant's attorney or other authorized representative. The proposed amendment parallels proposed amendments to §§ 2.114(c), 2.134(a), and 2.135.

Section 2.112(a) is proposed to be revised to delete the requirement that a petitioner indicate in the petition "the respondent party to whom notification shall be sent," and to substitute a requirement that the petitioner indicate, to the best of the petitioner's knowledge, "the name and address of the current owner of the registration." The purposes of the proposed revision are to provide the Board with information relating to the identity of the current owner of the registration sought to be cancelled, so that the Board can serve a copy of the petition on that party, and to remove any implication that the petitioner is permitted to designate who shall be the respondent. See also, in this regard, the proposed amendment to § 2.113.

Section 2.113 is proposed to be revised to codify the practices that the respondent shall be the party shown by the records of the PTO to be the current owner of the registration sought to be cancelled, except that the Board, in its discretion, may join or substitute as respondent a party who makes a showing of a current ownership interest in the registration. *See generally Gold Eagle Products Co. v. National Dynamics Corp.*, 193 USPQ 109 (TTAB 1976).

Section 2.114(b)(1) is proposed to be amended to include a short description of the content requirements for an answer to a petition for cancellation, just as present § 2.112(a) describes the content requirements for a petition for cancellation. The proposed amendment parallels the proposed amendment to § 2.106(b)(1) concerning answers to oppositions.

Section 2.114(c) is proposed to be amended to codify the practice that a registrant's written consent to the withdrawal of a petition for cancellation after answer may be signed by the registrant or by the registrant's attorney or other authorized representative. The proposed amendment parallels proposed amendments to §§ 2.106(c), 2.134(a), and 2.135.

Section 2.119 is proposed to be amended to change the title thereof from "Service of papers." to "Service and signing of papers.", so that the section title will describe the contents of the section as it is proposed to be amended by the revision of paragraphs (b) and (c), and by the addition of two new paragraphs, designated "(d)" and "(e)."

Section 2.119(b), which pertains to service of papers, is proposed to be revised to provide for two additional methods of service, namely, transmission by the "Express Mail" service of the United States Postal Service and transmission by overnight courier.

Section 2.119(c) is proposed to be revised to specify that whenever a party is required to take some action within a prescribed period after the service of a paper upon such party by another party, and the paper is served by first-class mail, "Express Mail," or overnight courier, 5 days shall be added to the prescribed period. The proposed amendments to this paragraph and to paragraph (b) codify existing practice.

Section 2.119(d) is proposed to be added to require that a party to an inter partes proceeding before the Board who is not domiciled in the United States, and is not represented by an attorney or other authorized representative located in the United States, appoint a domestic representative on whom may be served notices or process in the proceeding. The purpose of the proposed pargaraph is to facilitate the service of papers on foreign parties not represented by domestic counsel in proceedings before the Board.

Section 2.119(e) is proposed to be added to provide that every paper filed in an inter partes proceeding before the Board must be signed by the party filing it, or by the party's attorney or other authorized representative, but that an unsigned paper will not be refused consideration if a signed copy is submitted to the PTO within the time limit set in the notification of this defect by the Office. The purpose of the proposed amendment is to simplify practice, and to eliminate the necessity for a petition to the Commissioner in the case of an unsigned notice of opposition.

Section 2.120(a) is proposed to be amended to include a new sentence specifying that the opening of discovery is governed by the Federal Rules of Civil Procedure. The proposed amendment is a codification of current practice, which, in turn, finds its basis in the first sentence of the present paragraph. *See in general* Saul Lefkowitz and Janet E. Rice, *Adversary Proceedings Before the Trademark Trial and Appeal Board*, 75 TMR 323, 381–382 (1985).

Section 2.120(d) is proposed to be amended to change the title thereof from "Request for production." to "Interrogatories; request for production."; to redesignate the presen paragraph as "(2)"; and to add a new paragraph, designated "(1)." The proposed new paragraph limits the

number of interrogatories a party may serve upon another party to twenty-five, not counting subparts (which must be relevant, and reasonable in number), with additional interrogatories being allowed by the Board, in its discretion, only upon motion to the Board showing extraordinary circumstances, or upon stipulation of the parties. The purpose of the proposed amendment is to discourage parties from using written interrogatories for purposes of harassment, as exemplified in the case of *C.H. Stuart Inc. v. S.S. Sarna*, 212 USPQ 386 (TTAB 1980). The proposed amendment is believed to be in general harmony with corresponding local rules now prevalent in the Federal district courts.

Section 2.120(g) is proposed to be amended to change the title from "Failure to comply with order." to "Sanctions."; to redesignate the present paragraph as "(1)"; and to add a new paragraph, designated "(2)," providing that if a party fails to attend his or her discovery deposition, after being served with proper notice thereof, or fails to respond to a set of interrogatories or to a set of requests for production of documents and things, and such party or the party's attorney informs the party seeking discovery that he or she will not respond thereto, the Board may make any appropriate order by way of sanctions. The purpose of the proposed amendment is to eliminate the expense and delay resulting from the present practice, embodied in present paragraphs (e) and (g) of § 2.120, that in situations of the type described in the proposed paragraph, a motion to compel must be filed and granted and the resulting order violated before the party seeking discovery may move for sanctions. The proposed practice is in harmony with Rule 37(d) of the Federal Rules of Civil Procedure.

Section 2.120(j)(3) is proposed to be amended to redesignate the present paragraph as "(i)" and to add a new paragraph, designated "(ii)." The proposed new paragraph codifies the existing practice, exemplified in cases such as *Jeanne-Marc, Inc. v. Cluett, Peabody & Co., Inc.*, 221 USPQ 58 (TTAB 1984); *Autac Inc. v. Viking Industries, Inc.*, 199 USPQ 367 (TTAB 1978); *Harvey Hubbell, Inc. v. Red Rope Industries, Inc.*, 191 USPQ 119 (TTAB 1976); and *MRI Systems Corp. v. Wesley-Jessen Inc.*, 189 USPQ 214 (TTAB 1975), that a party who has obtained documents from another party, pursuant to a request for production under Rule 34 of the Federal Rules of Civil Procedure, may not make the produced documents of record by notice of reliance alone, except to the extent that the documents fall within the provisions of § 2.122(e). The reason for the practice is that document so obtained generally suffer from a lack of proper authentication, unless they are of the self-authenticating type admissible by notice of reliance under § 2.122(e).

Section 2.120(j)(4), which presently provides, in effect, that if an appropriate party files a notice of reliance upon only part of a discovery deposition, an adverse party may file a notice of reliance upon any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party, is proposed to be amended to require that the notice of reliance filed by the adverse party be supported by a written statement explaining why he or she needs to rely upon each of the additional parts listed in his or her notice, failing which the Board, in its discretion, may refuse to consider the additional parts. The proposed amendment represents a codification of current practice. Cf. *Alabama Board of Trustees v. BAMA-Werke Curt Baumann*, 231 USPQ 408, 409 (TTAB 1986), and *Holiday Inns, Inc. v. Monolith Enterprises*, 212 USPQ 949, 950–951 (TTAB 1981).

Section 2.120(j)(5), which presently specifies who may make of record (by notice of reliance) an interrogatory answer or an admission to a request for admission, is proposed to be amended to require that a party who seeks to rely upon certain of his or her own responses to interrogatories or requests for admissions, pursuant to the fairness exception presently provide in the paragraph, support his or her notice of reliance with a written statement explaining why he or she needs to rely upon each of the additional discovery responses listed in his or her notice, failing which the Board, in its discretion, may refuse to consider the additional parts. The proposed amendment parallels the proposed amendment to pragraph (j)(4) of the section and represents a codification of current practice. *See The Board of Trustees of the University of Alabama v. BAMA-Werke Curt Baumann, supra*, and *Holiday Inns, Inc. v. Monolith Enterprises, supra*.

Section 2.120(j)(8), which presently provides that "[i]nterrogatories, requests for production, requests for admissions, and materials or depositions obtained during the discovery period" should not be filed with the Board except under certain specified circumstances, is proposed to be revised to provide that "requests for discovery, responses thereto, and materials or depositions obtained through the discovery process" should not be filed with the Board except under the specified circumstances, and that papers or materials filed in violation of the paragrpah may be returned by the Board. The purpose of the proposed amendment is to clarify the beginning of the paragraph, and to reduce the number of papers and materials which must be retained in a proceeding file and stored by the Board.

Section 2.121(a)(1) is proposed to be amended to include a new sentence codifying the practice that the resetting of a party's time to respond to an outstanding request for discovery will not automatically result in the rescheduling of the discovery and/or testimony periods, and that such dates will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.

Section 2.122(e), which presently requires that a notice of reliance on a printed publication specify the printed publication and the pages to be read, indicate generally the relevance of the material being offered, and be accompanied by "the printed publication or a copy of the relevant portion thereof, including the title page and any other page needed to show the place and date of publication, the name and address of the publisher, and the name of the author or the editor," is proposed to be simplified by revising the paragraph to require that the notice of reliance specify the printed publication (including information sufficient to identify the source and the date of the publication) and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by the printed publication or a copy of the relevant portion thereof.

Section 2.123(c) is proposed to be amended to clarify the paragraph and to codify the current practice that testimony depositions may be noticed for any reasonable time and place in the United States, but that a testimony deposition may not be noticed for a place in a foreign country except as provided in paragraph (a)(2) of the section. The proposed codification of practice as to the place where testimony depositions may be taken roughly parallels § 1.673(a), which governs the taking of testimony depositions in patent interference proceedings in the PTO.

Section 2.123(e)(2) is proposed to be amended to include a new sentence stating that exhibits which are marked and identified at a deposition will be deemed to have been offered into evidence, without any formal offer

thereof, unless the intention of the parties is clearly to the contrary. The purpose of the proposed amendment is to revise existing practice, which requires either a formal offer or a clear indication in the transcript of an intent to introduce the exhibits. *See, for example, Roux Laboratories, Inc. v. Kaler*, 214 USPQ 134, 135–136 (TTAB 1982); *H. Betti Industries, Inc. v. Brunswick Corp.*, 211 USPQ 1188, 1189 (TTAB 1981); and *Kay Corp. v. Weisfield's, Inc*, 190 USPQ 565, 567–568 (TTAB 1976). Under the exising practice, a Party can lose a case simply because his attorney forgets to make a formal offer of the exhibits marked and identified during the party's testimony deposition. Under the proposed practice, the Board would be able to determine such cases on their merits, rather than on the basis of a technical defect.

Section 2.123(g)(1), which relates to the form of deposition transcripts, is proposed to be amended to permit the use of paper with numbered lines as an alternative to consecutively numbering the questions propounded to a witness. The proposed amendment, which parallels § 1.677(a), the provision governing the form of deposition transcripts in patent interference proceedings, would serve to simplify practice.

Section 2.125(a) is proposed to be amended to codify the existing practice that if a copy of a deposition transcript, with exhibits, is not served upon each adverse party within thirty days after completion of the taking of the testimony or within an extension of time for the purpose, any adverse party who was not served may have remedy by way of a motion to the Trademark Trail and Appeal Board to reset his or her testimony and/or briefing periods, as may be appropriate. The paragraph is proposed to be further amended to provide that if the deposing party fails to serve a copy of the transcript with exhibits on an adverse party after having been ordered to do so by the Board, the Board may strike the deposition, or enter judgment as by default against the deposing party, or take other action as may be deemed appropriate.

Section 2.127(e)(1) is proposed to be added to codify the long-established practice that a motion for summary judgment should be filed prior to the commencement of the first testimony period, and that the Board, in its discretion, may deny as untimely any motion for summary judgment filed thereafter. *See Rainbow Carpet, Inc. v. Rainbow International Carpet Dyeing & Cleaning Co.*, 226 USPQ 718 (TTAB 1985); *Allegro High Fidelity, Inc. v. Zenith Radio Corp.*, 197 USPQ 550 (TTAB 1977); *La Maur, Inc. v. Bagwells Enterprises, Inc.*, 193 USPQ 234 (Comm'r Pat. 1976); *Peterson's Ltd., Inc. v. Consolidated Cigar Corp.*, 183 USPQ 559 (TTAB 1974); *Cities Service Oil Co. v. Perfection American Inc.*, 157 USPQ 209 (TTAB 1968); T. Jeffrey Quinn, *Tips From the TTAB: Inter Partes Summary Judgment Revisited*, 76 TMR 73 (1986); and David J. Kera, *Tips From the TTAB: Summary Judgment*, 71 TMR 59, 61–62 (1981).

Section 2.127(e)2) is proposed to be added to provide, in essence, that for purposes of summary judgment only, a party may rely on his or her own responses to requests for discovery served upon him or her by an adverse party. The proposed amendment would serve to revise the Board's current practice, under which a party normally is not permitted to rely upon his or her own responses to discovery for purposes of summary judgment. It is believed that the proposed practice would be more consistent with the practice in the federal district courts.

Section 2.127(f) is proposed to be added to codify the existing practice that the Board does not have authority to hold any person in contempt, or to award attorney's fees or other expenses to any party. Although paragraphs (f), (g), and (h) of § 2.120, the section which governs the taking and use of discovery in inter partes proceedings before the Board, include provisions very similar in nature to the proposed paragraph, some litigants and/or their attorneys have mistakenly assumed that the Board has the authority to award attorney's fees or other expenses in situations not involving a failure to provide discovery. The addition of the proposed paragraph to § 2.127, the section which governs motions in general, would serve to clarify the matter.

Section 2.128(b), which presently provides, in pertinent part, that without leave of the Board, no brief shall contain more than fifty pages of argument, is proposed to be amended to specify a minimum type or print size for a brief and to provide that without prior leave of the Board, a main brief on the case shall not exceed fifty-five pages in length in its entirety. Litigants before the Board, and their attorneys, are often confused as to exactly what is encompassed by the term "argument," as used in the present paragraph. The proposed amendment would serve to simplify and clarify practice by specifying length limits for briefs in their entireties, followed by a list of the elements which are included within the length limit. The main brief length limit specified in the proposed paragraph is five pages longer than that specified in the present paragraph, because the proposed length limit covers the entire brief, including the table of contents and index of cases, whereas the present length limit does not.

Section 2.129(a), which presently provides, in pertinent part, that oral arguments at final hearing will be heard by three Members of the Board, is proposed to be amended to provide that such oral arguments will be heard by at least three Members of the Board. The purpose of the proposed amendment, which parallels a proposed amendment to § 2.142(e)(1), is to reflect the Board's use of augmented panels in certain cases.

Section 2.134(a) is proposed to be amended to codify the practice that in a cancellation proceeding, an adverse party's consent to the respondent's voluntary surrender of the involved registration may be signed by the adverse party or by the adverse party's attorney or other authorized representative. The proposed amendment parallels proposed amendments to §§ 2.106(c), 2.114(c), and 2.135.

Section 2.135 is proposed to be amended to codify the practice that in an opposition, concurrent use, or interference proceeding, an adverse party's consent to an applicant's abandonment of the applicant's involved application may be signed by the adverse party or by the adverse party's attorney or other authorized representative. The proposed amendment parallels proposed amendments to §§ 2.106(c), 2.114(c), and 2.134(a).

Section 2.142(b) is proposed to be amended to redesignate the present paragraph as "(1)" and to add a new paragraph, designated "(2)," codifying the form requirements and a length limit (twenty-five pages) for briefs filed in connection with ex parte appeals to the Board.

Section 2.142(e)(1), which presently provides that oral argument on an ex parte appeal to the Board will be heard by three Members of the Board, is proposed to be amended to provide that such oral argument will be heard by at least three Members of the Board. The purpose of the proposed amendment, which parallels a proposed amendment to § 2.129(a), is to reflect the Board's use of augmented panels in certain cases.

Section 2.142(f)(6) is proposed to be added to codify the practice that if, during an appeal to the Board from a refusal of registration, it appears to the

examiner that an issue not previously raised may render the mark of the appellant unregistrable, the examiner may request the Board to suspend the appeal and to remand the application to the examiner for further examination.

Section 2.145(c)(4) is proposed to be added to provide that a party to a proceeding before the Board who commences a civil action, pursuant to Section 21(b) of the Act, seeking review of a decision of the Board must file written notice with the Board, within one month after the expiration of the time for appeal or civil action, in order to avoid premature termination of the Board proceeding. The purpose of the proposed amendment is to ensure that parties who seek review of Board decisions by way of civil action will be aware of the need for informing the Board thereof.

Section 2.186, which presently provides that any action with respect to an assigned application or registration which may or must be taken by a registrant or applicant may be taken by the assignee provided that the assignment has been recorded, is proposed to be amended by adding at the end the phrase "or that proof of the assignment has been submitted." The purpose of the proposed amendment is to bring the section into closer conformity with Section 10 of the Act.

Environmental, Energy, and Other Considerations

The proposed rule change will not have a significant impact on the quality of the human environment or the conservation of energy resources.

The proposed rule change is in conformity with the requirements of the Regulatory Flexibility Act (Pub. L. 96-354), Executive Orders 12291 and 12612, and the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

The General Counsel of the Department of Commerce has certified to the Small Business Administration that the proposed rule change will not have a significant adverse economic impact on a substantial number of small entities (Regulatory Flexibility Act, Pub. L. 96-354). The rule change includes no additional or increased fees. Substantive rights to use valuable trademarks are not adversely affected.

The Patent and Trademark Office has determined that this rule change is not a major rule under Executive Order 12291. The annual effect to the economy will be less than $100 million. There will be no major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions. There will be no 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.

The PTO has also determined that this notice has no federalism implications affecting the relationship between the National Government and the states as outlined in Executive Order 12612.

This rule contains collections of information subject to the Paperwork Reduction Act previously approved by OMB under ICB Number 0651-0009. Public reporting burden for this collection of information is estimated to average 25 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 the burden, to Commissioner of Patents and Trademarks, Washington, DC 20231 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

List of Subject Terms in 37 CFR Part 2

Administrative practice and procedures, Courts, Lawyers, Trademarks.

Notice is hereby given that pursuant to the authority contained in section 41 of the Trademark Act of July 5, 1946, as amended, the Patent and Trademark Office proposes to amend Part 2 of Title 37 of the Code of Federal Regulations by amending §§ 2.42, 2.68, 2.91, 2.92, 2.93, 2.102, 2.104, 2.106, 2.112, 2.113, 2.114, 2.119, 2.120, 2.121, 2.122, 2.123, 2.125, 2.127, 2.128, 2.129, 2.134, 2.235, 2.142, 2.145, and 2.186, as set forth below. Additions are indicated by arrows and deletions by brackets.

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

1. The authority for Part 2 continues to read as follows:

Authority: 15 U.S.C. 1123; 35 U.S.C. 6, unless otherwise noted.

1a. Section 2.42 is proposed to be amended by removing paragraph (b), removing the designation "(a)" from the remaining paragraph, and revising that paragraph to read as follows:

§ 2.42 Concurrent use.

►(a)] An application for registration as a lawful concurrent user shall specify and contain all the elements required by the preceding sections. The applicant in addition shall state in the application [,] ►the area, the goods, and the mode of use for which applicant seeks registration; and also shall state,◄ to the extent of his knowledge, the concurrent lawful use of the mark by others, setting forth their names and addresses; registrations issued to or applications filed by such others, if any; the areas of such use; the goods on or in connection with which such use is made; the mode of such use; ►and◄ the periods of such use ►.◄ [; and the area, the goods, and the mode of use for which the applicant seeks registration.]

2. Section 2.68 is proposed to be revised to read as follows:

§ 2.68 Express abandonment (withdrawal) of application.

An application may be expressly abandoned by filing in the Patent and Trademark Office a written statement of abandonment or withdrawal of the application signed by the applicant, or the attorney or other person representing the applicant. The fact that an application ha been expressly abandoned ►during the ex parte prosecution thereof◄ shall not, in any proceeding in the Patent and Trademark Office, affect any rights that the applicant may have in the mark which is the subject of the abandoned application.

3. Section 2.91 is proposed to be amended by revising the title thereof to read as follows:

§ 2.91 ►Declaration of interference.◄ [Interferences.]

* * * * *

4. Section 2.92 is proposed to be revised to read as follows:

§ 2.92 Preliminary to interference.

►An interference which has been declared by the Commissioner will not be instituted by the Trademark Trial and Appeal Board until the Examiner of Trademarks has determined that the marks which are to form the subject matter of the controversy are registrable, and all of the marks have been published in the Official Gazette for opposition.◄ [Before the declaration of an interference, the marks which are to form the subject matter of the controversy must have been decided to be registrable by each party except for the interfering mark.]

5. Section 2.93 is proposed to be amended by revising the title thereof and by revising the text to read as follows:

§ 2.93 ►Institution◄ [Declaration] of interference.

An interference is ►declared and◄ instituted by the mailing of a notice of interference to the parties. The notice shall be sent to each applicant, in care of his attorney or other representative of record, if any, and if one of the parties is a registrant, the notice shall be sent to him or his assignee of record. The notice shall give the name and address of ►every◄ [the] adverse party and of this attorney or other authorized representative, if any, together with the serial number and date of filing and publication [, if published,] of each of the applications ►, or the registration number and date of issuance of each of the registrations,◄ [or registrations] involved.

6. Section 2.102 is proposed to be amended by revising paragraph (c) to read as follows:

§ 2.102 Extension of time for filing an opposition.

* * * * *

(c) The written request to extend the time for filing an opposition must be filed in the Patent and Trademark Office before the expiration of thirty days from the date of publication or within any extension of time previously granted, should specify the period of extension desired, and should be addressed to the Trademark Trial and Appeal Board. A first extension of time for not more than thirty days will be granted upon request. Further extensions of time may be granted by the Board for good cause. In addition, extensions of time to file an opposition aggregating more than ►four months◄ [120 days] from the date of publication of the application will not be granted except upon (1) a written consent or stipulation signed by the applicant or its authorized representative, or (2) a written request by the potential opposer or its authorized representative stating that the applicant or its authorized representative has consented to the request, and including proof of service on the applicant or its authorized representative, or (3) a showing of extraordinary circumstances, it being considered that a potential opposer has an adequate alternative remedy by a petition for cancellation.

* * * * *

7. Section 2.104 is proposed to be amended by redesignating the present paragraph as (a) and republishing it and by paragraph (b) to read as follows:

§ 2.104 Contents of opposition.

►(a)◄ The opposition must set forth a short and plain statement showing why the opposer believes he would be damaged by the registration of the opposed mark and state the grounds for opposition. A duplicate copy of the opposition, including exhibits, shall be filed with the opposition.

►(b) Oppositions to different applications owned by the same party may be joined in a consolidated opposition when appropriate, but the required fee must be included for each party joined as opposer for each class in which registration is opposed in each application against which the opposition is filed.◄

8. Section 2.106 is proposed to be amended by revising paragraphs (b)(1) and (c) to read as follows:

§2.106 Answer.

* * * * *

(b)(1) ►An answer shall state in short and plain terms the applicant's defenses to each claim asserted and shall admit or deny the averments upon which the opposer relies. If the applicant is without knowledge or information sufficient to form a belief as to the truth of an averment, applicant shall so state and this will have the effect of a denial. Denials may take any of the forms specified in Rule 8(b) of the Federal Rules of Civil Procedure.◄ An answer may contain any defense, including the affirmative defenses of unclean hands, laches, estoppel, acquiescence, fraud, mistake, [or] prior judgment[.] ►, or any other matter constituting an avoidance or affirmative defense.◄ When pleading special matters, the Federal Rules of Civil Procedure[s] shall be followed. A reply to an affirmative defense need not be filed. When a defense attacks the validity of a registration pleaded in the opposition, paragraph (b)(2) of this section shall govern. A pleaded registration is a registration identified by number and date of issuance in an original notice of opposition or in any amendment thereto made under Rule 15, FRCP.

* * * * *

(c) The opposition may be withdrawn without prejudice before the answer is filed. After the answer is filed, the opposition may not be withdrawn without prejudice except with the written consent of the applicant[.] ►or the applicant's attorney or other authorized representative.◄

9. Section 2.112 is proposed to be amended by revising paragraph (a) to read as follows:

§ 2.112 Contents of petition for cancellation.

(a) The petition to cancel must set forth a short and plain statement showing why the petitioner believes he is or will be damaged by the registration, state the grounds for cancellation, and indicate►, to the best of petitioner's knowledge, the name and address of the current owner of the registration.◄ [the respondent party to whom notification shall be sent.] A duplicate copy of the petition, including exhibits, shall be filed with the petition.

* * * * *

10. Section 2.113 is proposed to be revised to read as follows:

§ 2.113 Notification of cancellation proceeding.

When a petition for cancellation has been filed in proper form (see §§ 2.111 and 2.112), a notification shall be prepared by the Trademark Trial and Appeal Board, which shall identify the title and number of the proceeding and the registration or registrations involved and shall designate a time, not less than thirty days from the mailing date of the notification, within which an answer must be filed. A copy of the notification shall be forwarded to the attorney or other authorized representative of the petitioner, if any, or to the petitioner. The duplicate copy of the petition for cancellation and exhibits shall be forwarded with a copy of the notification to the respondent (see § 2.118)[.] ►, who shall be the party shown by the records of the Patent and Trademark Office to be the current owner of the registration or registrations sought to be cancelled, except that the Board, in its discretion, may join or substitute as respondent a party who makes a showing of a current ownership interest in such registration or registrations.◄ If the petition is found to be defective as to form, the party filing the petition shall be so advised and allowed a reasonable time for correcting the informality.

11. Section 2.114 is proposed to be amended by revising paragraphs (b)(1) and (c) to read as follows.

§ 2.114 Answer.

* * * * *

(b)(1) ►An answer shall state in short and plain terms the respondent's defenses to each claim asserted and shall admit or deny the averments upon which the petitioner relies. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an averment, respondent shall so state and this will have the effect of a denial. Denials may take any of the forms specified in Rule 8(b) of the Federal Rules of Civil Procedure.◄ An answer may contain any defense, including the affirmative defenses of unclean hands, laches, estoppel, acquiescence, fraud, mistake, [or] prior

judgment[.] ◄, or any other matter constituting an avoidance or affirmative defense.► When pleading special matters, the Federal Rules of Civil Procedure shall be followed. A reply to an affirmative defense need not be filed. When a defense attacks the validity of a registration pleaded in the petition, paragraph (b)(2) of this section shall govern. A pleaded registration is a registration identified by number and date of issuance in an original petition for cancellation or in any amendment thereto made under Rule 15, FRCP.

* * * * *

(c) The petition for cancellation may be withdrawn without prejudice before the answer is filed. After the answer is filed, the petition may not be withdrawn without prejudice except with the written consent of the registrant[.] ►or the registrant's attorney or other authorized representative.◄

12. Section 2.119 is proposed to be amended by revising the title thereof, revising paragraphs (b) and (c), and adding new paragraphs (d) and (e) to read as follows:

§ 2.119 Service ►and signing◄ of papers.

* * * * *

(b) Service of papers must be on the attorney or other authorized representative of the part if there be such or on the party if there is no attorney or other authorized representative, and may be made in ►any◄ [either] of the following ways:

(1) By delivering a copy of the paper to the person served;

(2) By leaving a copy at the usual place of business of the person served, with someone in his employment;

(3) When the person served has no usual place of business, by leaving a copy at his residence, with a member of his family over 14 years of age and of discretion;

(4) Transmission by the ►"Express Mail Post Office to Addressee" service of the United States Postal Service or by◄ first-class mail, which may also be certified or registered [.] ►;

(5) Transmission by overnight courier.◄ Whenever it shall be satisfactorily shown to the Commissioner that none of the above modes of obtaining service or serving the paper is practicable, service may be by notice published in the *Official Gazette.*

(c) When service is made by mail [,] ►or by overnight courier,◄ the date of mailing ►or of delivery to the overnight courier◄ will be considered the date of service. Whenever a party is required to take some action within a prescribed period after the service of a paper upon him by another party and the paper is served by ►first-class◄ mail, ►"Express Mail," or overnight courier,◄ 5 days shall be added to the prescribed period.

►(d) If a party to an inter partes proceeding is not domiciled in the United States and is not represented by an attorney or other authorized representative located in the United States, the party must designate by written document filed in the Patent and Trademark Office the name and address of a person resident in the United States on whom may be served notices or process in the proceeding. In such cases, official communications of the Patent and Trademark Office will be addressed to the domestic representative unless the application is being prosecuted by an attorney at law or other qualified person duly authorized under § 10.14(c) of this subchapter. The mere designation of a domestic representative does not authorize the person designated to prosecute the proceeding unless qualified under § 10.14(a), or qualified under paragraph (b) or (c) of § 10.14 and authorized under § 2.17(b).◄

►(e) every paper filed in an inter partes proceeding must be signed by the party filing it, or by the party's attorney or other authorized representative, but an unsigned paper will not be refused consideration if a signed copy is submitted to the Patent and Trademark Office within the time limit set in the notification of this defect by the Office.◄

13. Section 2.120 is proposed to be amended by revising paragraph (a); revising the titles of paragraphs (d) and (g); redesignating paragraph (d) as (d)(2) and republishing it; adding new paragraph (d)(1); redesignating paragraph (g) as (g)(1) and republishing it; adding new paragraph (g)(2); redesignating paragraph (j)(3) as (j)(3)(i) and republishing it; adding new paragraph (j)(3)(ii); and revising paragraphs (j)(4)(j)(5), and (j)(8) to read as follows:

§ 2.120 Discovery.

(a) *In general.* The provisions of the Federal Rules of Civil Procedure relating to discovery shall apply in opposition, cancellatoin, interference and concurrent use registration proceedings except as otherwise provided in this section. The Trademark Trial and Appeal Board will specify the closing date for the taking of discovery. ►The opening of discovery is governed by the Federal Rules of Civil Procedure.◄

* * * * *

(d) ►*Interrogatories; request*◄ [*Request*] *for production.* ►(1) The number of written interrogatories which a party may serve upon another party pursuant to Rule 33 of the Federal Rules of Civil Procedure shall not exceed twenty-five, except that the Trademark Trial and Appeal Board, in its discretion, may allow additional interrogatories upon motion therefor showing extraordinary circumstances, or upon stipulation of the parties. The twenty-five interrogatories, and any additional interrogatories allowed by the Board upon motion or stipulation, may contain a reasonable number of relevant subparts.◄

►(2)◄ The production of documents and things under the provisions of Rule 34 of the Federal Rules of Civil Procedures will be made at the place where the documents and things are usually kept, or where the parties agree, or where and in the manner which the Trademark Trial and Appeal Board, upon motion, orders.

* * * * *

(g) ►*Sanctions.*◄ [*Failure to comply with order.*] ►(1)◄ If a party fails to comply with an order of the Trademark Trial and Appeal Board relating to discovery, including a protective order, the Board may make any appropriate order, including any of the orders provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board does not have authority to hold any person in contempt or to award any expenses to any party. The Board may impose against a party any of the sanctions provided by this subsection in the event that said party or any attorney, agent, or designated witness of that party fails to comply with a protective order made pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

►(2) If a party, or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) of the Federal Rules of Civil Procedure to testify on behalf of a party, fails to attend his or her discovery deposition, after being served with proper notice, or fails to provide any response to set of interrogatories or to a set of requests for production of documents and things, and such party or the party's attorney or the notice of reliance. An objection made at a discovery deposition by a party answering a question subject to the objection will be considered at final hearing.

►(ii) A party who has obtained documents from another party under Rule 34 of the Federal Rules of Civil Procedure may not make the documents of record by notice of reliance alone, except to the extent that they are admissible by notice of reliance under the provisions of § 2.122(e).◄

(4) If only part of a discovery deposition is submitted and made part of the record by a party, an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party. ►A notice of reliance filed by an adverse party must be supported by a written statement explaining why such party needs to rely upon each additional part listed in his or her notice, failing which the Board, in its discretion, may refuse to consider the additional parts.◄

(5) An answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record by only the inquiring party except that, if fewer than all of the answers to interrogatories, or fewer than all of the other authorized representative informs the party seeking discovery that he or she will not respond thereto, the Board may make any appropriate order, as specified in paragraph (g)(1) of this section.◄

* * * * *

(j) *Use of discovery deposition, answer to interrogatory, or admission.*

* * * * *

►(3)(i)◄ [(3)] A discovery deposition, an answer to an interrogatory, or an admission to a request for admission, which may be offered in evidence under the provisions of paragraph (j) of this section may be made of record in the case by filing the deposition or any part thereof with any exhibit to the part that is filed, or a copy of the interrogatory and answer thereto with any exhibit made part of the answer, or a copy of the request for admission and any exhibit thereto and the admission (or a statement that the party from whom an admission was requested failed to respond thereto), together with a notice of reliance. The notice of reliance and the material submitted thereunder should be filed during the testimony period of the party who files admissions, are offered in evidence by the inquiring party, the responding party may introduce under a notice of reliance any other answers to interrogatories, or any other admissions, which should in fairness be considered so as to make not misleading what was offered by the inquiring party. ►The notice of reliance filed by the responding party must be supported by a written statement explaining why such party needs to rely upon each of the additional discovery responses listed in his or her notice, failing which the Board, in its discretion, may refuse to consider the additional responses.◄

* * * * *

(8) ►Requests for discovery, responses thereto,◄ [Interrogatories, requests for production, requests for admissions,] and materials or depositions obtained ►through the discovery process◄ [during the discovery period] should not be filed with the Board except when submitted with a motion to compel discovery, or in support of or response to a motion for summary judgment, or under a notice of reliance during a party's testimony period. ►Papers or materials filed in violation of this paragraph may be retained by the Board.◄

14. Section 2.121 is proposed to be amended by revising paragraph (a)(1) to read as follows:

§ 2.121 Assignment of times for taking testimony.

(a)(1) The Trademark Trial and Appeal Board will issue a trial order assigning to each party the time for taking testimony. No testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or, upon motion, by order of the Board. Testimony periods may be rescheduled by stipulation of the parties approved by the Board, upon motion granted by the Board, or by order of the Board. The resetting of the closing date for discovery will result in the rescheduling of the testimony periods without action by any party.

►The resetting of a party's time to respond to an outstanding request for discovery will not result in the automatic rescheduling of the discovery and/or testimony periods; such dates will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion granted by the board, or by order of the Board.◄

* * * * *

15. Section 2.122 is proposed to be amended by revising paragraph (e) to read as follows:

§ 2.122

Matters in evidence.

* * * * *

(e) *Printed publications and official records.* Printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding, and official records, if the publication or official record is competent evidence and relevant to an issue, may be introduced in evidence by filing a notice of reliance on the material being offered ►. The◄ [, which] notice shall specify the printed publication ►(including information sufficient to identify the source and the date of the publication)◄ or the official record and the pages to be read ►;◄ [,] indicate generally the relevance of the material being offered ►;◄ [,] and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules of Evidence, or by the printed publication or a copy of the relevant portion thereof ►.◄ [, including the title page and any other page needed to show the place and date of publication, the name and address of the publisher, and the name of the author or the editor.] A copy of an official record of the Patent and Trademark Office need not be certified to be offered in evidence. The notice of reliance shall be filed during the testimony period of the party that files the notice.

* * * * *

16. Section 2.123 is proposed to be amended by revising paragraphs (c), (e)(2), and (g)(1) to read as follows:

2.123 Trial testimony in inter partes cases.

* * * * *

(c) *Notice of examination of witnesses.* Before the depositions of witnesses shall be taken by a party, due notice in writing shall be given to the opposing party or parties, as provided in § 2.119(b), of the time when and place where the depositions will be taken, of the cause or matter in which they are to be used, and the name and address of each witness to be examined; if the name of a witness is not known, a general description sufficient to identify him or the particular class or group to which he belongs, together with a satisfactory explanation, may be given instead. ►Depositions may be noticed for any reasonable time and place in the United States. A deposition may not be noticed for a place in a foreign country except as provided in paragraph (a)(2)m of this section. No◄ [Neither] party shall take depositions in more than one place at the same time, nor so nearly at the same time that reasonable opportunity for travel from one place of examination to the other is not available.

* * * * *

(e) *Examination of Witnesses.*

* * * * *

(2) The deposition shall be taken in answer to questions, with the questions and answers recorded in their regular order by the officer, or by some other person (who shall be subject to the provisions of Rule 28 of the Federal Rules of Civil Procedure) in the presence of the officer except when his presence

is waived on the record by agreement of the parties. The testimony shall be taken stenographically and transcribed, unless the parties present agree otherwise. In the absence of all opposing parties and their attorneys or other authorized representatives, depositions may be taken in longhand, typewriting, or stenographically. ►Exhibits which are marked and identified at the deposition will be deemed to have been offered into evidence, without any formal offer thereof, unless the intention of the parties is clearly to the contrary.◄

* * * * *

(g) *Form of deposition.* (1) The pages of each deposition must be numbered consecutively, and the name of the witness plainly and conspicously written at the top of each page. The deposition may be written on legal-size or letter-size paper, with a wide margin on the left hand side of the page, and with the writing on one side only of the sheet. The questions propounded to each witness must be consecutively numbered ►unless paper with numbered lines is used,◄ and each question must be followed by its answer.

* * * * *

17. Section 2.125 is proposed to be amended by revising paragraph (a) to read as follows:

§ 2.125 Filing and service of testimony.

(a) One copy of the transcript of testimony taken in accordance with § 2.123, together with copies of documentary exhibits and duplicates or photographs of physical exhibits, shall be served on each adverse party within thirty days after completion of the taking of that testimony. ►If the transcript with exhibits is not served on each adverse party within thirty days or within an extension of time for the purpose, any adverse party who was not served may have remedy by way of a motion to the Trademark Trial and Appeal Board to reset his or her testimony and/or briefing periods, as may be appropriate. If the deposing party fails to serve a copy of the transcript with exhibits on an adverse party after having been ordered to do so by the Board, the Board, in its discretion, may strike the deposition, or enter judgment as by default against the deposing party, or take any such other action as may be deemed appropriate.◄

* * * * *

18. Section 2.127 is proposed to be amended by adding new paragraphs (e)(1), (e)(2), and (f) to read as follows:

§ 2.127 Motions.

* * * * *

►(e)(1) A motion for summary judgement should be filed prior to the commencement of the first testimony period, and the Trademark Trial and Appeal Board, in its discretion, may deny as untimely any motion for summary judgment filed thereafter.◄

►(2) For purposes of summary judgment only, a discovery deposition, or an answer to an interrogatory, or a document or thing produced in response for production, or an admission to a request for admission, will be considered by the Trademark Trial and Appeal Board if any party files, with his or her brief on the summary judgment motion, the deposition or any part thereof with any exhibit to the part that is filed, or a copy of the interrogatory and answer thereto with any exhibit made part of the answer, or a copy of the request for production and the documents or things in response thereto, or a copy of the request for admission and any exhibit thereto and the admission (or a statement that the party from whom an admission was requested failed to respond thereto.).◄

►(f) The Board does not have authority to hold any person in contempt, or to award attorneys' fees or other expenses to any party.◄

19. Section 2.128 is proposed to be amended by revising paragraph (b) to read as follows:

§ 2.128 Briefs at final hearing.

* * * * *

(b) Briefs shall be submitted in typewritten or printed form, double spaced, ►in at least pica or eleven-point type,◄ on letter-size paper. ►Each brief shall contain an alphabetical index of cases cited therein.◄ Without ►prior◄ leave of the Trademark Trial and Appeal Board, ►a main brief on the case shall not exceed fifty-five pages in length in its entirety, including the table of contents, index of cases, description of the record, statement of the issues, recitation of facts, argument, and summary, and a reply brief shall not exceed twenty-five pages in its entirety.◄ [no brief shall contain more than fifty pages of argument and, in the case of a reply brief, the entire brief shall not exceed twenty-five pages. Each brief shall contain an alphabetical index of cases cited therein]. ►Three◄ [One original and two] legible copies, on good quality paper, of each brief shall be filed.

20. Section 2.129 is proposed to be amended by revising pragraph (a) to read as follows:

§ 2.129 Oral argument; reconsideration.

(a) If a party desires to have an oral argument at final hearing, the party shall request such argument by a separate notice filed not later than ten days after the due date for the filing of the late reply brief in the proceeding. Oral arguments will be heard by ►at least◄ three Members of the Trademark Trial and Appeal Board at the time specified in the notice of hearing. If any party appears at the specified time, that party will be heard. If the Board is prevented from hearing the case at the specified time, a new hearing date will be set. Unless otherwise permitted, oral arguments in an inter partes case will be limted to thirty minutes for each party. A party in the position of plaintiff may reserve part of the time allowed for oral argument to present a rebuttal argument.

* * * * *

21. Section 2.134 is proposed to be amended by revising paragraph (a) to read as follows:

§ 2.134 Surrender or voluntary cancellation of registration.

(a) After the commencement of a cancellation proceeding, if the respondent applies for cancellation of the involved registration under section 7(d) of the Act of 1946 without the written consent of every adverse party [,] ►to the proceeding,◄ judgment shall be entered against the respondent. ►The written consent of an adverse party may be signed by the adverse party or by the adverse party's attorney or other authorized representative.◄

* * * * *

22. Section 2.135 is proposed to be revised to read as follows: **§ 2.135 Abandonment of application or mark.**

After the commencement of an opposition, concurrent use, or interference proceeding, if the applicant files a written abandonment of the application or of the mark without the written consent of every adverse party [,] ►to the proceeding,◄ judgment shall be entered against the applicant. ►The written consent of an adverse party may be signed by the adverse party or by the adverse party's attorney or other authorized representative.◄

23. Section 2.142 is proposed to be amended by redesignating paragraph (b) as (b) (1) and republishing it; adding new paragraphs (b)(2) and (f)(6); and revising paragraph (e)(1), to read as follows:

§ 2.142 Time and manner of ex parte appeals.

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►(b)(1)◄ [(b)] The brief of appellant shall be filed within sixty days from the date of appeal. If the brief is not filed within the time allowed, the appeal may be dismissed. The examiner

shall, within sixty days after the brief of appellant is sent to the examiner, file with the Trademark Trial and Appeal Board a written brief answering the brief of appellant and shall mail a copy of the brief to the appellant. The appellant may file a reply brief within twenty days from the date of mailing of the brief of the examiner.

►(2) Briefs shall be submitted in typewritten or printed form, double spaced, in at least pica or eleven-point type, on letter-size paper. Without prior leave of the Trademark Trial and Appeal Board, a brief shall not exceed twenty-five pages in length in its entirely.◄

* * * * *

(e)(1) If the appellant desires an oral hearing, a request therefor should be made by a separate notice filed not later than ten days after the due date for a reply brief. Oral argument will be heard by ►at least◄ three Members of the Trademark Trial and Appeal Board at the time specified in the notice of hearing, which may be reset if the Board is prevented from hearing the argument at the specified time or, so far as is convenient and proper, to meet the wish of the appellant or his attorney or other authorized representative.

* * * * *

(f)(1) * * *

* * * * *

►(6) If, during an appeal from a refusal of registration, it appears to the examiner that an issue not involved in the appeal may render the mark of the appellant unregistrable, the examiner may request the Board to suspend the appeal and to remand the application to the examiner for further examination. If the request is granted, the examiner and appellant shall proceed as provided by §§ 2.61, 2.62, 2.63 and 2.64. After the additional ground for refusal of registration has been withdrawn or made final, the examiner shall return the application to the Board, which shall resumue proceedings in the appeal and take further appropriate action with respect thereto.◄

* * * * *

24. Section 2.145 is proposed to be amended by adding new paragraph (c)(4) to read as follows:

§ 2.145 Appeal to court and civil action.

* * * * *

(c) *Civil action.*

* * * * *

►(4) A party to a proceeding before the Trademark Trial and Appeal Board who commences a civil action, pursuant to Section 21(b) of the Act, seeking review of a decision of the Board must file written notice thereof in the Patent and Trademark Office, addressed to the Board, within one month after the expiration of the time for appeal or civil action, in order to avoid premature termination of the Board proceeding.◄

* * * * *

25. Section 2.186 is proposed to be revised to read as follows:

§ 2.186 Action may be taken by assignee of record.

Any action with respect to an assigned application or registration which may or must be taken by ►an applicant or registrant◄ [a registrant or applicant] may be taken by the assignee provided that the assignment has been recorded [.] ►or that proof of the assignment has been submitted.◄

Dated: March 1, 1989.

Donald J. Quigg,

Assistant Secretary and Commissioner of Patents and Trademarks.

[FR Doc. 89-5153 Filed 3-6-89; 8:45 am]

BILLING CODE 3510-16-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Parts 59, 60 and 65

National Flood Insurance Program

AGENCY: Federal Insurance Administration (FIA), Federal Emergency Management Agency (FEMA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the National Flood Insurance Program (NFIP) definitions of "substantial improvement", "new construction", and "development"; revise regulations dealing with variances, enclosed areas below the lower floor, and wind loading values in coastal high hazard areas; and create definitions for "alluvial fan" "apex" (as it pertains to alluvial fans), "historic structure" and "substantial damage". The proposed rule would also clarify NFIP regulations pertaining to procedures for map revisions and amendments and establish standards and procedures for the types of supporting data needed when map changes are requested involving Special Flood Hazard Areas (SFHAs) on alluvial fans.

DATES: Comments must be received on or before May 8, 1989.

ADDRESSES: Send comments to Rules Docket Clerk, Office of General Counsel, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Charles M. Plaxico, Federal Emergency Mangement Agency, Federal Insurance Administration, 500 C Street, SW., Washington DC 20472; telephone number (202) 646-3422.

SUPPLEMENTARY INFORMATION: These proposed amendments are the result of a continuing reappraisal of the NFIP from the standpoint of achieving greater administrative and fiscal effectiveness and encouraging sound flood plain management so that reductions in the loss of life and property and in disaster expenditures can be realized. Several revisions to NFIP flood plain management criteria are proposed that are intended to clarify or further explain provisions in those criteria or which liberalize certain requirements. Since this is a case, communities participating in the NFIP will not be required to amend their flood plain management regulations to incorporate the revised language. However, if a community has had difficulties in administering a provision, that community would be encouraged to amend its regulations accordingly.

Substantial Improvement

A number of revisions are proposed to the definition of "substantial improvement" in § 59.1. These revisions are the result of an ongoing study by FEMA on issues related to the implementation of the "substantial improvement" definition and are intended to clarify portions of that definition. In addition to these revisions, FEMA is presently developing further guidance to assist communities in administering substantial improvement. Substantial improvements of existing structures must meet nearly all of the same flood plain management requirements as new construction.

The proposed revision address three areas that have been identified as being in need of clarification including, (1) substantially damaged structures, (2) historic structures, and (3) cost exemptions for correcting health, safety and sanitary code related violations. Substitutions and deletions of terminology are also proposed to make the definition fully consistent with other NFIP definitions and existing FEMA policy, and to account for the revisions in the three areas.

There have been issues raised regarding the interpretation of the substantial improvement definition where a building has been substantially damaged and is either not fully repaired, or is repaired using discounted or donated materials and labor. The proposed rule explicitly defines a

building as being substantially damaged when it sustains damage from any cause, whereby the cost of fully restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before damage occurred.

There have been instances where structures have been substantially damaged and not fully repaired. Some communities have determined that the repair of these structures is not a substantial improvement because they believed that the cost of repair was less than 50 percent of the structure's market value. While this is contrary to FEMA's interpretation of the definition, it is not unreasonable given the ambiguities in the current definition.

In essence, the reference to repair costs in the substantial improvement definition means the repair of *all* damages sustained and thus cannot reflect a level of repairs which is less than the amount of damages suffered. A building which sustains damages exceeding 50 percent of its market value will be subject to the substantial improvement rule, even if the actual cost of the repairs performed is reduced below the 50 percent threshold. Thus, the "cost of repair" used in determining repair cost to market value ratios shall be equal to the combined *value* of materials and labor used *or necessary* in repairing *all* damages sustained by a building, but in no case, shall be less than the value of materials and labor necessary to restore the building to its pre-damaged condition.

The value of "materials" shall be equal or equivalent to the actual or estimated cost of all materials, to be used or considered necessary in repairing all damages sustained by a building, and shall be no less than that required to restore the building to its pre-damaged condition. Where materials or servicing equipment are donated or discounted below normal market values, the value should be adjusted to an amount which would be equivalent to that estimated for normal market transactions for a given geographic location.

The value of "labor" shall be equal or equivalent to the actual or estimated labor charge for repair of all damages to the structure. Where non-reimbursed labor is involved (self or donated labor), the value of labor for the non-reimbursable portions shall be computed based on applicable hourly wage scales adjusted for a given geographic location and the type and skill of the labor involved.

Ultimately, it is the responsibility of the community permit official to assure that the cost of repair estimates provided or obtained reasonably reflect the value of damages sustained (or actual cost of repairs and improvements if greater than the value of the damages).

The underlying principle for including the costs associated with donated labor and materials is the added value of real property that would be located in flood hazard areas and that would be at risk to flood damage. It should be noted that in some form, the Federal Government (the NFIP and various disaster assistance programs) would likely be obligated to pay a portion of or all future damages to these more expensive improvements.

In estimating the "cost of material" for calculating substantial improvement, the costs of improvements required to remedy health, safety, and sanitary code violations can be deducted under the current definition of substantial improvement. However, there have been issues raised in the interpretation of substantial improvement in terms of the conditions of the code requirements and the degree of improvements which qualify for these deductions.

Current FEMA policy is that costs associated with improvements made to a structure are deductible from the overall costs of improvement *only* if the structure or specific items within the structure have been previously identified by the local code enforcement official as being substandard and in violation. If no official knowledge existed prior to the improvements, the local permit official has no way of knowing which items truly qualified as deductible and what the cost to repair or replace these items may have been. Without documentation or knowledge on the part of the permit official, the structure is assumed to have met all codes prior to the improvements, and all costs of improvements would be counted toward substantial improvement.

It is proposed that the substantial improvement definition be reworded to explicitly state that the costs of improvements required to remedy code deficiencies are deductible only if (1) an appropriate regulatory official such as a building official, code enforcement officer, fire marshal, or health officer was informed about and knew the extent of the code related deficiencies and (2) the deficiency was in existence prior to the repair or improvement and not triggered solely by the fact that the structure is being improved.

Consistent with current FEMA policy, for any improvement required to meet health, sanitary, and safety codes, the proposed rule also provides that only the *minimum* necessary to assure safe living conditions shall be credited as being deductible from the cost of the overall improvement. Costs of improvements which are in excess of the minimum necessary for continued occupancy or use will be counted toward the cost of the overall improvement. For example, if a certain feature of an item was in need of *repairs* to remedy a code violation, but the owner, of his own volition, chose to allocate additional funds to *replace* the entire item, then this additional cost would be counted substantial improvement and only the cost to perform the minimal necessary repairs would be deductible. The same policy applies when the owner chooses to use materials (or labor) that exceed the minimum expense for materials (or labor) necessary to remedy the code violation; the additional cost associated with the more expensive materials or labor would be counted toward substantial improvement.

As with donated labor and materials, the underlying principle for counting the extra costs associated with more expensive materials, labor, or designs is the added value of real property that would be located in flood hazard areas and that would be at risk to flood damage. It should be noted that in some form, the Federal Government (the NFIP and various disaster assistance programs) would likely be obligated to pay a portion of or all future damages to these more expensive improvements.

Historic Structures

Presently, in both the NFIP variance procedures (§ 60.6) and the definition of substantial improvement (§ 59.1) there is a provision which exempts "any alteration of a structure listed on the National Register of Historic Places or a State Inventory of historic places." Issues have been raised as to whether this exempting language can be modified to include structures that are not individually listed on the National Register, but that are located in a National, state or local historic district. In addition, the present exempting language is not fully consistent with the regulations of the Department of Interior (DOI) which define and set criteria for certification of historic structures.

The proposed rule change would clarfiy the current definition of substantial improvement and the procedures covering variances as they relate to the exemption of historic structures. This is to be done by including in the NFIP regulations, a separate definition for "historic structure" which is consistent with, but broader and more "inclusive than, the

DOI definiton of "certified historic structure". In addition, language wuld be added to § 60.6(a) to clarify that variances granted to historic structures should be only the minimum deviation from NFIP criteria that is necessary to assure that the historic character and design of the structure is not destroyed.

A "Certified Historic Structure" is defined by the DOI (36 CFR 67.2) as any building (and its structural components) which is listed individually in the National Register of Historic Places (a listing maintained by the DOI); or, located in a "registered historic district" and "certified" by the Secretary of the Interior as contributing to the historic significance of that district.

The proposed NFIP definition of "historic structure" would include all structures which have been officially designated by the DOI as ""certified historic structure", but would go beyond this to include (a) structures individually listed on state inventories for states with historic preservation programs that have been approved by the Secretary of the Interior under 36 CFR 61.4 and (b) structures individually listed on local inventories for communities with historic preservation programs that have been certified either by an approved state program as determined by the Secretary of the Interior under 36 CFR 61.5, or directly by the Secretary of the Interior in states without approved programs.

The original intent of providing special treatment to historic structures was two-fold: First, to allow historic structures to always maintain Pre-FIRM, subsidized insurance rates and, second, to minimize the adverse impacts of NFIP requirements on historic structures. Therefore, the proposed rule modifies § 60.6(a) to stipulate that the variance be the minimum deviation necessary to preserve both the historic character of the structure and its designation as a historic building.

The granting of a variance should be based on a structure-by-structure review to determine whether elevation (or floodproofing if a non-residential structure is involved) to or above the base flood elevation would destroy the historic character or design of the structure. If so, a variance for that structure may be granted. Variances should never be granted for portions of, or entire historic districts, but only for individual historic structures.

For example, if elevation of a historic structure would destroy its character and cause a loss of its DOI designation, a variance for the elevation requirement may be considered. However, the owner of the structure should still be required, in accordance with § 60.6(a)(4), to elevate all utilities and finished interior workings to or above the BFE (or to the maximum extent possible or practrically feasible) in order to reduce the potential of flood damage.

Physical alternations made to a "historic structure" which would otherwise constitute a substantial improvement must not result in the delisting of the structure from its DOI certified, state, or local inventory status. If such alterations cause the structure to lose its official listing or historic status, the structure would no longer be a "historic structure" for the purposes of the NFIP and would be considered a substantial improvement and must, therefore, comply with the NFIP requirements for new construction.

For further background on the pertinent regulations, procedures and adopted nomenclature of the DOI as they pertain to historic structures see 36 CFR 61.4, 61.5, 67.2, 67.4, 67.5, and 67.10.

Start of Construction

To make the definition of "start of construction" consistent with the definition of "substantial improvement", the second sentence in the current substantial improvement definition, which defines the point at which initial construction of a substantial improvement begins would be moved to the start of construction definition. In its place, a reference to "start of construction" would be added in the first sentence of the proposed substantial improvement definition. The actual start of construction for substantially improved structures would continue to mean the "the first alteration of any wall, ceiling, floor, or other structural part of a building, whether or not that alteration affects the external dimensions of the structure."

The term "reconstruction" has been deleted from the first sentence of the proposed definitions of "start of construction" and of "substantial improvement" and the terms "rehabilitation" and "addition" have been substituted. It is felt tha the terms "rehabilitation" and "addition" better describe the two types of improvements that actually occur to structures. This change is also consistent with current FEMA policy which, for the purposes of substantial improvement, differentiates between rehabilitations (improvements to a structure without an increase in external dimensions) and additions (increases in square footage of a structure) in terms of floodplain management and insurance rating requirements.

The term "repair" (due to damage) and the reference to market value of damaged structures would also be deleted from the first sentence of the substantial improvement definition because they are referenced in the proposed definition of "substantial damage".

Other Flood Plain Management Revisions

In addition, four other minor changes are proposed to clarify certain provisions of the regulations. First, the definition of "new construction" in § 59.1 would be modified to affirm current FEMA interpretation that the term applies to any subsequent improvements to a structure which meets the definition of "new construction". Occasionally, individuals have misinterpreted the current definition and argued that it allows for improvements to these structures which are not compliant with standards in § 60.3 provided that the improvements are not "substantial improvements". FEMA has maintained that the "substantial improvement" definition applies only to existing structures and that, once a structure meets the definition of "new construction", *any* further improvements to that structure must meet "new construction" requirements. Any other interpretation would be inconsistent with the structure and intent of the regulations in their entirety. However, FEMA believes that the fact that these misunderstandings of the definition have occurred is of sufficient concern to warrant clarification of the definition.

Second, paragraph (c)(5) of § 60.3 would be revised to make it clear that the openings requirement in that paragraph applies only to enclosures that are usable solely for vehicle parking, building access or storage. This would have to be the case since enclosures used for other uses would not be excluded under the definition of "lowest floor" and would have to be elevated to or above the base flood elevation or floodproofed (if non-residential). This change eliminates the need to refer back to the definition of "lowest floor" to draw this conclusion. Note that the type of storage permitted in these enclosures is only that which is incidental and accessory to the principal use of the structure. For instance, if the structure is a residence, the storage in the enclosure should be limited to items such as lawn and garden equipment, snow tires, and other low damage items which cannot be conveniently stored in the elevated portion of the structure. These items are likely to be flooded during more frequent flood events. No flood insurance coverage is provided for these items under most circumstances.

Third, the anchoring requirement for structures built on piles or columns in coastal high hazard areas at § 60.3(e)(4) and (e)(5) would be revised to replace a requirement that such structures be capable of resisting floatation, collapse, and lateral movement due to the combined effects of wind and water loading from the one percent chance event. The proposed revision instead references the wind loading values in applicable State and local building requirements.

The reason for this change is that the original NFIP wind requirement was based on the 1972 version of the American National Standards Institute, Inc. (ANSI) standard. However, almost all State or local building codes now base their wind requirements on the 1982 version of the ANSI standard, which increased the loading requirements and developed a new basic wind speed map, based on a "50 year" mean recurrence interval. Because of the difference in basis for the wind speed maps, it has sometimes been interpreted that the codes' use of the "50 year" wind map is in conflict with FEMA's requirement that the "100 year" wind map be used. FEMA has examined this problem and has concluded that use of the new 1982 ANSI standard with its increased loading requirements will result in a design which is as protecting as using the 1972 ANSI standard.

Fourth, the definition of "development" in § 59.1 would be modified to clarify situations covering the storage of equipment and material. There have been questions raised as to whether the open-air storage of equipment and material constitutes "development" and whether certain stock-pile items such as lumber and equipment (e.g., heavy machinery storage lots, automobile salvage yards, etc.) require a flood plain permit and should adhere to NFIP regulations under § 60.3.

"Development" is currently defined as "any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations". The definition of "development" describes the range of flood plain activities which require a permit by the community and which may increase flood levels during the occurrence of the base flood. For both communities which do not have designated floodways, and for those that do, development represents flood plain and floodway encroachments that must adhere to NFIP regulations under § 60.3(c)(10) and (d)(3), respectively.

Actual situations in the file have resulted in commercial enterprises storing equipment or materials in the designated floodway. In one situation a company was proposing to store lumber in the floodway. In another situation a company was storing numerous pieces of heavy equipment such as bulldozers, road graders, and cranes in the floodway. These experiences have demonstrated to FEMA the need to further define development to include the storage of equipment and material. Equipment or material stored on a site represents an encroachment which may increase flood levels during the base flood and must, therefore, under the proposed rule be both permitted by the community and considered during the application of § 60.3(c)(10) and (d)(3).

Revision of Base Flood Elevation Determinations

The proposed rule expands § 65.6(a)(6) by providing clarification of the criteria for acceptable hydraulic or hydrologic methodologies submitted to FEMA as supporting data for a request to revise a base flood elevation determination. No new requirements for such methodologies are proposed.

The flood risk data published on NFIP maps and in Flood Insurance Study (FIS) reports form the technical basis for the administration of the FNIP in each flood-prone community in the nation. These data provide the basis for local floodplain management measures required for participation in the NFIP, as well as the basis for actuarial flood insurance premiums. Although the preparation of NFIP maps and FIS reports is subject to rigorous technical standards, it is recognized that improvements in techniques used to estimate flood risks, changes in physical conditions in flood plains or watersheds, and availability of new technical data may necessitate revisions of the maps and studies.

In responding to new analyses submitted by appellants and in making such revisions, FEMA must exercise extreme care to ensure that all requests are fully documented and well justified. Therefore, adequate supporting data must be submitted. These data allow FEMA to review and evaluate the requests and to carry out its responsibility to ensure that the information to be presented is scientifically and technically correct. The availability of these data and methodology documentation also ensure that the right of the community and other property owners to review and appeal the new analysis is not infringed upon. Finally, access to the data and methods is necessary to update flood elevations and maps in an efficient manner as hydrologic or hydraulic conditions change in the future.

The existing regulation at § 65.6(a)(6) states: "In order for an alternative hydraulic or hydrologic methodology to be accepted, any computer program used must be accepted for general use by a governmental agency or notiable scientific body, must be well documented including a user's and programmer's manual, and must be available to the general user." The proposed rule is intended to eliminate the confusion regarding certain terms used in this regulation.

Specifically, the proposed rule includes an explanation of "governmental agency". In the context of this provision, it means an agency of the Federal Government that is responsible for water resources activities. A non-inclusive list of such agencies would consist of: The U.S. Army Corps of Engineers, U.S. Geological Survey, USDA Soil Conservation Service, Tennessee Valley Authority, and Bureau of Reclamation. "Governmental agnecy" does not embrace Federal agencies that do not have these responsibilities and does not include any governmental entity below the Federal level, whether they have these responsibilities or not.

"Notable scientific body" is explained in the proposed rule as an organization comparable to the National Academy of Sciences and is not intended to include individual universities and colleges.

The proposed rule clarifies the requirement that a computer program be available to the general user. Language has been added to explain that the program must be in the public domain (i.e., nonproprietary). If a program source code can be sent to FEMA free of charge with fully documented permission from the owner that FEMA may release this information and the user's manual to whomever requests it, with only nominal charges to cover FEMA's cost of reproducing these materials (i.e., photocopying the manuals and/or the cost of a magnetic tape or PC diskette), then FEMA will consider the program to be in the public domain.

Mapping and Revision of Alluvial Fan Special Flood Hazard Areas

The revisions to § 59.1 and 65.13, setting forth FEMA's policy for issuing Letters of MAP Amendment (LOMAs), Letters of Map Revision (LOMRs), Flood Insurance Rate Map (FIRM) revisions, and conditional Letters of Map Revision (CLOMRs) for Special Flood Hazard Areas (SFHAs) on alluvial fans is

necessary because of the high level of interest in development of alluvial fans and in anticipation of an increasing demand for map changes for areas on alluvial fans.

Alluvial fans are cone or fan-shaped deposits of boulders, gravel, sand, and fine sediments that have been eroded from mountain slopes, transported by floodwater draining upsteam watersheds, and then deposited on the adjacent valley floor. Active alluvial fans are areas of extreme hazard subject to flash flood and high velocity flows. Unlike riverine flooding, that is associated with permanent channels and identifiable flood plains, or unlike shallow flooding by slow-moving sheetflows, flooding that occurs on alluvial fans is characterized by fast-moving debris and sediment-laden shallow flows. The paths followed by these flows are prone to lateral migration and sudden relocation to other portions of the fan. In addition, these fast-moving flows present hazards associated with erosion, debris flow, and sediment transport.

Alluvial fans occur in a variety of environments, particularly in arid, semi-arid or seasonally dry regions, where the sediment supply is large enough that deposition can occur. Such locations are particularly common along faulted or tectonic mountain fronts in California, Colorado, Nevada, Utah, Oregon, Texas, Arizona, Idaho, New Mexico, Wyoming, Montana, and Washington; however, alluvial fans are also found in Alaska, West Virginia, Kentucky, and Tennessee. Some of the fastest developing areas of the United States are in the arid and semi-arid southwestern regions, where alluvial fans occupy a large portion of the land area.

For flood insurance purposes, FEMA has chosen the 100-year flood as the base flood for the determination and mitigation of flood hazards and for setting insurance rates. However, the technology of mathematically modeling the hydrodynamics of water and debris flows on alluvial fans is still in the early development stage. Therefore, the estimation of the values of the various hazard parameters associated with the base flood is highly uncertain for alluvial fans.

Further research is needed to provide better understanding of the factors that affect alluvial fan flooding, including: The hydrology of the watersheds above and below the apex; the effects of alluvial fan geometric characteristics, sediment source and quantity; the effect of sediment on channel avulsion; the stability of flood channels on alluvial fans; the location and extend of the distinct hydraulic zones on the fan; and the determination of the stability of existing man-made structures during major flood events; and the effects of those structures on the natural alluvial fan boundaries.

In addition, the state of the art for the design and construction of other than major structural projects (i.e., whole fan protection projects) is not well developed. The efficacy of more localized projects in providing protection from fan hazards is not well known or readily assessed. Further research is also needed to investigate construction techniques and to assess design parameters for the construction of flood mitigation structures on fans. Unfortunately, the needed research will take time to complete.

Given the present interest in development of alluvial fans and in anticipation of an increasing demand for Flood Insurance Rate Map (FIRM) changes for areas on alluvial fans, FEMA has identified the need to develop a policy for issuing map revisions for SFHAs on alluvial fans. FEMA believes that it is prudent to take a conservative stand concerning the removal of the SFHA designation, and its associated lender notification and mandatory insurance purchase requirements, from alluvial fans. FEMA will, therefore, consider as a basis for map revisions involving alluvial fans only major structural flood mitigation measures that are supported by appropriate engineering analyses.

Such measures should be designed to mitigate all hazards associated with alluvial fan flooding which include inundation, ground erosion, scour around structures, and debris and sediment flow and accumulation, in addition to aggradation and degradation of the conveyance systems. In addition, the short and long-range effects of such measures on adjacent properties must be considered. Major mitigation structures may include, but are not restricted to, diversion dikes, flood walls, detention basins, and diversion channels with inlet and outlet systems.

Several communities special construction standards and zoning regulations for flood mitigation in developments on alluvial fans. While such approaches are encouraged, their efficacy in the control of flood waters on alluvial fans is uncertain. Therefore, FEMA will generally not recognize such approaches by themselves as an adequate basis for map revision.

Because of the complexities associated with the many variables affecting flooding on alluvial fans and the lack of information with which to qualify the major fan hazards and provide the appropriate construction techniques for structures on alluvial fans, the creation of an overall development master plan of flood control, drainage maintenance and floodplain management is encouraged by FEMA. Such plans allow for strategic management of alluvial fans at the early stages of development. At this stage, the community is afforded a number of alternatives for dedicating specific portions of the fan to both structural and non-structural measures that will address the unique hazards associated with alluvial fan flooding.

The proposed rule adds definitions for "Alluvial Fan" and "Apex". Additionally, the proposed rule amends Part 65 to add a new section to establish the policy, principles, and data requirements for flood plain mitigation measures on alluvial fans and the requirements for mapping and revising alluvial fan SFHAs.

FEMA has determined, based upon an Environmental Assessment, that the proposed rule does not have significant impact upon the quality of the human environment. As a result, an Environmental Impact Statement will not be prepared. A finding of no significant impact is included in the formal docket file and is available for public inspection and copying at the Rules Docket Clerk, Office of General Counsel, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

The proposed rule does not have a significant economic impact on a substantial number of small entities and has not undergone regulatory flexibility analysis.

The proposed rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, and hence, no regulatory analysis has been prepared.

FEMA has determined that this proposed rule does not contain a collection of informaiton requirement as described in section 3504(h) of the Paperwork Reduction Act.

List of Subjects in 44 CFR Parts 59, 60 and 65

Flood insurance, Flood plains.

Accordingly, it is proposed to amend CFR Chapter I, Subchapter B as follows:

PART 59—GENERAL PROVISIONS

1. The authority citation for Part 59 continues to read as follows:

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

§ 59.1 [Amended]

2. §59.1 is amended as follows:

a. By adding alphabetically, a definition of "Alluvial Fan" to read as follows:

* * * * *

"*Alluvial fan*" means a geomorphologic feature characterized by a cone or fan-shaped deposit of boulders, gravel, and fine sediments that have been eroded from mountain slopes, transported by flood flows, and then deposited on the valley floors, and which is subject to flash flooding, high velocity flows, debris flows, erosion, sediment movement and deposition, and channel migration.

* * * * *

b. By adding, alphabetically, a definition of "Apex" to read as follows:

* * * * *

"*Apex*" means the point of highest elevation on an alluvial fan, which on undisturbed fans is generally the point where the major stream that formed the fan emerges from the mountain front.

* * * * *

c. By adding to the definition of "Development" after the word "operations" the words "or storage of equipment or materials.

d. By adding, alphabetically, a definition of "Historic structure" to read as follows:

* * * * * * *

"*Historic structure*" means any structure that is:

(a) Listed individually in the National Register of Historic Places (a listing maintained by the Department of Interior) or preliminarily determined by the Secretary of the Interior as meeting the requirements for individual listing on the National Register;

(b) Certified or preliminarily determined by the Secretary of the Interior as contributing to the historical significance of a registered historic district or a district preliminarily determined by the Secretary to qualify as a registered historic district;

(c) Individually listed on a state inventory of historic places in states with historic prevervation programs which have been approved by the Secretary of Interior; or

(d) Individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified either:

(1) By an approved state program as determined by the Secretary of the Interior or

(2) Directly by the Secretary of the Interior in states without approved programs.

* * * * * * *

e. By revising the definition of "New construction" to read as follows:

* * * * * * *

"New construction" means, for the purposes of determining insurance rates, structures for which the "start of construction" commenced on or after the effective date of an initial FIRM or after December 31, 1974, whichever is later, and includes any subsequent improvements to such structures. For flood plain management purposes, "new construction" means structures for which the "start of construction" commenced on or after the effective date of a flood plain management regulation adopted by a community and includes any subsequent improvements to such structures.

f. By removing in the definition of "Start of construction" the word "reconstruction" in the first sentence and adding in its place the words "rehabilitation, addition" and by adding the following sentence at the end of the definition: "For a substantial improvement, the actual start of construction means the first alteration of any wall, ceiling, floor, or other structural part of a building, whether or not that alteration affects the external dimensions of the building."

g. By adding, alphabetically, a definition of "Substantial damage" to read as follows:

* * * * * * *

"*Substantial damage*"means damage of any orgin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

* * * * * * *

h. By revising the definition of "Substantial improvement" to read as follows:

* * * * * * *

"Substantial improvement" means any rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the "start of construction" of the improvement. This term includes structures which have incurred "substantial damage", regardless of the actual repair work performed. The term does not, however, include either—(a) Any project for improvement of a structure to correct existing violations of state of local health, sanitary or safety code specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions or

(b) Any alteration of a "historic structure".

PART 60—CRITERIA FOR LAND USE MANAGEMENT AND USE

3. The authority citation for Part 60 continues to read as follows:

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

§ 60.3 [Amended]

4. § 60.3 is amended as follows:

a. By adding in pargraph (c)(5) between the words "that" and "are" the phrase "are usable solely for parking of vehicles, building access or storage in an area other than a basement and which".

b. By removing the sentence in paragraph (e)(4) that begins with the word "Wind" and adding in its place "Water loading values used shall be those associated with the base flood. Wind loading values used shall be those required by applicable State of local building standards."

c. By removing the sentence in paragraph (e)(5)(ii) that begins with the word "Maximum" and adding in its place "Water loading values used shall be those associated with the base flood. Wind loading values used shall be those required by applicable State or local building standards."

* * * * *

§ 60.6 [Amended]

5. Section 60.6 is amended by removing in paragraph (a) introductory text the sentence "Variances may be issued by a community for the reconstruction, rehabilitation or restoration of structures listed on the National Register of Historic Places or a State Inventory of Historic Places or a State Inventory of Historic Places, without regard to the procedures set forth in this section", and adding in its place "Variances may be issued for the repair or rehabilitation of historic structures upon a determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and that the variance is the minimum necessary to preserve the historic character and design of the structure."

PART 65—IDENTIFICATION AND MAPPING OF SPECIAL HAZARD AREAS

6. The authority citation for Part 65 continues to read as follows:

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

§ 65.6 [Amended]

7. § 65.6 is amended by revising paragraph (a)(6) to read as follows:

* * * * *

(a) * * *

(6) In order for an alternative hydraulic or hydrologic methodology to be accepted, any computer program used must meet all of the following criteria:

(i) It must be reviewed and approved for general use by a Federal agency responsible for water resources activities, such as the U.S. Army Corps of Engineers, U.S. Geological Survey, USDA Soil Conservation Service, Tennessee Valley Authority, or Bureau of Reclamation; or by a notable scientific body such as the National Academy of Sciences. Reviews or acceptance by Federal agencies that do not have water resources responsibilities, by non-Federal agencies, or by individual universities and colleges, are not admissible.

(ii) It must be well documented including source codes and user's manual.

(iii) It must be available to the general user, i.e. it must be in the public domain and nonproprietary. If the program is not generally available from a Federal agency, but the source code can be sent to FEMA free of charge with fully documented permission from the owner that FEMA may release the code and the user's manual to whomever requests it, with only nominal charges to cover FEMA's cost of reproducing these materials, then FEMA will consider the program to be in the public domain.

* * * * *

§ 65.13 [Redesignated as § 65.14]

8. Part 65 is amended by the redesignation of § 65.13 as 65.14 and the addition of a new § 65.13 to read as follows:

§ 65.13 Mapping and Revision of Alluvial Fan Special Flood Hazard Areas

This section describes the procedures to be followed and the types of information FEMA needs to recognize that a flood control measure is effective in removing or reducing the size of a Special Flood Hazard Area (SFHA) located on an alluvial fan. This information must be supplied to FEMA by the community or other party seeking recognition of such a flood control measure at the time a flood risk study or restudy is conducted, when a map revision under the provisions of Part 65 of this subchapter is sought, and upon request by the Administrator during the review of previously recognized flood control measures. The FEMA review will be for the sole purpose of establishing appropriate risk zone determinations for NFIP maps and shall not constitute a determination by FEMA as to how the flood control measure or system will perform in a flood event.

(a) The applicable provisions of §§ 65.2, 65.3, 65.4, 65.6, and 65.8 shall also apply to FIRM revisions involving alluvial fans.

(b) The provisions of § 65.5 regarding map revisions based on fill or other topographic alterations and the provisions of Part 70 regarding inadvertent inclusion of properties within a SFHA shall not apply to FIRM revisions involving alluvial fans. In general, topographic alterations alone, by fill or other means, will not serve as a basis for removing SFHA designations from alluvial fans.

(c) FEMA will consider for map revision purposes major flood control measures whose design and construction are supported by sound engineering analyses which demonstrate that the measures will effectively eliminate all alluvial fan flood hazard from the area protected by such measures. The provided analyses must include, but are not necessarily limited to the following:

(1) Engineering analyses that quantify the design discharges and volumes of water flow, debris flow, and sediment movement associated with the flood that has a one-percent probability of being equaled or exceeded in any year at the apex of the fan under current watershed conditions and under potential adverse conditions (e.g., deforestation of the watershed by fire). The potential for debris flow and sediment movement must be assessed using an engineering method acceptable to FEMA. The assessment should consider the characteristics and availability of sediment in the drainage basin above the apex and on the alluvial fan.

(2) Engineering analyses showing that the project elements will accommodate the estimated peak discharge and volumes of water, debris, and sediment, as determined in accordance with (c)(1) of this section, and their associated hydrodynamic and hydrostatic forces.

(3) Engineering analyses showing that the project elements have been designed against the erosion and scour forces present.

(4) Engineering analyses or evidence showing that the project elements will provide protection form potential lateral migration and sudden relocation of flows from other parts of the fan.

(5) Engineering analysis that assesses the methods of disposal of concentrated flood water and associated sediment load on adjacent properties.

(6) Engineering analyses demonstrating that flooding from local runoff, or sources other than the fan apex, is insignificant or has otherwise been accommodated by the appropriate flood control or drainage measures.

(d) Coordination. FEMA will recognize projects that are adequately designed and constructed provided that:

(1) Evidence is submitted to show that the impact of the project on flood hazards in all areas of the fan, (including those not protected by the project) and the design and maintenance requirements of the different elements of the project were reviewed and approved by the community, State or local agency that has jurisdiction over flood control activities in the community.

(2) The community provides assurance to FEMA that appropriate easements have been secured from owners of property on which flood waters have been directed.

(e) Operation and Maintenance Plans and Criteria. The requirements for operation and maintenance of flood control measures on alluvial fans shall be those specified under § 65,10 (c) and (d) when applicable.

(f) Certification Requirements. Data submitted to support that a given flood mitigation measure complies with the requirements set forth in paragraphs (c)(1) through (6) of this section must be certified by a registered professional engineer. Also, certified as-built plans of the flood mitigation measures must be submitted. Certifications are subject to the definition given at § 65.2 of this subchapter.

Dated: February 28, 1989.

Harold T. Duryee,

Federal Insurance Administrator.

[FR Doc. 89-5094 Filed 3-6-89; 8:45 am]

BILLIING CODE 6718-05-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposal to List the Golf Stick Pearly Mussel as an Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Service proposes to list a freshwater mussel, the golf stick pearly mussel (*Obovaria retusa*), as an endangered species under the Endangered Species Act of 1973, as

amended (Act). This freshwater mussel historically occurred in the Ohio River and its large tributaries in Pennsylvania, West Virginia, Ohio, Indiana, Illinois, Kentucky, Tennessee, and Alabama. Presently, the golf stick pearly mussel is known from four relict, apparently nonreproducing, populations—two reaches of the Tennessee River (one in the State of Kentucky and one in the State of Tennessee), one reach of the Green River in Kentucky, and one reach of the Cumberland River in Tennessee. The distribution and reproductive capacity of this species has been seriously impacted by the construction of impoundments on the large rivers it once inhabited. Unless reproducing populations are found or methods developed to maintain existing populations, this species will likely become extinct in the foreseeable future. Comments and information are sought from the public concerning this proposal.

DATES: Comments from all interested parties must be received by May 8, 1989. Public hearing requests must be received by April 21, 1989.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Asheville Field Office, 100 Otis Street, Room 224, Asheville, North Carolina 28801. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Richard G. Biggins at the above address (704/259-0321 or FTS 672-0321).

SUPPLEMENTARY INFORMATION:

Background

The golf stick pearly mussel (*Obovaria retusa*) was described by Lamarck (1819). This freshwater species, which is characterized as a large river species (Bates and Dennis 1985), has a medium to large shell that is ovate to subquadrate in outline (Bogan and Parmalee 1983). The shell exterior lacks rays and has a yellow-green to brown color. Older individuals are usually darker brown or black. The inside of the shell is salmon to deep purple surrounded by a white border. Like other freshwater mussels, it feeds by filtering food particles from the water. It has a complex reproductive cycle in which the mussel's larvae parasitize fish. The mussel's life span, fish species its larvae parasitize, and other aspects of its life history are unknown.

The golf stick pearly mussel has historically widely distributed in the Ohio, Cumberland, and Tennessee River systems in Pennsylvania, West Virginia, Ohio, Illinois, Indiana, Kentucky, Tennessee, and Alabama (Bogan and Parmalee 1983, Kentucky Nature Preserves Commission 1980, Parmalee and Klippel 1982, Lauritsen 1987, Stansbery 1970). Based on personal communication with knowledgable experts (Steven Ahlstedt and John Jenkinson, Tennessee Valley Authority, 1987; Arthur Bogan, Philadelphia Academy of Sciences, 1988; Arthur Clarke, Corpus Christi State University, 1986; Ronald Cicerello, Kentucky Natural Preserves Commission, 1988; James Sickel, Murry State University, 1987; David Stansbery, Ohio State University, 1987) and a review of current literature (see above plus Sickel 1985), the species is known to survive in only four river reaches. The species still exists but apparently does not reproduce in the Tennessee River in Livingston, Marshall, and McCracken Counties, Kentucky; the Tennessee River in Hardin County, Tennessee; the Cumberland River in Wilson, Trousdale, and Smith Counties, Tennessee; and the Green River in Hart and Edmonson Counties, Kentucky.

The continued existence of these four popoulations is questionable. Unless reproducing populations can be found or methods can be developed to maintain these or create new populations, the species will become extinct in the forseeable future. The individuals that do still survive in these four river reaches are also threatened from other factors. The Green River in Kentucky has experienced water quality problems related to the impacts from oil and gas production in the watershed. The individuals still surviving in the Tennessee and Cumberland Rivers are potentially threatened by gravel dredging, channel maintenance, and commercial mussel fishing. Although the species is not commercially valuable, incidental take of the species does sometimes occur during commercial mussel fishing for other species.

The golf stick pearly mussel was recognized by the Service in the May 22, 1984, **Federal Register** (49 FR 21664) as a species that was being considered for possible addition to the Federal List of Endangered and Threatened Wildlife and Plants. The species was a candidate placed in Category 2; such species are those for which information then in possesion of the Service indicates that a proposal is possibly inappropriate, but for which conclusive data are still lacking to support such a proposal. On March 17, 1987, and October 27, 1987, the Service notified Federal, State, and local governmental agencies and interested individuals by mail that a status review was being conducted specifically on the golf stick pearly mussel and that the species could be proposed for listing. Since that time, additional contacts with Federal and State agency personnel and the scientific community have occurred concerning the status and potentiality of the species' being protected under the Endangered Species Act.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR Part 424) promulgatged to implement the listing provisions of the Act set forth procedures for adding species to the Federal lists. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(A)(1). These factors and their application to the golf stick pearly mussel (*Obovaria retusa*) are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range

The golf stick pearly mussel was once widespread in the Ohio River and its large tributaries in Pennsylvania, West Virginia, Ohio, Kentucky, Indiana, Illinois, Tennessee, and Alabama (Bogan and Parmalee 1983). However, most of the historically known populations were apparently lost due to conversion of many sections of these big rivers to a series of large impoundments. This seriously reduced the availability of preferred riverine gravel/sand habitat, and it likely affects the distribution and availability of the mussels' fish host. As a result, the species' distribution has been substantially reduced.

The species was last taken in Pennsylvania in 1908 (Pennsylvania Department of Environmental Resources, personal communication, 1987). No live or fresh dead specimens have been taken in West Virginia in recent years (William Tolin, U.S. Fish and Wildlife Service, personal communication, 1987). According to a personal communication from Robert McCance, Jr., Ohio Department of Natural Resources (1987), the last Ohio collection of the golf stick pearly mussel was made in 1938. In Indiana waters the species has not been collected in decades (Max Henschen, Indiana Mollusk Technical Advisory Committee, personal communication, 1987). The Illinois Department of Energy and Natural Resources (Kevin Cummings, personal communication, 1987) reported

that the species has not been collected in over 30 years from Illinois.

The species is presently known from only four river reaches—two in Kentucky and two in Tennessee. In Kentucky waters the golf stick has been taken in recent years only from the Tennessee River in McCracken, Livingston, and Marshall Counties and from the Green River in Hart and Edmonson Counties (Linda Andrews, Kentucky Department of Fish and Wildlife Resources, and Ronald Cicerello, personal communication, 1987). Kentucky's Tennessee River population is represented by the collection of only two live individuals in recent years. One was taken in 1985 (Sickel 1985), and the other was collected in 1986 (C. E. Moore, U.S. Army Corps of Engineers, personal communication, 1987). In the Green River, only one fresh dead individual was taken during a mussel survey between Munfordville, Kentucky, and Mammoth Cave, Kentucky, in 1987 (Ronald Cicerello, personal communication, 1987). The last live specimen taken from the Green River was collected in the mid-1960s (Kentucky Natural Resources and Environmental Protection Cabinet, personal communication, 1987).

In Tennessee the species apparently still survives in the Cumberland River in Wilson, Trousdale, and Smith Counties, and in the Tennessee River in Hardin County. According to personal communication with knowledgeable individuals, the species is taken on rare occasions by commercial mussel fishermen from both these rivers (Paul Parmalee, University of Tennessee, personal communication, 1986; Steven Ahlstedt, personal communication, 1987; Paul Yokley, University of North Alabama, personal communication, 1987).

The four surviving populations are all threatened from impacts on their environment. The Green River population is threatened from degradation of water quality resulting from inadequate environmental controls at oil and gas exploration and production facilities and from altered stream flows from an upstream reservoir. The other populations are potentially threatened by river channel maintenance, navigation projects, and gravel and sand dredging.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Although the species is not commercially valuable, it does exist on harvested mussel beds, and the species is therefore sometimes taken by mussel fishermen. Thus, take does pose some threat to the species. Federal protection would help to control the take of individuals.

C. Disease or Predation

Although the golf stick pearly mussel is undoubtedly consumed by predatory animals, there is no evidence that predation threatens the species. However, freshwater mussel die-offs have recently (early to mid-1980s) been reported throughout the Mississippi River basin, including the Tennessee River and its tributaries (Richard Neves, Virginia Polytechnic Institute and State University, personal communication, 1986). The cause of the die-offs has not been determined, but significant losses have occurred to some populations.

D. The Inadequacy of Existing Regulatory Mechanisms

The States of Kentucky and Tennessee prohibit taking fish and wildlife, including freshwater mussels, for scientific purposes without a State collecting permit. However, these States do not protect the species from take for other purposes. Federal listing will provide the species additional protection under the Endangered Species Act by requiring Federal permits to take the species and by requiring Federal agencies to consult with the Service when projects they fund, authorize, or carry out may adversely affect the species.

E. Other Natural or Manmade Factors affecting its Continued Existence

None of the four populations is known to be reproducing. Therefore, unless reproducing populations can be found or methods can be developed to maintain these or create new populations, the species will be lost in the foreseeable future. In fact, three of the populations (Cumberland and Tennessee River populations) may contain only old individuals that have passed their reproductive age.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to propose this rule. Based on this evaluation, the preferred action is to list the golf stick pearly mussel (*Obovaria retusa*) as an endangered species. Historical records reveal that the species was once much more widely distributed in many of the large rivers of the Ohio River system. Presently only four isolated, apparently non-reproducing, populations are known to survive. Due to the species' history of population losses and the vulnerability of the four remaining populations, threatened status does not appear appropriate for this species. See the following section for a discussion of why critical habitat is not being proposed for the golf stick pearly mussel.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary designate any habitat of a species that is considered to be critical habitat at the time the species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for the golf stick pearly mussel at this time, owing to the lack of benefits from such designation. The U.S. Army Corp of Engineers and the Tennessee Valley Authority are the two Federal agencies most involved, and they, along with the State natural resources agencies in Tennessee and Kentucky, are already aware of the location of the remaining populations that would be affected by any activities in these river reaches. Both Federal agencies have conducted numerous studies in these river basins and are knowledgeable of the fauna and of their projects' impacts. No additional benefits would accrue from critical habitat designation that would not also accrue from the listing of the species. In addition, this species is so rare that taking for scientific purposes and private collection could be a threat. The publication of critical habitat maps and other publicity accompanying critical habitat designation could increase that threat. The location of populations of this species have consequently been described only in general terms in this proposed rule. Any existing precise locality data would be available to appropriate Federal, State, and local governmental agencies through the Service office described in the "Addresses" section.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed

species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibition against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in the destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or destroy or adversely modify its critical habitat. If a Federal action may adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. The Service has notified Federal agencies having programs that may affect the golf stick pearly mussel. Federal activities that could occur and impact the species include, but are not limited to, the carrying out or the issuance of permits for hydroelectric facility construction and operation, reservoir construction, river channel maintenance, stream alterations, wastewater facilities development, and road and bridge construction. It has been the experience of the Service, however, that nearly all section 7 consultations have been resolved so that the species has been protected and the project objectives have been met. In fact, the areas inhabited by the golf stick pearly mussel are also inhabited by other mussels that have been federally listed since 1976, and all section 7 consultations for these areas have been successfully resolved.

The Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any subject to the jurisdiction of the United States to take any listed species, import or export it, ship it in interstate commerce in the course of commercial activity, or sell it or offer it for sale in interstate or foreign commerce. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions would apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes to enhance the propagation or survival of the species and/or for incidental take in connection with otherwise lawful activities. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available.

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning any aspect of this proposal are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to this species;

(2) The location of any additional populations of this species and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range and distribution of this species; and

(4) Current or planned activities in the subject area and their possible impacts on this species.

Final promulgation of the regulation on this species will take into consideration the comments and any additional information received by the Service, and such communications may lead to adoption of a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be filed within 45 days of the date of the proposal. Such requests must be made in writing and addressed to the Field Supervisor, U.S. Fish and Wildlife Service, Asheville Field Office, 100 Otis Street, Room 224, Asheville, North Carolina 28801.

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, needed not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Bates, J.M., and S.D. Dennis. 1985 State Museum of Tennessee Wildlife Resources Agency Technical Report No. 85-3. p. 125.

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Lamarck, J.B.P.A. 1815–1822. Histoire naturelle des animaux sans vertebres. Tome V–VII, 8 vol.

Lauritsen, Diane. 1987. The Nature Conservancy element stewardship abstract: *Obovaria retusa*. The Nature Conservancy, Midwest Regional Office, Minneapolis, Minnesota. Unpublished report. 4 pp.

Parmalee, P.W., and W.E. Klippel. 1982. A relic population of *Obovaria retusa* in the middle Cumberland River, Tennessee. The Nautilus, 96(1):30–32.

Sickel, James B. 1985. Biological assessment of the freshwater mussels in the Kentucky Dam tailwaters of the Tennessee River. Submitted to Kentucky Division of Water, Frankfort, Kentucky. 42 pp.

Stansbery, David H. 1970. Eastern freshwater mollusks: (I) the Mississippi and St. Lawrence River systems. Malacologia, 10(1):9–22.

Author

The primary author of this final rule is Richard G. Biggins, U.S. Fish and Wildlife Service, Asheville Field Office, 100 Otis Street, Room 224, Asheville, North Carolina 28801 (704/259–0321 or FTS 672–0321).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Proposed Regulation Promulgation

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

11. The authority citation for Part 17 continues to read as follows:

Authority: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411; Pub. L. 100–478, 102 Stat. 2306; Pub. L. 100–653, 102 Stat. 3825 (16 U.S.C. 1531 *et seq.*); Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

12. It is proposed to amend § 17.11(h) by adding the following, in alphabetical

order under CLAMS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Clams:							
*	*	*	*	*	*	*	*
Pearly mussel, golf stick (=pink ring)	*Obovaria retusa*	U.S.A. (AL, IL, IN, KY, OH, PA, TN and WV).	NA	E		NA	NA
*	*	*	*	*	*	*	*

Dated: December 22, 1988.

Becky Norton Dunlop,

Assistant Secretary for Fish and Wildlife and Parks.

(Proposal: Golf stick pearly mussel (*Obovaria retusa*)—endangered)

[FR Doc. 89-5252 Filed 3-6-89; 8:45 am]

BILLING CODE 4310-55-M

Notices

Federal Register
Vol. 54, No. 43
Tuesday, March 7, 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

Special Committee on Ethics in Government; Public Meeting

SUMMARY: Pursuant to the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of a meeting of the Special Committee on Ethics in Government of the Administrative Conference of the United States. The committee has scheduled the meeting to continue its discussion of appropriate conflict-of-interest rules for Federal advisory committee members.

DATE: Tuesday, March 14, 1989 at 9:30 a.m.

LOCATION: Library of the Administrative Conference, 2120 L Street NW., Suite 500, Washington, DC.

PUBLIC PARTICIATION: The committee meeting is open to the interested public, but limited to the space available. Persons wishing to attend should notify the contact person at least two days prior to the meeting. The committee chairman may permit members of the public to present oral statements at the meeting. 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: Michael W. Bowers, Office of the Chairman, Administative Conference of the United States, 2120 L Street NW., Suite 500, Washington, DC 20037. Telephone: (202) 254-7065.

Dated: March 3, 1989.

Michael W. Bowers,

Deputy Research Director.

[FR Doc. 89-5401 Filed 3-6-89; 8:45 am]

BILLING CODE 6110-01-M

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Privacy Act; System of Records

AGENCY: Office of the Secretary, USDA.

ACTION: Notice of New Privacy Act System of Records.

SUMMARY: Notice is hereby given that USDA proposes to create a new Privacy Act system of records, USDA/FS-50, entitled "Skills Bank Data Base, USDA/FS."

EFFECTIVE DATE: This notice is effective on March 7, 1989.

FOR FURTHER INFORMATION CONTACT: Eddie L. Wade, Forest Service Privacy Act Officer, Forest Service, USDA, Information Systems Staff, P.O. Box 96090, Washington, D.C. 20090-6090.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act, 5 U.S.C. 552a, USDA is creating a new system of records to be maintained by the Forest Service (FS). The purpose of this notice is to announce the creation and character of this system of records maintained by the FS. The system contains data on FS employees concerning their knowledge, skills, and abilities; career aspirations, work history, and education. This system is being created pursuant to a consent decree entered in the case of *Bernardi* v. *Lyng*, Civil Action No. 73-1110 SC (CW), which is pending in the United States District Court for the Northern District of California. These obligations require the FS to establish a "skills bank," for the purpose of assisting the FS to achieve, to the greatest extent possible, a long term goal of eliminating underrepresentation of women within each General Schedule job series represented within its workforce and at each grade level therein.

A "Report on New System," required by 5 U.S.C. 552a(r), as implemented by Appendix I to OMB Circular A-130, was sent to the President of the Senate, the Speaker of the House of Representatives and the Director of the Office of Management and Budget on February 10, 1989.

Signed at Washington, DC, on February 10, 1989.

PETER C. MYERS,

Deputy Secretary.

USDA/FS-50

SYSTEM NAME: 1Skills Bank Data Base, USDA/FS.

SYSTEM LOCATION:

USDA/FS, Pacific Southwest Forest and Range Experiment Station (Station), 1960 Addison Street, Berkeley, California 94704.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All FS permanent employees assigned to the Pacific Southwest Region and to the Pacific Southwest Forest and Range Experiment Station.

CATEGORIES OF RECORDS IN THE SYSTEM:

A skills bank data form, containing the name, social security number, position title, series, grade, career goals and aspirations, knowledge, skills, abilities, work history, and education of FS employees.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 7 U.S.C. 2201, and 42 U.S.C. 2000e-16, *et seq.*

PURPOSE OF THE SYSTEM:

Assistance in eliminating underrepresentation of women within each General Schedule job series represented within the regional workforce and at each grade level therein and assistance in effective human resource management by encouraging more qualified applicants for vacancies and certain details.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

There are no routine uses for this system of records.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Skills Bank Data Base records are stored for computers on disks, magnetic tape, and other electronic media accessible only by password.

RETRIEVABILITY:

Records can be accessed by data entry number; computer address, name, social security number (obtained voluntarily and used for purposes of verification only), position title, current pay plan, series and job grade; career goals; education; work experience, and knowledge, skills and abilities.

SAFEGUARDS:

On-line access to Skills Bank Data Base data is controlled by password protection, and is limited to those names entered into a controlled pool of names of persons with designated access authority in the Region. These are either the persons who have been assigned to access the Skills Bank data base or those supervisors who have agreed to do so. At the Station, access is limited to the Director, Assistant Directors, Project Leaders, Group Leaders, Administrative Officer or Business Management Assistant.

RETENTION AND DISPOSAL:

Until the National Archives and Records Administration determines an appropriate retention and disposal schedule for these records, they will be retained indefinitely in accordance with the FS Handbook 6209.11, Records Management Handbook.

SYSTEM MANAGER(S) AND ADDRESS:

Group Leader of Statistics and Computer Services, Pacific Southwest Station, 1960 Addison Street, Berkeley, California 94704.

NOTIFICATION PROCEDURE:

An individual may request information as to whether the system contains records pertaining to him or her by signing on to a locally-based computer terminal and viewing his or her own record. The employee can then print out the data. Individuals not employed in the Pacific Southwest Region or Station may obtain this information by written request to the System Manager.

RECORD ACCESS PROCEDURE:

Same as notification procedure.

CONTESTING RECORD PROCEDURES:

See notification procedure, above. An employee, having obtained and printed his or her own record, may make corrections on the printed record and forward the corrected record to the appropriate Personnel Office for correction of the record in the data base. Further information may be obtained by making a written request to the system manager. USDA regulations on contesting contents of records and appealing initial determinations are set forth at 7 CFR 1.100–1.123.

RECORD SOURCE CATEGORIES:

Information in these records is obtained directly from the individuals in the system.

[FR Doc. 89–5229 Filed 3–6–89; 8:45 am]

BILLING CODE 3410–11–M

Agricultural Marketing Service

[No. LS–89–103]

Beef Promotion and Research; Certification and Nomination; Cattlemen's Beef Promotion and Research Board

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: Notice is hereby given that the United States Department of Agriculture's Agricultural Marketing Service (AMS) is accepting applications from State cattle producer organizations and beef importers who desire to be certified to nominate producers or importers for appointment to vacant positions on the Cattlemen's Beef Promotion and Research Board (board). Organizations which have not previously been certified that are interested in submitting nominations must complete and submit an official application form to AMS. Previously certified organizations do not need to reapply. Notice is also given that vacancies will occur on the board; and that during a period to be established, nominations will be accepted from eligible organizations and individual importers.

DATE: Applications for Certification must be received by close of business, April 6, 1989.

ADDRESS: Certification forms as well as copies of the certification and nomination procedures may be requested from Ralph L. Tapp, Chief; Marketing Programs and Procurement Branch; Livestock and Seed Division; Agricultural Marketing Service, USDA; Room 2610–S; P.O. Box 96456; Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: Ralph L. Tapp at 202–447–2650 (FTS 447–2650).

SUPPLEMENTARY INFORMATION: The Beef Promotion and Research Act of 1985 (Act) (7 U.S.C. 2901 et seq.), approved December 23, 1985, authorizes the implementation of a national Beef Promotion and Reasearch Order. The Order, as published in the July 18, 1986, **Federal Register** (51 FR 26132), provides for the establishment of a board. The board consists of 108 cattle producers and 5 importers appointed by the Secretary. The duties and responsibilities of the board are specified in the Order.

The Act and the Order provide that the Secretary shall either certify or otherwise determine the eligibility of State or importer organizations or associations to nominate members to the board to ensure that nominees represent the interests of cattle producers and importers. Nominations for importer representatives may also be made by indivduals who import cattle, beef, or beef products. Individual importers do not need to be certified as eligible to submit nominations. When individual importers submit nominations, they must establish to the satisfaction of the Secretary that they are in fact importers of cattle, beef, or beef products, pursuant to § 1260.143(b)(2) of the Order (7 CFR 1260.143(b)(2)). Individual importers are encouraged to contact AMS at the above address to obtain further information concerning the nomination process including the beginning and ending dates of the established nomination period and required nomination forms and biographical data sheets. Certification and nomination procedures were promulgated in the final rule, published in the April 4, 1986, **Federal Register** (51 FR 11557). Organizations which have previously been certified to nominate members to the board do not need to reapply for certification to nominate producers and importers for the existing vacancies.

The Act and the Order provide that the members of the board shall serve for terms of three (3) years, except that members appointed to the initial board shall serve proportionately for terms of 1, 2, and 3 years. The Order also requires USDA to announce when a board vacancy does or will exist. Since the initial board was appointed on August 4, 1986, there will be vacancies in those States or units whose producer or importer representatives were appointed to the initial board for a 3-year term. The 39 vacancies by State or unit are as follows:

State or unit	No. of vacancies
Alabama	1
Arkansas	1
California	2
Colorado	1
Florida	1
Georgia	1
Idaho	1
Illinois	1
Indiana	1

State or unit	No. of vacancies
Iowa	2
Kansas	2
Kentucky	1
Minnesota	1
Missouri	2
Montana	1
Nebraska	2
New York	1
North Dakota	1
Ohio	1
Oklahoma	2
Oregon	1
Pennsylvania	1
South Dakota	1
Tennessee	1
Texas	5
Virginia	1
Wisconsin	1
Northwest	1
Importers	1

Since there are no anticipated vacancies on the board for the remaining States' positions, or for the positions of the Northeast and mid-Atlantic units, nominations will not be solicited from certified organizations or associations in those States or units.

Uncertified eligible producer organizations in all States that are interested in being certified as eligible to nominate cattle producers for appointment to the listed producer positions, must complete and submit an official "Application for Certification of Organization or Association," which must be received by close of business 30 days after publication of this notice in the **Federal Register**. Uncertified, eligible importer organizations that are interested in being certified as eligible to nominate importers for appointment to the listed importer positions must apply by the same date. Importers should not use the application form but should provide the requested information by letter, as provided for in 7 CFR 1260.540(b). Applications from States or units without vacant positions on the board and other applications not received within the 30 day period after publication of this notice in the **Federal Register** will be considered for eligibility to nominate producers or importers for subsequent vacancies on the board.

Only those organizations or associations which meet the criteria for certification of eligibility promulgated at 7 CFR 1260.530 as published in 51 FR 11557, 11559 (April 4, 1986) are eligible for certification. Those criteria are:

(a) For State organizations or associations.

(1) Total paid membership must be comprised of at least a majority of cattle producers or represent at least a majority of cattle producers in a State or unit.

(2) Membership must represent a substantial number of producers who produce a substantial number of cattle in such State or unit.

(3) There must be a history of stability and permanency.

(4) There must be a primary or overriding purpose of promoting the economic welfare of cattle producers.

(b) For organizations or associations representing importers, the determination by the Secretary as to the eligibility of importer organizatons or associations to nominate members to the board shall be based on applications containing the following information—

(1) The number and type of members represented (i.e., beef or cattle importers, etc.).

(2) Annual import volume in pounds of beef and beef products and/or the number of head of cattle.

(3) The stability and permanency of the importer organization or association.

(4) The number of years in existance.

(5) The names of the countries of origin for cattle, beef, or beef products imported.

All certified organizations and associations, including those which were previously certified in the States or units having vacant positions on the board, will be notified simultaneously in writing of the beginning and ending dates of the established nomination period and will be provided with required nomination forms and biographical data sheets.

The names of qualified nominees received by the established due date will be submitted to the Secretary of Agriculture for consideration as appointees to the board.

The information collection requirements referenced in this notice have been previously approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C., Chapter 35 and have been assigned OMB No. 0581-0152.

Done in Washington, DC, on March 2, 1989.

J. Patrick Boyle,

Administrator.

[FR Doc. 89-5189 Filed 3-6-89; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF AGRICULTURE
Forest Service

DEPARTMENT OF THE INTERIOR

National Park Service

Grand Canyon Airport Railroad Spurline

AGENCIES: Forest Service, USDA and National Park Service, Interior.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Department of Agriculture, Forest Service, and the Department of Interior, National Park Service, as joint lead agencies, will prepare an environmental impact statement for Grand Canyon Railway's proposed Grand Canyon Airport railroad spurline. Conceptually, the spurline would originate in the vicinity of the Grand Canyon Airport adjacent to the unincorporated community of Tusayan, Arizona, and extend in a westerly direction connecting with the existing railroad line that terminates in the Grand Canyon Village at the South Rim of the Grand Canyon. Analysis of this spurline proposal is independent of the environmental assessment prepared for the existing railroad line which authorized reactivation of passenger rail service from Williams to the Grand Canyon Village. This spurline proposal involves Federal lands under the administrative juridiction of the National Park Service, Grand Canyon National Park and the Forest Service, Tusayan Ranger District, Kaibab National Forest.

Construction of the proposed spurline, railroad depot and parking lot in Tusayan, in conjunction with the development of other transportation systems, could provide an opportunity to reduce vehicle congestion in the Grand Canyon National Park.

A range of alternatives will be considered in the analysis of the Grand Canyon Airport railroad spurline. A no action alternative will be considered, as will other alternative methods of transportation. The analysis will also evaluate alternative route locations for the spurline, as well as placement of the railroad depot and parking lot which could serve as a "transportation hub" for the Grand Canyon National Park.

Federal, State and local agencies, and other individuals and organizations who may be interested in or affected by the spurline proposal are invited to participate in the scoping process. The scoping process will define tentative issues and concerns such as potential social and economic impacts of the proposal on Tusayan, Coconino County and the Grand Canyon National Park, and environmental considerations involving wildlife, vegetative, cultural and mineral resources as well as impacts on the Grand Canyon Airport. The scoping process may also help identify alternative types of public transportation that could be developed in conjunction with, or in lieu of the proposed railroad spurline.

Open house scoping meetings are tentatively scheduled for Tusayan and Flagstaff, Arizona in mid-March. The analysis is expected to take about 6 months. The draft environmental impact statement should be available for public review in the Fall of 1989. The final environmental impact statement is scheduled to be completed in the Spring of 1990.

Leonard A. Lindquist, Forest Supervisor, Kaibab National Forest and Stanley T. Albright, Regional Director, Western Region, National Park Service are the responsible officials.

DATE: Written comments concerning initial issues or the analysis should be received by May 15, 1989.

ADDRESSES: Written comments and suggestions concerning the analysis should be sent to Forest Supervisor, Kaibab National Forest, 800 South Sixth Street, Williams, Arizona 86046 or Superintendent, Grand Canyon National Park, P.O. Box 129, Grand Canyon, Arizona 86023.

FOR FURTHER INFORMATION CONTACT: Questions about the proposal and environmental impact statement should be directed to R. Dennis Lund of the Kaibab National Forest, phone (602) 635-2681 or Chuck Lundy of the Grand Canyon National Park, phone (602) 638-7708.

Date: February 28, 1989.

Leonard A. Lindquist,

Forest Supervisor, Kaibab National Forest.

Stanley T. Albright,

Regional Director, Western Region, National Park Service.

[FR Doc. 89-5244 Filed 3-6-89; 8:45 am]

BILLING CODE 3410-11-M

COMMISSION ON CIVIL RIGHTS

District of Columbia Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the District of Columbia Advisory Committee to the Commission will convene at 1:30 p.m. and adjourn at 4:30 p.m. on Thursday, March 30, 1989, in the Conference Room, 5th Floor, U.S. Commission on Civil Rights, 1121 Vermont Ave., NW., Washington, DC 20425. The Committee will meet for orientation of new members, staff reports on the status of the agency, Committee actions, and program planning.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Walter E. Washington or John I. Binkley, Director of the Eastern Regional Division of the Commission at (202/523-5264 or TDD 202/376-8117). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, March 1, 1989.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 89-5241 Filed 3-6-89; 8:45 am]

BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

Export Administration Bureau

[Docket Nos.: 8110-01 et al.]

Actions Affecting Export Privileges of Goran Josberg

In the matter of: Goran Josberg (Docket No. 8110-01), individually and doing business as Globe Trade (Docket No. 8110-02), Globe Metals (Docket No. 8110-03), Globe Computers (Docket No. 8110-04), respondents.

Summary

Pursuant to the January 31, 1988 Recommended Decision and Order of the Administrative Law Judge, which Decision and Order is attached hereto and affirmed by me, Goran Josberg (aka Goran B. Josberg, Gooran B. Josberg and Goeran B. Josberg), individually and doing business as Globe Trade (aka Globe Trade AB), Globe Metals, and Globe Computers, all with an address of Strandvagen 9, S-11456 Stockholm, Sweden, is, and the Respondents are collectively, denied for a period of thirty-five years from the date hereof, all privileges of participating in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the regulations (14 CFR Part 768-700).

Order

On January 31, 1988, the Administrative Law Judge (ALJ) entered his Recommended Decision and Order in the captioned matter. That Decision and Order, a copy of which is attached hereto and made a part hereof, has been referred to me for final action. I hereby affirm the Recommended Decision and Order of the ALJ.

This constitutes final agency action in this matter.

Date: March 2, 1989.

Paul Freedenberg,

Under Secretary, Bureau of Export Adminstration.

Decision And Order

In the matter of: Goran Josberg[1] individually and doing business as Globe Trade[2], Globe Metals, Globe Computers, respondents.

Appearance for respondents: Goran Josberg and Globe Trade: Goran Josberg, President, Globe Trade, Strandvagen 9, S-11456 Stockholm, Sweden.

Appearance for agency: Louis K. Rothberg, Esq., Office of Chief Counsel, for Export Administration.

U.S. Department of Commerce, Room H-3329, 14th & Constitution Ave., NW., Washington, DC 20230.

Preliminary Statement

This proceeding began with the issuance by the Office of Export Enforcement ("the Agency"), Bureau of Export Administration, U.S. Department of Commerce of a May 2, 1988 charging letter against Respondent Goran Josberg, individually and doing business as Respondent Globe Trade, as Respondent Globe Metals, and as Respondent Globe Computers. (All four Respondents will hereinafter be referred to collectively as "Respondent Josberg," unless otherwise indicated.) The charging letter was issued under the authority of the Export Administration Act of 1979, as amended (50 U.S.C. App. 2401-2420) ("the Act"), and the Export Administration Regulations ("the Regulations").[3]

[1] This Respondent was listed in most of the materials in this proceeding as "Goran Josberg," but in some appeared as "Goran B. Josberg" and in one as "Gooran B. Josberg" or "Goeran B. Josberg" (Respondent's September 13, 1988 letter). In this Decision and Order, this Respondent is listed as "Goran Josberr," and the Decision and Order applies to this Respondent also under any of the other quoted listings of his name.

[2] The Agency's charging letter, most of the Agency's subsequent filings, and the orders issued in this proceeding listed this Respondent as "Globe Trade." This Respondent was, however, identified as "Globe Trade AB" in the June 1, 1988 answer filed by this Respondent, in the two certificates of service filed by the Agency after that answer (July 19, 1988 and September 1, 1988), and in the Order of December 28, 1983 from a previous proceeding that was submitted by the Agency in this proceeding (Agency Exhibit III-10). In this Decision and Order, this Respondent is listed as "Globe Trade," and the Decision and Order applies to this Respondent also under the name "Globe Trade AB."

[3] The Act was reauthorized and amended by the Export Administration Amendments Act of 1985, Pub. L. 99-64, 99 Stat. 120 (July 12, 1985), and amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (August 23, 1988).

Continued

The charging letter alleged that Respondent Josberg violated the Regulations through three separate transactions or series of transactions from 1983 through 1985. First, the charging letter alleged that Respondent Josberg violated §§ 387.3, 387.4, and 387.6 by conspiring with others to export an airstream modulator from the United States through Western Europe to the Soviet Union without the required U.S. authorization. Second, the charging letter alleged that Respondent Josberg violated §§ 387.4 and 387.6 by making eleven exports of U.S.-origin computers and peripherals from Sweden to the Soviet Union without the required U.S. authorization. Third, the charging letter alleged that Respondent Josberg violated §§ 387.3, 387.4, and 387.6 by conspiring with others to acquire a U.S.-origin computer in Sweden and to export it to the Soviet Union without the required U.S. authorization.

Respondent Josberg filed a June 1, 1988 answer claiming that the first two transactions or series of transactions had been approved by Swedish authorities, essentially denying any participation in the third transaction, and suggesting that a hearing on all three be held in Sweden. That suggestion for a hearing in Sweden was declined by this Tribunal in an Order of June 10, 1988; and, pursuant to the schedule set in that Order, this case is decided on the record without a hearing. The record contains submissions from both the Agency and Respondent Josberg since that June 10, 1988 Order. Finally, it may be noted that this case is one of several separate proceedings initiated by the Agency, each brought against one of the several individuals with whom Respondent Josberg is alleged in this case to have conspired.[4]

Discussion

Of the three transactions or series of transactions that are the subject of the Agency's charges, it is the second for which the Agency has supplied the most direct evidence (Agency Exhibits (hereinafter "Exh.") II-1 through II-12). Here the Agency charged that Respondent Josberg, from June 1983 through April 1985, on eleven separate occasions shipped U.S.-origin computers and peripherals from Sweden to the Soviet Union without the U.S. authorization that Respondent Josberg knew or should have known was required.

In the Agency's words, its evidence for these eleven transactions is as follows (Agency September 1, 1988 Submission 16–17).

The transactions are summarized on invoices with Josberg's Globe Metal or Globe Computer letterhead. Sales contracts corroborate the transactions described by the invoices. The sales contracts are on Soviet letterhead, and each one clearly describes the shipper to be one of the Globe companies, all related to Josberg, with delivery to be either to Prommashimport or Electronorgtechnica in Moscow. For some shipments, there are "acceptance and delivery protocols" indicating the "seller" to be Globe Metals or Globe Computers. In other exhibits, there are credit advices, showing the paying bank as "Bank for Foreign Trade of the U.S.S.R., Moskva".

In fact, the Agency's evidence does not always track each of the eleven shipments precisely as the Agency has described them.[5] Also, the Agency's evidence indicates that, had Respondent Josberg applied for U.S. authorization for the eleven shipments, all the equipment contained in them would have benefited from a presumption of approval.

But these aspects of the Agency's evidence do not undercut its main thrust. The evidence establishes that Respondent Josberg made the eleven shipments as alleged, and that each was made without the required U.S. authorization, required mostly for national security reasons. Indeed, Respondent Josberg did not deny either that the eleven shipments were made as charged, or that they lacked the required U.S. authorization. Respondent Josberg's only defense was that Swedish authorization had been obtained. No evidence was advanced to support that defense, nor was any explanation offered as to how such Swedish authorization would satisfy the requirement for U.S. authorization.

The Agency charged that, since each of the eleven shipments lacked the required U.S. authorization, Respondent Josberg in making them violated § 387.6 of the Regulations, which proscribes unauthorized exports. This Agency charge is sustained by a preponderance of the evidence. The Agency's documentary presentation shows that Respondent Josberg made the unauthorized exports as alleged, and Respondent Josberg's defense of an unsubstantiated reference to a Swedish authorization is unpersuasive.

The Agency additionally cited evidence—consisting partly of interviews of Respondent Goran Josberg, one by a U.S. government official (Agency Exh. III-11, III-13)—to show Respondent Josberg's awareness of U.S. export licensing requirements. Consequently, the Agency charged that in making these eleven shipments Respondent Josberg violated also § 387.4 of the Regulations, which proscribes participating in an export with knowledge that it is unauthorized.

Further, the Agency charged that an Order of December 28, 1983 had temporarily denied the U.S. export privileges of Respondent Goran Josberg and Respondent Globe Computers. Thus the Agency asserted that those six of the eleven shipments made after that date violated § 387.4 on the additional ground that Respondent Josberg knew that they were contravening the Order of December 28, 1983. These Agency charges of violations of § 387.4, on both grounds cited by the Agency, are not refuted by Respondent Josberg's defense of an unsubstantiated Swedish authorization, and are sustained by a preponderance of the evidence.

The first of the transactions or series of transactions that were listed as subjects of the Agency's charging letter is the most complex, and will be discussed last. The third of those three transactions concerned the acquisition of a U.S.-origin computer from a Swedish distributorship and its subsequent export to the Soviet Union, all in November and December 1985. The Agency charged that Respondent Josberg masterminded a conspiracy to acquire the computer, partly by misrepresenting the identity of the end user, and to ship it to Moscow.

The Agency introduced evidence showing the acquisition of the computer by several individuals other than Respondent Goran Josberg. This evidence consisted of commercial documentation of the acquisition (Agency Exh. III-1, III-4, III-5), of the signed statements of two officials of the Swedish distributorship (Agency Exh. III-2, III-8), and of a certificate signed by that one of the several individuals who played a leading role in acquiring the computer (Agency Exh. III-7).

The Regulations, formerly codified at 15 CFR Parts 368–399, were redesignated as 15 CFR Parts 768–799, effective October 1, 1988 (53 FR 37751, September 28, 1988).

The charging letter alleged that Respondent Josberg violated the Regulations from April 1983 through December 1985. As the charging letter noted (at 1 n.1), twice during this period the Regulations were maintained in effect, not pursuant to the Act, which had lapsed, but pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (1982)).

[4] One of these cases has been already concluded: *Anton Elzer*, 53 FR 28676, July 29, 1988.

[5] For example, the memoranda in the Agency's Exhibits II-1 through II-11 to show the licensing requirement for the shipments do not always speak to the same month as that in which the Agency claimed that the shipment occurred.

The Agency further cited this evidence to argue that these several individuals had misrepresented to the Swedish distributorship that one of them would be the end user, when that in fact was not their intention (Agency Exh. III-1, III-2, III-4, III-8). The signed statement of one of the distributorship officials asserted that the individual designated as the end user had admitted that he had not intended to fulfill that role (Agency Exh. III-2); and the signed statement of the other distributorship officials asserted that the individual who played the leading role in the acquisition had said that he gave the computer to Respondent Goran Josberg and Respondent Globe Trading (Agency Exh. III-8).

For the Agency's claim that the computer was shipped to the Soviet Union, the Agency presented an air waybill for data equipment (Agency Exh. III-6), and cited circumstantial evidence involving the date of this shipment and its Moscow destination (Agency September 1, 1988 Submission 20-21). To tie Respondent Josberg to the acquisition of the computer from the Swedish distributorship and its shipment to Moscow, the Agency cited principally two documents. The first was the signed statement of one of the distributorship officials in which he said that the individual who played the leading role in acquiring the computer had declared that Respondent Goran Josberg was finishing the acquisition (Agency Exh. III-8). The second was the certificate signed by that individual in which he said that he gave the computer to Respondent Goran Josberg and Respondent Globe Computer (Agency Exh. III-7).

Finally, the Agency introduced evidence to show that the shipment of the computer from Sweden to the Soviet Union lacked the required U.S. authorization, and that this requirement was imposed for national security reasons (Agency Exh. III-9, III-9A). As evidence that Respondent Josberg was aware of the unauthorized nature of the shipment, the Agency cited, among other items, the evidence adduced above regarding the eleven computer shipments for Respondent Josberg's awareness of U.S. licensing requirements. The Agency cited also the Order of December 28, 1983 denying U.S. export privileges to Respondent Goran Josberg and Respondent Globe Trade.

In conclusion, the Agency contended that Respondent Josberg's actions violated three sections of the Regulations. According to the Agency, participating in the conspiracy to arrange the unauthorized export to the Soviet Union violated § 387.3, participating in the export with knowledge that it was illegal violated § 387.4, and participating in an unauthorized export violated § 387.6.

The reply of Respondent Josberg to these charges was a denial. Respondent Josberg denied any knowledge of the individual who had been represented to be the end user in the acquisition of the computer, denied conducting the alleged transaction with the individual who played the leading role in that acquisition, and claimed that Respondent Globe Trade had been sold at the end of 1985 to that individual. Respondent Josberg offered no evidence to support these denials and the claim.

On balance, the preponderance of the evidence sustains the Agency's charges. The Agency's documentary presentation shows an unauthorized shipment of a U.S.-origin computer from Sweden to the Soviet Union, and satisfactorily ties Respondent Josberg to this transaction through the statements of the individual who played the leading role in acquiring the computer from the Swedish distributorship. Respondent Josberg's rebuttal unsupported by evidence is insufficient to discredit the Agency's case. Respondent Josberg's denial of knowing the individual who has been represented to be the end user in the computer acquisition, for example, even if true, would not refute the Agency's case. Respondent Josberg was still shown by the record to have had enough connection with the other individual who was involved in that acquisition, enough connection with the shipment from Sweden to the Soviet Union, and enough awareness of U.S. licensing requirements to have violated §§ 387.3, 387.4, and 387.6 of the Regulations.

The last for discussion of the transactions or series of transactions that were the subject of the Agency's charging letter was the first listed, and the most complex. The Agency alleged that in 1983-84 Respondent Josberg masterminded a conspiracy to buy an airstream modulator in the United States, on the representation that the Federal Republic of Germany (F.R.G.) would be the ultimate destination, and then to export it to the Soviet Union without the required authorization.

As evidence, the Agency cited a letter to this Tribunal from one of the two alleged co-conspirators, Anton Elzer, of Sweden, who did business there as Development and Consultant Elzer ECO AB (Agency Exh. I-7). In this letter, Elzer said that he initially canceled the project to obtain the airstream modulator when both he and Respondent Goran Josberg declined to sign the end user statement that was required for a U.S. export license (*id.* 2). Subsequently, according to this letter, they arranged to obtain the equipment through Helmut Keck, of the F.R.G., who did business there as OTC Mess-Und Videotechnik GmbH (*id.*). Keck was the third of the Agency's alleged co-conspirators.

Keck ordered the airstream modulator from the U.S. manufacturer and submitted an F.R.G. import certificate in support of the order, as shown by the export license application filed by the manufacturer (Agency Exh. I-27). The export license was issued for the export to the F.R.G., listing Keck's company as the end user; and the equipment was shipped from the United States to the F.R.G. on or about October 12, 1984 (*id.*)

The Agency's contention was that this airstream modulator was really intended, not for Keck's company in the F.R.G., but for Respondent Josberg and reshipment to the Soviet Union. To prove this contention, the Agency cited a statement in the above letter to this Tribunal from Elzer declaring that Respondent Josberg had ordered the equipment from Allinson Ltd., of Singapore, with which Elzer was connected (Agency Exh. I-13, I-17).

The Agency then cited a commercial document (Agency Exh. I-26) indicating that Allinson Ltd. ordered the equipment from Keck in April 1984; and Keck confirmed the order in mid-May 1984, even before Keck ordered the equipment from the U.S. manufacturer at the end of May 1984, supporting that order with the F.R.G. import certificate (Agency Exh. I-27). Allinson Ltd., according to the Agency's evidence (Agency Exh. I-17), was a small operation located in Singapore and Hong Kong. It was, per that evidence (*id.*), apparently controlled significantly by Elzer, represented only the firms of Respondent Goran Josberg and Keck, and did all of its business in cash.

The Agency cited the above referenced commercial document to show also that Keck's company delivered the airstream modulator to Allinson Ltd. on or about October 25, 1984 (Agency Exh. I-26). The equipment itself apparently traveled directly from the United States to the F.R.G. When the equipment arrived in the F.R.G., Elzer and Keck arranged, according to a commercial document (Agency Exh. I-25) and the above referenced letter to this Tribunal from Elzer (Agency Exh. I-7 at 2), for it to be transferred to a freight forwarder in Finland. The letter stated that these arrangements were made at the direction of Respondent Goran Josberg, who had placed the

original order for the equipment with Allinson Ltd. (*id.*).

The Agency asserted that the airstream modulator was next shipped from Finland to Moscow on October 26, 1984. To support this assertion, the Agency introduced a Helsinki-Moscow air waybill for that date for a shipment of "electricals" listing Elzer as the shipper and Respondent Globe Metals as the consignee (Agency Exh. I-28). To prove that the "electricals" were really the airstream modulator, the Agency further noted the evidence that the modulator, after its arrival in the F.R.G., had been moved rapidly to Finland at Respondent Josberg's direction, and that Respondent Goran Josberg had been the original customer for the equipment.

Finally, the Agency introduced evidence that export of the airstream modulator was controlled for national security reasons, and that a presumption of denial existed for a license application to export it to the Soviet Union (Agency Exh. I-10). The Agency noted also that the Order of December 28, 1983 denied Respondent Josberg's U.S. export privileges throughout all of 1984 when this export of the airstream modulator occurred, and cited the same evidence as in the other transactions addressed by the charging letter for Respondent Josberg's knowledge of U.S. export licensing requirements. The Agency observed additionally that Elzer has been found by this Tribunal to have violated the Regulations for his role in exporting the airstream modulator (*Anton Elzer*, 53 FR 28676, July 29, 1988).

The Agency charged that Respondent Josberg violated three sections of the Regulations in the export of the airstream modulator to the Soviet Union. According to the Agency, Respondent Josberg conspired to violate the Regulations in contravention of § 387.3, participated in this export with knowledge that it was unauthorized in contravention of Section 387.4, and participated in an unauthorized export in contravention of § 387.6.

In defense, Respondent Josberg denied any knowledge of Keck, noted that a U.S. export license had been issued, and asserted that Swedish authorities had advised that the transaction was legal. No evidence was supplied regarding the claimed Swedish advice, nor was any explanation offered as to how the reexport to the Soviet Union would be authorized either by such advice or by the U.S. license for an export to the F.R.G.

Respondent Josberg's defense fails to rebut the Agency's case. The claimed advice from Swedish authorities, unsupported by evidence or explanation, does not constitute an adequate rebuttal. Even if Respondent Josberg's claimed ignorance of Keck were true, the Agency's charges are sufficiently documented by the evidence tying Respondent Josberg to Elzer and to the unauthorized export to the Soviet Union, and showing Respondent Elzer's awareness of U.S. licensing restrictions. Thus the Agency has made its case by a preponderance of the evidence.

Conclusion

The Agency's charges regarding each of the three transactions or series of transactions cited in the charging letter are sustained by the evidence of record. Respondent Josberg's participation in the 1983–84 export of the airstream modulator from the United States through the F.R.G. and Finland to the Soviet Union violated §§ 387.3, 387.4, and 387.6 of the Regulations. Respondent Josberg's eleven shipments from June 1983 through April 1985 of U.S. -origin computers and peripherals from Sweden to the Soviet Union violated Sections 387.4 and 387.6 of the Regulations. Respondent Josberg's participation in the 1985 export of a U.S. -origin computer from Sweden to the Soviet Union violated §§ 387.3, 387.4, and 387.6 of the Regulations.

For Respondent Josberg's violations, the Agency has proposed a 35-year denial of U.S. export privileges. The magnitude of Respondent Josberg's violations is such that a denial period of that substantial length is warranted.

Order

I. For a period of 35 years from the date of the final Agency action, Respondent, Goran Josberg, individually and doing business as Globe Trade, Globe Metals, Globe Computers, Strandvagen 9, S-11456 Stockholm, Sweden, and all successors, assignees, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the Regulations.

II. Participation prohibited in any such transaction, either in the United States or abroad, shall include, but not be limited to, participation:

(i) As a party or as a representative of a party to a validated or general export license application;

(ii) In preparing or filing any export license application or request for reexport authorization, or any document to be submitted therewith;

(iii) In obtaining or using any validated or general export license or other export control document;

(iv) In carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported; and

(v) In the financing, forwarding, transporting, or other servicing of such commodities or technical data.

Such denial of export privileges shall extend to those commodities and technical data which are subject to the Act and the Regulations.

III. After notice of opportunity for comment, such denial of export privileges may be made applicable to any person, firm, corporation, or business organization with which any Respondent is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

IV. All outstanding individual validated export licenses in which any Respondent appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Respondents' privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

V. No person, firm, corporation, partnership, or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing, shall, with respect to commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with any Respondent or any related person, or whereby any Respondent or any related person may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly:

(i) apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for any Respondent or related person denied export privileges, or

(ii) order, buy, receive, use, sell, deliver, store, dispose of, forward,

transport, finance or otherwise service or participate in any export, reexport, transshipment or diversion of any commodity or technical data exported or to be exported from the United States.

VI. This Order as affirmed or modified shall become effective upon entry of the Secretary's final action in this proceeding pursuant to the Act (50 U.S.C.A. app. 2412(c)(1)). That disposition will constitute the sole basis for any entry regarding any Respondent in the Table of Denial Orders, until modified (15 CFR Part 388, Supp. No. 1).[6]

Date: January 31, 1989.

Thomas W. Hoya,

Administrative Law Judge.

[FR Doc. 89-5268 Filed 3-7-89; 8:45 am]

BILLING CODE 3510-DT-M

Bureau of Export Administration

Export Privileges; ABK International Distributors

Order

The Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce (Department), having notified Nabila Mango Shehadeh (Shehadeh), individually and formerly doing business as ABK International Distributors (ABK), (Respondents) but now doing business as Bisan Distribution Center, Inc. (Bisan), of its intention to initiate an administrative proceeding against Shehadeh and ABK pursuant to section 13(c) of the Export Administration Act of 1979 (50 U.S.C. app. §§ 2401-2420 (1982 and Supp. III 1985), as amended by Pub. L. 100-418, 102 Stat. 1107 (August 23,1988)) (the Act), by alleging that, on 30 separate occasions between August 3, 1984 and June 3, 1985, Shehadeh and ABK committed a total of 30 violations of section 787.5 of the Export Administration Regulations.[1]

The Department and Shehadeh, both on behalf of herself and doing business as ABK and Bisan, having entered into a Consent Agreement whereby the parties have agreed to settle this matter by the Department's imposing a civil penalty of $40,000, the Department's denying Shehadeh's, including Bisan's, export privileges for a one-year period, and ABK's export privileges for a three-year period;

The terms of the Consent Agreement having been approved by the undersigned;

It Is Therefore Ordered, First, Shehadeh shall pay to the Department a civil penalty in the amount of $40,000, as follows: Shehadeh shall pay $1,000 within 30 days of the entry of this Order. Within 30 days after the date of the payment of $1,000, Shehadeh shall make the first of seven installment payments to the Department of $2,000 each, to be paid every other month, over a period of 14 months, for a total of an additional $14,000. The last $2,000 installment payment shall be made within 15 months after the entry of this Order, whereupon the sum of $15,000 shall have been paid to the Department. The remainder of the civil penalty, $25,000, shall be suspended, as authorized by section 788.16(c) of the Regulations, for a period of two years from the date of entry of this Order, and shall thereafter be waived provided that, during the period of suspension, Shehadeh has committed no violation of the Act or any regulation, order or license issued under the Act.

Second, ABK International Distributors shall be denied, for a period of three years following the date of this Order, all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving the export of U.S.-origin commodities or technical data from the United States or abroad. Further, Nabila Mango Shehadeh, individually and now doing business as Bisan Distribution Center, Inc., shall be denied, for a period of one year following the date of this Order, all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving the export of U.S.-origin commodities or technical data from the United States or abroad.

A. All outstanding individual validated export licenses in which ABK appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all ABK's privileges of participating, in any manner or capacity, in any special licensing procedure including, but not limited to, distribution licenses, are hereby revoked.

B. Without limiting the generality of the foregoing, participation prohibited in any such transaction, either in the United States or abroad, shall include, but is not limited to, participation: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexport authorization, or any document to be submitted therewith; (iii) in obtaining from the Department or using any validated or general export license or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of any commodities or technical data, in whole or in part, exported or to be exported from the United States and subject to the Regulations; and (v) in financing, forwarding, transporting, or other servicing of such commodities or technical data. Such denial of export privileges shall extend only to those commodities and technical data which are subject to the Act and the Regulations.

C. After notice and opportunity for comment, such denial may be made applicable to any person, firm, corporation, or business organization with which Shehadeh, ABK or Bisan is now or may hereafter be related to by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

D. No person, firm, corporation, partnership or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing shall, with respect to U.S.-origin commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with Shehadeh, ABK or Bisan or any related party, or whereby Shehadeh, ABK or Bisan or any related party may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly: (a) Apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported, in whole or in part, or to be exported by, to, or for Shehadeh, ABK, Bisan or any related party denied export privileges;

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[6] To be considered in the 30 day statutory review process which is mandated by section 13(c) of the Act, submissions must be received in the Office of the Under Secretary for Export Administration, U.S. Department of Commerce, 14th & Constitution Ave., NW., Room 3898B, Washington, DC 20230, within 12 days. Replies to the other party's submission are to be made within the following 8 days. 15 CFR 388.23(b), 50 FR 53134 (1985). Pursuant to section 13(c)(3) of the Act, the order of the final order of the Under Secretary may be appealed to the U.S. Court of Appeals for the District of Columbia within 15 days of its issuance.

[1] The Regulations have been redesignated as Parts 768-799 of Title 15 of the Code of Federal Regulations. 53 FR 37751 (September 28, 1988). The transfer merely changed the first number of each Part from a "3" to a "7". Until such time as the Code of Federal Regulations is republished, the Regulations can be found at 15 CFR Parts 368-399 (1988).

or (b) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any export, reexport, transshipment, or diversion of any commodity or technical data exported or to be exported from the United States. These prohibitions apply only to those commodities and technical data which are subject to the Act and the Regulations.

E. As authorized by section 788.16(c) of the Regulations, Shehadeh's and Bisan's denial periods shall be suspended for a period of 11 months beginning one month from the date of the entry of this order, and shall thereafter be waived provided that, during the period of suspension, Shehadeh and Bisan have committed no violation of the Act or any regulation, order or license issued under the Act.

Third, that the proposed Charging Letter and the Consent Agreement shall be made available to the public, and this Order shall be published in the **Federal Register**.

This Order is effective immediately.

William V. Skidmore,

Acting Assistant Secretary for Export Enforcement.

Entered this 24th day of February, 1989.

[FR Doc. 89-5164 Filed 3-6-89; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

Export Trade Certificate of Review

AGENCY: Department of Commerce.

ACTION: Notice of Issuance of an Amended Export Trade Certificate of Review, Application No. 88-AE015.

SUMMARY: The Department of Commerce has issued an amendment to the Export Trade Certificate of Review granted to the Ferrous Scrap Export Association on December 12, 1988 (53 FR 51294, December 12, 1988).

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 ("the Act") (Pub. L. No. 97-290) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III are found at 15 CFR Part 325 (50 FR 1804, January 11,1985).

The Office of Export Trading Company Affairs is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Department of Commerce to publish a summary of a Certificate in the **Federal Register**. Under section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Amended Certificate

Export Trade Certificate of Review No. 88-00015, issued to the Ferrous Scrap Export Association ("FSEA") on December 12, 1988, is amended as follows:

(1) "Financing" has been added to the list of FSEA's "Export Trade Facilitation Services"; and

(2) "The United States International Trade Commission" has been added to paragraph 1(j) of "Export Trade Activities and Methods of Operation," which lists the administrative agencies before which FSEA's Members may seek relief.

Effective date: January 9, 1989.

A copy of the amended Certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, Room 4102, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Dated: March 3, 1989.

Thomas H. Stillman,

Director, Office of Export Trading Company Affairs.

[FR Doc. 89-5353 Filed 3-6-89; 8:45 am]

BILLING CODE 3510-DR-M

Petitions By Producing Firms for Determinations of Eligibility To Apply for Trade Adjustment Assistance

Petitions have been accepted for filing on the dates indicated from the following firms: (1) Menapace Woodworking, Inc., Amory Street, Boston, Massachusetts 02119, producer of sofas, beds and headboards, accessories and office desks and credenzas (September 13, 1988); (2) Mohawk Industries, Inc., 601 Amhurst Street, Buffalo, New York 14207, producer of vertical hydraulic presses (September 15, 1988); (3) Trident Products, Inc., 2353 Industrial Parkway West, Hayward, California 94545, producer of toilet bowl cleaners (September 26, 1988); (4) Pyro Media, Inc., 7911 10th Avenue, South, Seattle, Washington 98108, producer of planters and pots (September 29, 1988); (5) Jennifer Dale, Inc., 75-16 Rockaway Boulevard, Woodhaven, New York 11421, producer of women's & girls' nightshirts, nightgowns, pajamas, loungewear and robes (October 3, 1988); (6) S & M Dress, Inc., 21 Lehman Street, Lebanon, Pennsylvania 17041, producer of women's blouses, robes, skirts and slacks (October 4, 1988); (7) The Slovin Company, Inc., 121 Higgins Industrial Park Worcester, Massachusetts 01606, producer of skirts and pants (October 4, 1988); (8) Angela Marie's, Inc., Building E-4, Freeport West, Clearfield, Utah 84015, producer of rice crispy marshmallow treats (October 5, 1988); (9) Carsell Lighting & Design, Inc., 4620 S. Valley View, Las Vegas, Nevada 89103, producer of lighting fixtures (October 5, 1988); (10) Tilton & Cook Company, 38 Spruce Street, Leominster, Massachusetts 01453, producer of combs, hair ornaments and tripers (October 5, 1988); (11) Printek, Inc., 1517 Townline Road, Benton Harbor, Michigan 49022, producer of matrix printers (October 6, 1988); (12) Padabar, Inc., 5701-5800 Grays Avenue, Philadelphia, Pennsylvania 19143, producer of folding paperboard boxes (October 6, 1988); (13) J. D. Phillips Corporation, 181 North Industrial Highway, Alpena, Michigan 49707, producer of milling machines, lathes and grinders (October 7, 1988); (14) Semicon Tools, Inc., 55 Webster Avenue, New Rochelle, New York 10801, producer of dicing blades, bonding tools and scribing tools (October 13, 1988); (15) Beatty Page, Inc., Brooklyn Navy Yard Bldg. 5, Flushing, New York 11205, producer of hat linings (October 20, 1988); (16) Color-Craft Flower Dyes, Inc., Box 52, Route 394, Chautauqua, New York 14722, producer of flower dyes (October 20, 1988); (17) A & G Manufacturers, Inc., P.O. Box 63, Brooklyn, New York 11231, producer of women's shower and sleep hats and women's shoe bows and pony-tail clips (November 2, 1988); (18) Woodcraft Industries, Inc., 6303 Rich Road, S.E., Olympia, Washington 98501, producer of kitchen cabinets (November 2, 1988); (19) Midwest Uncuts, Inc., 117 East Salem, Indianola, Iowa 50125, producer of glass, plastic & polycarbonate eye lenses (November 2, 1988); (20) L. H. Lincoln & Sons, Inc., P.O. Box 110, Coudersport, Pennsylvania 16915, producer of pancreatic enzymes, leather fillers and extracts, oils, greases and waterproofing for leather (November 3, 1988); (21) Phoenix Lighting Fixture Co., Inc., 167 41st Street, Brooklyn, New York 11232, producer of indoor and outdoor lighting fixtures (November 4, 1988); (22) Simmons Machine Tool Corporation, 1700 North Broadway, Albany, New York 12204, producer of lathes, wheel

truing machines, wheel borers, railroad presses and parts (November 7, 1988); (23) Troytown Shirt Corporation, 100 N. Mohawk Street, Cohoes, New York 12047, producer of women's blouse and men's formal dress shirts (November 7, 1988); (24) Aztec Tool Company, Inc., 50 Doxsee Drive, Freeport, New York 11520 producer of injection molds, injection molded parts and brass pins (November 7, 1988); (25) Penril Corporation, 7811 Montrose Road, Potomac, Maryland 20854, producer of electrical measuring devices, static discharge simulators, modems, multiplexers, panel instruments, portable test meters, engine test equipment and audio speakers (November 8, 1988); (26) Insulated Duct & Cable Company, 96 Stokes Avenue, Trenton, New Jersey 08605, producer of rubber & plastic hoses (November 9, 1988); (27) David E. Anderson, Inc., 2186 Walden Avenue, Buffalo, New York 14225, producer of jewelry (November 10, 1988); (28) Goldfinger Hawaii, Inc., P.O. Box 10578, Honolulu, Hawaii 96816, producer of 14k gold rings, bracelets, earrings, pendants, charms (November 14, 1988); (29) Fulford Manufacturing Company, 65 Tripps Lane, East Providence, Rhode Island 02915, producer of pewter miniatures and stamped metal parts for automobiles and handbags and misc. articles (November 18, 1988); (30) Chahta Enterprises, Choctaw Industrial Park, Route 7, Box 20-D, Philadelphia, Mississippi 39350, producer of automotive and truck wiring harnesses (November 18, 1988); (31) Blue Hill Transformer, Inc., 500 Blue Hill Avenue, Mattapan, Massachusetts 02126, producer of transformers (November 18, 1988); (32) Jacques deLoux, Inc., 220 North Main Street, Sellersville, Pennsylvania 18960, producer of men's and women's sweaters (November 29, 1988); (33) Piscitelli, Inc., 1125 Pontiac Avenue, Cranston, Rhode Island 02920, producer of costume jewelry (November 30, 1988); (34) Trophy Glove Company, 122 East Washington Avenue, Albina, Iowa 52531, producer of sporting gloves (December 1, 1988); (35) Custom Chrome and Bumper, 335 Garden Highway, Yuba City, California 95991, producer of automobile bumpers and exhaust and injector pipes (December 1, 1988); (36) Applied Storage Koncepts, Inc., 13231 Lakeland Road, Sante Fe Springs, California 90670, producer of steel shelving systems (December 1, 1988); (37) George Frost Company, Leominster Road, Shirley, Massachusetts 01464, producer of leather and fabric belts and suspenders (December 1, 1988); (38) Lucky Star Undergarments, Inc., 160 Jay Street, Brooklyn, New York 11201, producer of girls slips and nightwear (December 2, 1988); (39) DaleBoot USA, 2150 South 300 West, Salt Lake City, Utah 84115, producer of ski boots (December 5, 1988); (40) Trac-Back Corporation, Highway 4 South, Emmetsburg, Iowa 50536, producer of attachable hydraulic cranes (December 6, 1988); (41) Better Sleep, Inc., 571 Industrial Road, Berkeley Heights, New Jersey 07922, producer of pillows and cushions, back rest, bed board, pillow covers and other bedding and bath accessories (December 7, 1988); (42) Opti-Gage, Inc., 5861 Wolf Creek Pike, Trotwood, Ohio 45426, producer of printed circuit board (December 7, 1988); (43) Sun Clothes, 26th and Reed Street, Philadelphia, Pennsylvania 19106, producer of swimming trunks, bathing suits, shorts and bathing suit liners (December 7, 1988); (44) Quality Steel Rule Die of Western New York Company, Inc., 701 Seneca Street, Buffalo, New York 14210, producer of custom-made "soft" dies for cutting paper cartons for the printing industry, dies for the medical industry (I.V. disposable containers and plasma bags), and dies for foam promotion products (December 8, 1988); (45) Hall-Welter Company, Inc., 970 Jay Street, Rochester, New York 14611, producer of automatic check writing machines (December 8, 1988); (46) Tekin-Plex, Inc., 68 35th Street, Brooklyn, New York 11232, producer of plastic and foil liners, packaging material and polystyrene trays (December 8, 1988); (47) Catskill Craftsman, Inc., 15 West End Avenue, Stamford, New York 12167, producer of wood kitchen work stations, cutting boards, bookcarts and clockcases (December 12, 1988); (48) Beldoch Industries Corporation, 1411 Broadway, New York, New York 10018, producer of women's sweaters and skirts (December 12, 1988); (49) A & A Manufacturing Company, Inc., P.O. Box 6069, Fall River, Massachusetts 02724, producer of skirts (December 15, 1988); (50) BW/EMP, Inc., 21000 East 32nd Parkway, Auror, Colorado 80011, producer of misc. metal enclosures and fabricated metal parts (December 16, 1988); (51) Hern Iron Works, Inc., 1900 Millview, Coeur D'Alene, Idaho 83814, producer of manhole covers (December 19, 1988); (52) Midwest Uncuts, Inc., 117 East Salem, Indianola, Iowa 50125, producer of plastic & glass eyeglass lenses (December 27, 1988); (53) Carolina Maid Products, Inc., P.O. Box 308, Granite Quarry, North Carolina 28072, producer of women's dresses (December 29, 1988); (54) Yale Sportswear Corporation, 215 North Washington Street, Easton, Maryland 21601, producer of shorts and sweatsuits (December 30, 1988); (55) Trout Traps Ltd., Inc., 7180 West 117th Avenue, Unit B, Broomfield, Colorado 80020, producer of float tubes (December 30, 1988); (56) Applied Photonics, Inc., 97 Marcus Boulevard, Hauppauge, New York 11788, producer of excimer lazer gas purifiers (December 30, 1988); (57) Roye's Fashions, Inc., 122 East Seventh Street, #1200, Los Angeles, California 90014, producer of women's dresses, suits, and blouses (January 3, 1989); (58) Sleeper & Hartley Corporation, P.O. Box 10, 335 Chandler Street, Worcester, Massachusetts 01602, producer of spring making machines (January 3, 1989); (59) Bon Homme Shirtmakers Ltd., Inc., 350 5th Avenue, Suite 6310, New York, New York 10118, producer of men's and boys' shirts (January 3, 1989); (60) Electrographics International Corporation, 1825 Stout Drive, Warminster, Pennsylvania 18974, producer of remanufactured microlithographic equipment (January 3, 1989); (61) The House That Tilly Built, Inc., 7610 Miramar Road, San Diego, California 92126, producer of stuffed dolls (January 6, 1989); (62) Greene Technologies, Inc., P.O. Box 156, Greene, New York 13778, producer of metal wire products (January 9, 1989); (63) HLP Manufacturing, Inc., 100 N. Mohawk, Cohoes, New York 12047, producer of women's blouses and men's formal shirts (January 9, 1989); (64) Delizza and Elster, Inc., 840 Fifth Avenue, Brooklyn, New York 11232, producer of jewelry (January 10, 1989); (65) Hughes Company, Inc., 1200 West James Street, Columbus, Wisconsin 53925, producer of food processing equipment (January 10, 1989); (66) Church & Company, 400 Kennedy Drive North, Bloomfield, New Jersey 07003, producer of jewelry (January 12, 1989); (67) Scientific Radio Systems, Inc., 367 Orchard Street, Rochester, New York 14606, producer of transceivers, transmitters and receivers (January 10, 1989); (68) Pasta U.S.A., Inc., East 601 Pacific Avenue, Spokane, Washington 99202, producer of pasta (January 30, 1989).

The petitions were submitted pursuant to section 251 of the Trade Act of 1974 (Pub. L. 93-618), as amended. Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by Certification Division, Office of Trade Adjustment Assistance, Room 4015A, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, no later than the close of business of the tenth calendar day following the publication of this notice.

The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.309, Trade Adjustment Assistance. Inasfar as this notice involves petitions for the determination of eligibility under the Trade Act of 1974, the requirements of Office of Management and Budget Circular No. A-95 regarding review by clearinghouses do not apply.

E.T. Baker,

Supervisory Eligibility Examiner, Certification Division, Office of Trade Adjustment Assistance.

[FR Doc. 89-5198 Filed 3-6-89; 8:45 am]

BILLING CODE 3510-DR-M

National Oceanic and Atmospheric Administration

National Fish and Seafood Promotional Council; Meeting

Agency: National Marine Fisheries Service (NMFS), NOAA, DOC.

Time and Date: The meeting will convene at 3:00 p.m., March 28, 1989 and adjourn approximately 5:00 p.m., March 30, 1989.

Place: Georgetown Marbury Hotel, 3000 M Street, NW., Washington, DC 20007.

Status: NOAA announces a meeting of the National Fish and Seafood Promotional Council (NFSPC). The NFSPC, consisting of 15 industry members and the Secretary of Commerce as a non-voting member, was established by the Fish and Seafood Promotion Act of 1986 to carry out programs to promote the consumption of fish and seafood and to improve the competitiveness of the U.S. fishing industry.

The NFSPC is required to submit an annual plan and budget to the Secretary of Commerce for his approval that describes the marketing and promotion activities the NFSPC intends to carry out. Funding for NFSPC activities is provided for through Congressional appropriations.

Matters to be Considered

Portion Opened to the Public:

March 29, 1989

8:30 a.m.-10:30 a.m.—Chairman's opening remarks, approval of minutes from last meeting, agenda for meeting, and discussion of Council/Advertising agency working relationship. 10:30 a.m.-6:00 p.m.—Presentation by W. B. Doner & Company of alternate execution/implementation styles/plans for the Council's advertising program. Lunch break: 12:30 p.m.-1:30 p.m.

March 30, 1989

8:30 a.m.-5:00 p.m.—Council Chairman's update, Executive Director's update, discussion of agency proposal, update on pollution/media relations activities, recap of the American Seafood Challenge, Canadian generic marketing presentation, regional implementation proposal, discussion of environmental issues and the handling of adverse publicity, future meeting agenda and other pending business. Lunch break: 12:30 p.m.-1.30 p.m.

Portion Closed to the Public:

March 28, 1989

3:00 p.m.-5:30 p.m.—Election of Council Chairman and discussion of Council operations.

For Further Information Contact: Jeanne M. Grasso, Program Coordinator, National Fish and Seafood Promotional Council, 1825 Connecticut Avenue, NW., Room 618, Washington, DC 20235. Telephone: (202) 673-5237.

Dated: March 1, 1989.

James W. Brennan,

Assistant Administrator for Fisheries.

[FR Doc. 89-5199 Filed 3-6-89; 8:45 am]

BILLING CODE 3510-22-M

New England Fishery Management Council; Public Hearing

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

ACTION: Notice of a rescheduled public hearing and request for comments.

SUMMARY: A notice of public hearings was published February 3, 1989 (54 FR 5539), concerning (1) two proposed measures to be included in a regulatory amendment to the regulations implementing the Sea Scallop Fishery Management Plan (FMP) and (2) six proposals for possible inclusion in Amendment 3 to the FMP. The New England Fishery Management Council (Council) has rescheduled and changed the location of one hearing and extended the public comment period to solicit additional input. Individuals and organizations may comment in writing to the Council if they are unable to attend the hearing.

DATES: The public comment period for the proposed regulatory amendment has been extended to March 18, 1989. The comment period for the other six proposals will close March 18, 1989.

The hearing previously scheduled for February 18, 1989, is rescheduled for March 16, 1989, 7:00 p.m. to 11:00 p.m.

ADDRESSES: All written comments and requests for hearing documents should be addressed to Chairman, New England Fishery Management Council, 5 Broadway (Route 1), Saugus, MA 01906.

The rescheduled March 16, 1989, hearing location is being changed from Washington, North Carolina, to the Craven County Courthouse, Broad & Craven Street, Superior Court Room, New Bern, North Carolina.

FOR FURTHER INFORMATION CONTACT: Douglas G. Marshall, Executive Director, New England Fishery Management Council, 617-231-0422.

SUPPLEMENTARY INFORMATION: The information concerning other hearings that were held was published February 3, 1989 (54 FR 5539), and will not be repeated here.

Dated: March 2, 1989.

Alan Dean Parsons,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-5209 Filed 3-6-89; 8:45 am]

BILLING CODE 3510-22-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board Task Force on Use of Commercial Components in Military Equipment; Meeting

ACTION: Notice of advisory committee meetings.

SUMMARY: The Defense Science Board Task Force on Use of Commercial Components in Military Equipment will meet in closed session on March 30, 1989 at the TRW Corporation, Fairfax, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting the Task Force will receive classified briefings on military acquisition programs and systems availability and the affect of

increased use of commercial items on force posture.

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 this DSB Task Force meeting, concerns matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly this meeting will be closed to the public.

March 1, 1989.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 89-5194 Filed 3-6-89; 8:45 am]

BILLING CODE 3810-01-M

Defense Science Board Task Force on Technological and Operational Surprise; Change in Meeting Date

ACTION: Change in date of advisory committee meeting notice.

SUMMARY: The meeting of the Defense Science Board Task Force on Technological and Operational Surprise scheduled for March 2-3, 1989 as published in the **Federal Register** (Vol. 54, No. 28, Page 6566, Monday, February 13, 1989, FR Doc. 89-3297) will be held on March 7-8, 1989.

March 1, 1989.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 89-5195 Filed 3-6-89; 8:45 am]

BILLING CODE 3810-01-M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection concerning contract cost or pricing data.

ADDRESS: Send comments to Ms. Eyvette Flynn, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson, Office of Federal Acquisition and Regulatory Policy, (202) 523-3781.

SUPPLEMENTARY INFORMATION: a. *Purpose.* The Competition in Contracting Act of 1984, Title VII of Pub. L. 98-369 substantially changed the basic statutes underlying the Federal procurement system—with a corresponding major impact on the FAR. Under the Act, agencies are required to provide for full and open competition by soliciting sealed bids or requesting competitive proposals, or use other competitive procedures, unless a statutory exception permits other than full and open competition. In addition, the Act lowered the threshold for submission of certified cost of pricing data by offerors from $500,000 to $100,000 when adequate price competition does not exist.

The information is used by the Government to perform cost analysis and to ultimately enable the Government to negotiate fair and reasonable prices on contracts.

b. *Annual reporting burden.* The annual reporting burden is estimated as follows: Respondents, *14,781;* responses per respondent, *10;* total annual responses, *147,814;* hours per response, *4;* and total response burden hours, *591,256.*

Obtaining Copies of Proposals: Requester may obtain copies from General Services Administration, FAR Secretariat (VRS), Room 4041, Washington, DC 20405, telephone (202) 523-4755. Please cite OMB Control No. 9000-0013, Cost or Pricing Data.

Dated: February 27, 1989.

Margaret A. Willis,

FAR Secretariat.

[FR Doc. 89-5166 Filed 3-6-89; 8.45 am]

BILLING CODE 6820-JC-M

DEPARTMENT OF EDUCATION

Office of Bilingual Education and Minority Languages Affairs

Proposed Funding Priority for Fiscal Year 1989

AGENCY: Department of Education.

ACTION: Notice of Proposed Funding Priority for Fiscal Year 1989.

SUMMARY: The Secretary of Education proposes a funding priority for activities to be supported under the Transitional Bilingual Education and Special Alternative Instructional programs of the Office of Bilingual Education and Minority Languages Affairs (OBEMLA) in fiscal year (FY) 1989.

DATE: Comments must be received on or before April 6, 1989.

ADDRESS: All written comments and suggestions should be sent to OBEMLA, U.S. Department of Education, Room 5086, Switzer Bldg., 400 Maryland Ave., SW., Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: William Wooten, OBEMLA (Telephone: (202) 732-5063).

SUPPLEMENTARY INFORMATION: Authority for the Transitional Bilingual Education (TBE) and the Special Alternative Instructional (SAI) programs is contained in section 7021 of the Bilingual Education Act of 1984, as amended. Under both the TBE and SAI programs awards are made to local educational agencies (LEAs) to provide programs of instruction for limited English proficient (LEP) children. The following priority is designed to give a preference to programs that provide services to children who have not been previously served through federally funded TBE or SAI programs. Additionally, the LEA may not previously have provided services in the native language of those students to be served in the proposed project with TBE or SAI funds received from the Department.

The Secretary invites public comment on the merits of the proposed priority, including suggested modifications to the proposed priority. The final priority will be established on the basis of public comment, and other relevant Departmental considerations, and will be announced in a notice in the **Federal Register.** A notice inviting applications for this competition will be published at that time, after which application packages will be available. This competition is in addition to the previously announced TBE and SAI competitions for FY 1989. This Notice of Proposed Priority does not solicit applications, and Department of Education staff will not review concept papers or pre-applications. The publication of this proposed priority does not bind the Federal government to fund projects in this area, except as otherwise directed by statute. Funding of particular projects depends on the final priority, the availability of funds, and on the quality of applications that are received.

Proposed Priority

Bilingual instruction programs have been funded by the Federal government for over 20 years in an effort to insure

Equal Educational Opportunity for all students. During that time new immigrant populations have continued to arrive, introducing new languages and cultures into many school systems whose existing bilingual programs were designed for other languages. The Secretary is concerned that children whose language is new to a school district receive bilingual instruction comparable with that of those children already in bilingual education programs.

In accordance with the Education Department General Administrative Regulations at 34 CFR 75.105(c)(3), the Secretary proposes to give an absolute perference to applications that meet the following priority:

The LEA must propose to provide bilingual instructional services for a group of limited English proficient (LEP) students who have not previously received services under TBE or SAI programs funded by the Department. Additionally, the LEA may not previously have provided service with TBE or SAI funds received from the Department in the native language of those students to be served in the proposed project.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding this proposed priority. All comments submitted in response to this proposed priority will be available for public inspection during and after the comment period in Room 5086, Switzer Bldg., 330 C. Street SW., Washington DC, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

Authority: 20 U.S.C. 3231.

Dated: February 14, 1989.

Lauro F. Cavazos,

Secretary of Education.

[FR Doc. 89-5221 Filed 3-6-89; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No.: 84.128G]

Vocational Rehabilitation Service Projects Program for Migratory Agricultural and Seasonal Farmworkers With Handicaps; Invitation for Applications for New Awards for Fiscal Year 1989

Purpose of Program: This program supports projects conducted by State or local vocational rehabilitation agencies that provide vocational rehabilitation services to migratory agricultural workers with handicaps or seasonal farmworkers with handicaps.

Deadline for Transmittal of Applications: May 16, 1989.

Deadline for Intergovernmental Review Comments: July 16, 1989.

Applications Available: March 15, 1989.

Available Funds: $254,000.

Estimated Range of Awards: $100,000 to $150,000.

Estimated Average Size of Awards: $127,000.

Estimated Number of Awards: 2.

Note.—The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 75, 77, 79, 80, and 85; and (b) the regulations for this program in 34 CFR Parts 369 and 375.

The information collection requirements, including selection criteria, for Parts 369 and 375 are pending approval by the Office of Management and Budget. If any substantive changes are made in the information collection requirements for this program, applicants will be given an opportunity to revise or resubmit their applications.

For Applications or Information Contact: Joseph DePhillips, U.S. Department of Education, 400 Maryland Avenue SW., Room 3326, Switzer Building, Washington, DC 20202-2575. Telephone: (202) 732-1329.

Program Authority: 29 U.S.C. 777b.

Dated: March 2, 1989.

Madeleine Will,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 89-5218 Filed 3-6-89; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Bonneville Power Administration

U.S.-Canada Free-Trade Agreement; Modification of Bonneville Power Administration's Long-Term Intertie Access Policy

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Notice of modification of BPA's long-term intertie access policy (Policy) to comply with U.S.-Canada Free-Trade Agreement.

SUMMARY: On May 17, 1988, BPA finalized its Long-Term Intertie Access Policy. The Policy defines how the portion of the Pacific Northwest-Pacific Southwest Intertie (Intertie) controlled by BPA will be used. One provision of the Policy addresses the then proposed U.S.-Canada Free-Trade Agreement. Section 8(b) states as follows:

> Upon approval of the proposed U.S.-Canada Free Trade Agreement by the Canadian Parliament and the United States Congress, any and all distinctions made in this policy between Canadian and United States Extraregional Utilities shall terminate on the effective date of the Agreement.

The Free-Trade Agreement has been approved by both Canada and the United States and became effective on January 1, 1989. Chapter 9 of the Statement of Administrative Action that accompanied the U.S.-Canada Free-Trade Agreement Implementation Act of 1988 states that the United States will "eliminate any discriminatory treatment of electricity produced by British Columbia Hydro as compared to electricity produced by U.S. utilities located outside the Pacific Northwest region with respect to access to the . . . Intertie into the California electricity market." Accordingly, under the Policy, British Columbia now will obtain access to BPA's share of the Intertie on the same basis as U.S. utilities located outside the Pacific Northwest region.

FOR FURTHER INFORMATION CONTACT: Ms. Marg Nelson, Intertie Section Chief, at 503-230-5847, or the Public Involvement office at 503-230-3478. Oregon callers may use 800-452-8429 to reach the Public Involvement office; callers in California, Idaho, Montana, Nevada, Utah, Washington, and Wyoming may use 800-547-6048. Information may also be obtained from:

Mr. George E. Gwinnutt, Lower Columbia Area Manager, Suite 243, 1500 NE. Irving Street, Portland, Oregon 97232, 503-230-4551.

Mr. Robert W. Rasmussen, Acting Eugene District Manager, Room 206, 211 East Seventh Street, Eugene, Oregon 97401, 503-687-6952.

Mr. Wayne R. Lee, Upper Columbia Area Manager, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509-456-2518.

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406-329-3060.

Mr. Ronald K. Rodewald, Wenatchee District Manager, Room 307, 301 Yakima Street, Wenatchee, Washington 98801, 509-662-4377, extension 379.

Mr. Terence G. Esvelt, Puget Sound Area Manager, Suite 400, 201 Queen Anne Avenue, Seattle, Washington 98109-1030, 206-442-4130.

Mr. Thomas V. Wagenhoffer, Snake River Area Manager, 101 West Poplar, Walla Walla, Washington 99362, 509-522-6225.

Mr. Robert N. Laffel, Idaho Falls District Manager, 1527 Hollipark Drive, Idaho Falls, Idaho 83401, 208-523-2706.

Mr. Thomas H. Blankenship, Boise District Manager, Room 494, 550 West Fort Street, Boise, Idaho 83724, 208-334-9137.

Issued in Portland, Oregon, on February 15, 1989.

James J. Jura,

Administrator.

[FR Doc. 89-5144 Filed 3-6-89; 8:45 am]

BILLING CODE 6450-01

Federal Energy Regulatory Commission

[Docket Nos. EL89-19-000 et al.]

City of Hamilton, OH, et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. City of Hamilton, Ohio v. Cincinnati Gas & Electric Company

[Docket No. EL89-19-000]

March 1, 1989.

Take notice that on February 21, 1989, the City of Hamilton, Ohio (Hamilton) submitted a complaint and request for hearing and refund effective date against the Cincinnati Gas & Electric Company (CG&E), pursuant to rule 206 of the rules of practice and procedure of the Commission and sections 206 and 306 of the Federal Power Act.

Hamilton asserts that the rates charged by CG&E for transmission service under a 1981 interconnection agreement between Hamilton and CG&E are unjust and reasonable. Hamilton further asserts that the limitations on the services provided by CG&E under the 1981 agreement between Hamilton and CG&E further support rate reductions. Hamilton also asserts that CG&E is over-billing Hamilton for short term energy under the 1981 agreement. Hamilton urges the Commission to order a hearing to investigate the material issues of fact that Hamilton asserts it has raised in its complaint and to establish the just and reasonable rates, terms and conditions for the transmission and other services provided by CG&E to Hamilton. Hamilton also urges the Commission to direct CG&E to refund to Hamilton all over-collections for short term energy, establish a refund effective date 60 days after the date of filing of Hamilton's complaint, and grant Hamilton such further relief as is just and appropriate under the circumstances.

Comment date: March 31, 1989, in accordance with Standard Paragraph E at the end of this notice.

2. Arizona Corporation Commission v. Alamito Company

[Docket No. EL89-18-000]

March 1, 1989.

Take notice that on February 15, 1989, the Arizona Corporation Commission (Arizona Commission) submitted a complaint against Alamito Company (Alamito), pursuant to rule 206 of the rules of practice and procedure of the Commission and section 306 of the Federal Power Act.

The Arizona Commission asserts that the complaint concerns matters related to but not fully considered and decided in certain cases pending before the Commission, most notably Docket Nos. ER87-47-000 and ES87-23-000. The Arizona Commission requests that the Commission determine the just, reasonable and not unduly discriminatory rates to be charged by Alamito to Tuscon Electric Power Company (TEP) under a rate schedule on file with the Commission for the period November 26, 1984 to the date of the Commission's decision. The Arizona Commission requests that the Commission order Alamito to refund to TEP all amounts collected from TEP since November 26, 1984 in excess of the rate determined to be just, reasonable and not unduly discriminatory, plus interest computed in accordance with the Commission's regulations. The Arizona Commission requests the Commission to set a refund effective date as of 60 days following the filing of this complaint, and that the rates collected subsequent thereto be collected subject to refund, plus interest. The Arizona Commission requests that the Commission determine the just, reasonable and not unduly discriminatory rates, terms and conditions of service to be observed prospectively for the sale of electric power and energy by Alamito to TEP.

Comment date: March 31, 1989, in accordance with Standard Paragraph E at the end of this notice.

3. Montaup Electric Company

[Docket No. ER89-250-000]

March 3, 1989.

Take notice that on February 23, 1989, Montaup Electric Company (Montaup) filed a letter under section 205 of the Federal Power Act of a surcharge under its Purchased Capacity Adjustment Clause (PCAC) to true up the amounts billed in 1988 under a forecast billing rate to conform with actual purchased capacity costs. The surcharge will be added to bills charged Montaup for all requirements service to Montaup's affiliates Eastern Edison Company in Massachusetts and Blackstone Valley Electric Company in Rhode Island and contract demand service to the three nonaffiliated customers: The Town of Middleborough in Massachusetts and Pascoag Fire District and Newport Electric Corporation in Rhode Island.

The PCAC was established by the settlement agreement in FERC Docket No. ER85-106-002 and provides that Montaup will collect PCAC revenues from its wholesale customers for the sale of electric power through a forecast billing over an adjustment period consisting of a calendar year and will true up the amounts collected during each adjustment period to reflect actual cost through a surcharge or credit at the end of the adjustment period. The forecast billing rate is determined based on cost estimates provided by each supplier. The company keeps track of the accumulated overrecovery or underrecovery under the forecast billing rate as compared with actual payments by Montaup for purchased capacity and accrues a carrying charge to the customer's credit (in the case of an accumulated overrecovery) or customer's credit (in the case of an accumulated underrecovery). The accumulated overrecovery or underrecovery as of the end of each calendar year is flowed through to or recovered from customers in a credit or surcharge filed after the end of that year. The credit or surcharge is to be applied to a single month's bill unless (in the case of a surcharge) the percentage increase in the bill would exceed five percent. Any inaccuracy in the forecast billing rate is thus corrected and customers end up paying the costs actually incurred.

Montaup's forecast billing rate in effect during 1988 did not fully recover its purchased capacity cost, resulting in cumulative underrecoveries as of December 31, 1988, as follows:

Blackstone Valley—1,712,354.14.

Eastern Edison—3,409,073.34.

Newport Electric—333,205.90.

Middleborough—33,083.97.

Pascoag—16,591.80.

Montaup requests that it be permitted to collect the amounts shown above as a surcharge to monthly billings beginning with bills for January 1988 service and requests waiver of the 60-day notice requirement. Because of the 5 percent limit the surcharge will be collected over four or five months.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

4. The Washington Water Power Company

[Docket No. ER89-247-000]

March 3, 1989.

Take notice that on February 22, 1989, The Washington Water Power Company (WWP) tendered for filing copies of the Seventh Amendment to an Exchange Agreement with Puget Sound Power & Light Company (Puget) which provides for the exchange of steam-electric generation which, because of plant locations and load area locations, results in substantial savings in both transmission service cost and in transfer losses. The savings resulting therefrom are shared equally by WWP and Puget under the terms of the Exchange Agreement.

The Seventh Amendment shows the calculation of estimated costs and benefits for the 12-month period beginning January 1, 1988. The Seventh Amendment reflects the effect of the state of Montana's "Beneficial Use Tax" on the Exchange, and replaces the Sixth Amendment which was also effective January 1, 1988. It is estimated that the equal sharing of benefits under the Exchange Agreement will result in payments by Puget to WWP of $1,874,652 during this period.

Copies of the filing were served upon Puget.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

5. Montaup Electric Company

[Docket No. ER89-245-000]

March 3, 1989.

Take notice that on February 22, 1989, Montaup Electric Company (Montaup) tendered for filing copies of short-term System Exchange Agreement, dated August 29, 1983, between Montaup and Boston Edison Company (Boston Edison). This agreement provides for a sale of capacity and associated energy from Montaup to Boston Edison in exchange for an equal amount of capacity and any associated energy from Boston Edison. This agreement allows each company to lower energy costs to their respective customers as the opportunity arises.

Boston Edison has a parallel agreement with Montaup. That agreement was filed in Docket No. ER87-408-000 and accepted for filing in September 1987.

In order to permit Montaup and Boston Edison to achieve mutual benefits from this agreement, Montaup requests waiver of the 60-day notice requirement to permit this rate schedule to become effective on August 29, 1983. The waiver, if granted, will have no effect upon purchases under any other rate schedule.

The agreement provides for payment by Boston Edison of an energy charge as provided in Article 7 for any energy which may be provided by Boston Edison and in Article 8 for energy to be provided by Montaup. Justification for the energy reservation charge rate was made and accepted by the FERC in Docket No. ER85-397-000, Rate Schedule FERC No. 97.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

6. Arkansas Power & Light Company

[Docket No. ER89-246-000]

March 3, 1989.

Take notice that on February 14, 1989, Arkansas Power & Light Company (AP&L) tendered for filing an executed rate formula agreement with the City Water & Light Plant of the City of Jonesboro, Arkansas (Jonesboro). AP&L states that the proposed rate formula is the same as that filed for other customers in Docket No. ER89-159-000 and that the formula results in an 11.7 percent increase for Jonesboro.

AP&L proposes an effective date of March 1, 1989, for Jonesboro, as was proposed in its filing in Docket No. ER89-159-000.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

7. Orange and Rockland Utilities, Inc.

[Docket NO. ER89-249-000]

March 3, 1989.

Take notice that on February 16, 1989, Orange and Rockland Utilities, Inc. (O&R) tendered for filing pursuant to Federal Energy Regulatory Commission's order issued January 15, 1988 in Docket No. ER88-112-000, and executed Service Agreement between O&R and Wakefern Food Corporation (Wakefern).

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this document.

8. Detroit Edison Company

[Docket No. ER89-251-000]

march 3, 1989.

Take notice that on the Detroit Edison Company (Detroit Edison) on February 23, 1989, tendered for filing Supplement No. 4 to Detroit Edison's Rate Schedule No. 23.

Detroit Edison states that Supplement No. 4 revises the present agreement for interconnection services between its electrical system and the City of Wyandotte by providing for an additional 120 kV service point. Detroit Edison states that no rates or charges for service are increased by Supplement No. 4 but rates and charges for Emergency Power and Energy, Capacity Reservation Power and Energy, Short Term Power and Energy and Displacement Power and Energy are restated in independent supplier-purchaser format. Detroit Edison requests that the supplement be permitted to become effective as of December 2, 1988.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

9. New England Power Company

[Docket No. ER89-216-000]

March 3, 1989

Take notice that on February 1, 1989, New England Power Company (NEP) submitted for filing an executed Amendment to the Power Contract between NEP and the Town of Norwood, Massachusetts (Norwood).

NEP states that the Amendment modifies the notice of termination provision in the Contract, increases the transmission credit provided under the Contract, and allows Norwood to intervene in future NEP rate proceedings affecting Norwood's service, notwithstanding a prohibition on any such interventions under a settlement of an earlier antitrust action. NEP requests waiver of the notice requirements so that the Amendment may become effective September 20, 1988.

Comment: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

10. Southern Company Services, Inc.

[Docket No. ER89-252-000]

March 3, 1989.

Take notice that on February 24, 1989, Southern Company Services, Inc., acting on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company (Southern Companies) tendered for filing an interchange contract between Florida Power Corporation, Southern Companies and SCSI, together with service schedules showing the basis for interchange transactions between such companies. The filing also includes informational schedules which detail the charges and derivation of components of the rates to be used during the calendar year 1989. The new interchange contract is proposed to be made effective as of January 1, 1989.

The new interchange contract between Florida Power Corporation, Southern Companies and SCSI

constitutes an agreement to continue operation and maintenance of interconnection facilities. The contract provides for the provision of certain services, including Emergency Assistance, Economy Interchange and Economic Energy Participation, and establishes the basis of settlement for such services.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

11. Florida Power Corporation

[Docket No. ER89-248-000]

March 3, 1989.

Take notice that on February 22, 1989, Florida Power Corporation, (Florida Power) tendered for filing a revised Attachment H-1 ("Letter of Commitment for Reserve Interchange Service") to Service Schedule H of Florida Power's August 1, 1983 Contract for Interchange Service with Seminole Electric Cooperative, Inc. ("Seminole"). Attachment H-1 specified the amount, duration and pricing for Florida Power's sale to Seminole of operating reserves and supplemental reserves for the period commencing January 1, 1989. The submittal continues in effect through April 30, 1989, the updated capacity charges which were implemented in 1988, pursuant to Florida Power's annual cost support filing.

Florida Power requests the sixty day notice requirement be waived so that the revised Attachment H-1, in accordance with its terms, may be permitted to become effective on January 1, 1989.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulation Commission, 825 North Capitol Street, NE. Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-5238 Filed 3-6-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. ER89-599-000 et al.]

Rochester Gas and Electric Co., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

March 1, 1989.

Take notice that the following filings have been made with the Commission:

1. Rochester Gas and Electric Company

[Docket No. ER89-599-000]

Take notice that on February 13, 1989, Rochester Gas and Electric Corporation (Rochester) tendered for filing additional information on the development of the contract rates for Entitlement, Replacement, and Residual Power under the proposed contract between Rochester and Green Mountain Power.

Comment date: March 16, 1989, in accordance with Standard Paragraph E at the end of this notice.

2. Nevada Power Company

[Docket No. ER89-234-000]

Take notice that on February 17, 1989, Nevada Power Company (Nevada) tendered for filing an agreement entitled Short Term Seasonal Power Agreement between City of Boulder City (Boulder) and Nevada hereinafter "the Agreement". The primary purpose of the Agreement is to establish the terms and conditions for the Sale by Nevada to Boulder of 30 MW per hour of capacity and energy during January, February, and March 1989.

Nevada requests an effective date of January 1, 1989 and therefore requests waiver of the Commission's notice requirements.

Nevada states that Copies of the filing were served upon Boulder.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

3. Nevada Power Company

[Docket No. ER89-235-000]

Take notice that on February 17, 1989, Nevada Power Company (Nevada) tendered for filing an agreement entitled Short Term Seasonable Power Agreement between Valley Electric Association (Valley) and Nevada hereinafter "the Agreement". The primary purpose of the Agreement is to establish the terms and conditions for the Sale by Nevada to Valley of 30 MW per hour of capacity and energy during January, February, and March 1989.

Nevada requests an effective date of January 1, 1989 and therefore requests waiver of the Commission's notice requirements.

Nevada states that copies of the filing were served upon Valley.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this document.

4. Nevada Power Company

[Docket No. ER89-236-000]

Take notice that on February 17, 1989, Nevada Power Company (Nevada) tendered for filing an agreement entitled Short Term Seasonal Power Agreement between Overton Power District No. 5 (Overton) and Nevada hereinafter "the Agreement". The primary purpose of the Agreement is to establish the terms and conditions for the Sale by Nevada of Overton of 30 MW per hour of capacity and energy during January, February, and March 1989.

Nevada requests and effective date of January 1, 1989 and therefore requests waiver of the Commission's notice requirements.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

5. New York State Electric & Gas Corporation

[Docket No. ER89-237-000]

Take notice that on February 21, 1989, New York State Electric & Gas Corporation (NYSEG) tendered for filing as an initial rate schedule a contract dated November 17, 1988 between NYSEG and the County of Tompkins, a municipal corporation of the State of New York ("Tompkins County"). The contract provides for Tompkins County to pay a charge to NYSEG for the use of its facilities to deliver hydroelectric power and energy sold by Tompkins County to its residential customers, equal to the charges that would have been billed to such customers under NYSEG's appropriate residential electric rate schedule on file with the New York State Public Service Commission less NYSEG's fuel and purchased power costs reflected in such rate schedule.

NYSEG states that copies of this filing have been served by mail upon Tompkins County, the New York State Public Service Commission, and the Power Authority of the State of New York, from whom Tompkins County is purchasing the hydroelectric power and energy to be sold by Tompkins County to its customers.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this document.

6. Long Island Lighting Company

[Docket No. ER89-238-000]

Take notice that Long Island Lighting Company (LILCO) on February 21, 1989, tendered for filing proposed changes in its FERC Rate Schedule 34, pursuant to which LILCO transmits power and energy from the New York Power Authority, Brookhaven National Laboratory in Upton, New York and Grumman Corporation in Bethpage, New York. The proposed changes would increase revenues from such service by $43,184.00 based on the 12-month period ending May 31, 1989.

LILCO proposes to increase the rates in order to recover the increase in the cost of service.

Copies of this filing were served upon the New York Power Authority, Brookhaven National Laboratory, Grumman Corporation and the New York State Public Service Commission.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

7. Nevada Power Company

[Docket No. ER89-244-000]

Take notice that on February 21, 1989, Nevada Power Company (Nevada) tendered for filing an agreement entitled Economy Energy Agreement between Nevada and the Metropolitan Water District of Southern California (Metropolitan) hereinafter "the Agreement." The primary purpose of the Agreement is to establish the terms and conditions for the sale by Nevada of Economy Energy to Metropolitan upon request by Metropolitan and availability from Nevada.

Nevada states that copies of the filling were served upon Metropolitan.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

8. Northeast Utilities Service Company

[Docket No. ER89-243-000]

Take notice that on February 21, 1989, Northeast Utilities Service Company (NUSCO) tendered for filing proposed changes with respect to (i) Sales Agreement with respect to Montville and Middletown Units, and (ii) Sales Agreement with respect to Various Gas Turbine Units, both between the Connecticut Light and Power Company (CL&P) and South Hadley Electric Light Department (South Hadley), dated September 18, 1987.

The proposed changes would (1) provide additional sales of capacity and energy under both rate schedules, and (2) provide a renegotiated capacity charge rate for the additional sales in 1987 and a cost-of-service capacity charge rate for the additional sales during the remainder of the term of the Sales Agreement with respect to various Gas Turbine Units.

Pursuant to Section 35.19 of the Commission's Regulations and in order to conform with the requirements of Section 35.13 (b) and (c), NUSCO incorporates hereto by reference the information previously submitted to the Commission under FERC Rate Schedule Nos. CL&P 372 and 373.

NUSCO requests that the Commission waive its standard notice periods and filing regulations to the extent necessary to permit the rate schedule changes to become effective May 1, 1987.

NUSCO states that copies these rate schedule changes have been mailed or delivered to CL&P and South Hadley.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

9. Long Island Lighting Company

[Docket No. ER89-242-000]

Take notice that Long Island Lighting Company (LILCO) on February 21, 1989, tendered for filing a proposed rate schedule for the rate of emergency energy and capacity to Connecticut Light & Power Company. The proposed rate schedule would provide LILCO with $100,000 revenues from such service.

Copies of this filing were served upon the Connecticut Department of Public Utilities, Connecticut Light & Power Company, and the New York State Public Service Commission.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

10. Long Island Lighting Company

[Docket No. ER89-241-000]

Take notice that Long Island Lighting Company (LILCO) on February 21, 1989, tendered for filing a proposed rate schedule for the sale of emergency energy and capacity to Boston Edison & Power Company. The proposed rate schedule would provide LILCO with $981,000 in revenues from such service.

Copies of this filing were served upon the Massachusetts Department of Public Utilities, Boston Edison Company, and the New York State Public Service Commission.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

11. Long Island Lighting Company

[Docket No. ER89-240-000]

Take notice that Long Island Lighting Company (LILCO) on February 21, 1989, tendered for filing proposed changes in its FERC Rate Schedule 32, pursuant to which LILCO transmits power and energy from the New York Power Authority to the three municipal Electric utilities on Long Island: the Village of Greenport, Rockville Centre and Freeport. The proposed changes would increase revenues from such service by $37,270.00 based on the 12-month period ending May 31, 1989.

LILCO proposes to increase the rates in order to recover the increase in the Company's cost of service.

Copies of this filing were served upon the New York Authority the Municipal Electric Utilities Association of New York State, the Incorporated Villages of Greenport, Freeport and Rockville Centre, and the New York State Public Service Commission.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

12. Long Island Lighting Company

[Docket No. ER89-239-000]

Take notice that Long Island Lighting Company (LILCO) on February 21, 1989, tendered for filing a proposed rate schedule for the sale of emergency energy and capacity to New England Power Company, the proposed rate schedule would provide LILCO with $1.9 million in revenues from such service.

Copies of this filing were served upon the Massachusetts Departemnt of Public Utilities, New England Company, and the New York State Public Service Commission.

Comment date: March 16, 1989, in accordance with Standard Paragraph E at the end of this notice.

13. Arizona Public Service Company

[Docket No. ER89-181-000]

Take notice that on February 8, 1989, Arizona Public Service Company (Arizona) tendered for filing a letter in response to a request by staff for additional information. The information submitted concerned the cost of service used as the basis for the company's Energy Interchange Ceiling rate submitted in the above referenced docket.

Comment date: March 20, 1989, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-5236 Filed 3-6-89; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 1235-000 Virginia]

City of Radford, VA; Availability of Environmental Assessment

March 2, 1989.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the application for the minor license for the proposed Municipal Hydroelectric Project located on the Little River in Montgomery and Pulaski Counties, near Radford, Virginia, and has prepared an Environmental Assessment (EA) for the proposed project. In the EA, the Commission's staff has analyzed the potential environmental impacts of the proposed project and has concluded that the approval of the proposed project, with appropriate mitigative measures, would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, Room 1000, of the Commission's offices at 825 North Capital Street NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 89-5239 Filed 3-6-89; 8:45 am]

BILLING CODE 6717-01-M

Hydroelectric Application Filed with the Commission

March 1, 1989.

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is availble for public inspection.

a. Type of Application: Transfer of License.

b. Project No.: 1432-003.

c. Date Filed: January 19, 1989.

d. Applicant: CWC Fisheries, Inc. (transferor), Wards Cove Packing Company (transferee).

e. Name of Project: Dry Spruce Bay.

f. Location: On Dry Spruce Bay in Kodiack County, Alaska.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. Applicant Contact: Mr. R. Eldridge Hicks, Hicks, Boyd, Chandler & Falconer, 550 W. 7th Avenue, Suite 1530, Anchorage, AK 99501.

i. FERC Contact: Mr. William Roy-Harrison (202) 376-9830.

j. Comment Date: April 3, 1989.

k. Description of Project: CWC Fisheries, Inc. proposes to transfer its license to Wards Cove Packing Company. The project is currently operating under an annual license issued December 20, 1988. The transferee is a private corporation organized under the laws of the state of Alaska.

l. This notice also consists of the following standard paragraphs: B and C.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, and or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commision's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capital Street, NW., Washington, DC 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

Lois D. Cashell,

Secretary.

[FR Doc. 89-5176 Filed 3-6-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP89-865-000, et al.]

Williams Natural Gas Co., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. Williams Natural Gas Company

[Docket No. CP89-865-000]

February 28, 1989.

Take notice that on February 21, 1989, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP89-846,000 a request pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas on behalf of End Users Supply System (End Users), a marketer of natural gas, under WNG's blanket certificate issued in Docket No. CP86-631-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

WNG proposes to transport, on an interruptible basis, up to 7,734 MMBtu equivalent of natural gas on a peak day, 7,734 MMBtu equivalent on an average day, and 2,822,545 MMBtu equivalent on an annual basis for End Users. It is stated that WNG would receive the gas for End Users' account at various existing points on WNG's system in Kansas, Missouri, Oklahoma, Texas and Wyoming, and would deliver equivalent volumes at various points on WNG's system in Kansas, Missouri, and Nebraska. It is asserted that existing facilities would be used and that no construction of additional facilities would be required. It is explained that the transportation service commenced September 10, 1988, under the self-implementing authorization of § 284.223

of the Commission's Regulations, as reported in Docket No. ST89-1650. It is further explained that the service ceased January 7, 1989, because the 120-day period allowed under the Regulations was about to expire. It is stated that WNG now proposes to reinstate the transportation service.

Comment date: April 14, 1989, in accordance with Standard Paragraph G at the end of this notice.

2. Lone Star Gas Company, a Division of ENSERCH Corporation

[Docket No. CP87-190-007]
February 28, 1989.

Take notice that on February 22, 1989, Lone Star Gas Company, a Division of ENSERCH Corporation (Lone Star), 301 South Harwood Street, Dallas, Texas 75201, filed in Docket No. CP87-190-007 a petition to further amend a certificate issued in Docket No. CP87-190-000, as amended in Docket No. CP87-190-005, to extend the authorization term to expire on September 30, 1999, all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

It is stated that by order issued June 30, 1989, in Docket No. CP87-190-000, 39 FERC ¶ 61,380 (1987), Lone Star was granted authorization to provide firm transportation service for Coastal States Gas Transmission Company (Coastal), and to construct and operate certain facilities in interstate commerce necessary to perform the transportation service for a period of one year from the date of issuance of the order. It is then stated that by order issued June 6, 1988, in Docket No. CP87-190-005 43 FERC ¶ 62,271 (1988), Lone Star's authorization to transport for Coastal was amended to allow continued transportation for a term expiring on the earlier of one year from the date of issuance of the order or the date Lone Star accepts a blanket certificate pursuant to § 284.221 of the Commission's Regulations. Lone Star in its petition to further amend requests authority to extend this authorization to expire September 30, 1999, the date of expiration of its gas transportation contract. Lone Star proposes no other changes.

Comment date: March 21,. 1980, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

3. Northern Natural Gas Company Division of Enron Corp.

[Docket No. CP89-879-000]
February 28, 1989.

Take notice that on February 22, 1989, Northern Natural Gas Company, Division of Enron Corp., (Northern), 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251-1188, filed in Docket No. CP89-879-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations for authority to transport natural gas on behalf of PSI, Inc., a marketer of natural gas, all as more fully set forth in the application on file with the Commission and open to public inspection.

Southern proposes to transport up to 50,000 MMBtu per day for PSI, Inc. Construction of facilities will not be required to provide the proposed service. Service under Section 284.223(a) commenced January 4, 1989, as reported in Docket No. ST89-1849 (filed January 23, 1989).

Comment date: April 14, 1989, in accordance with Standard Paragraph G at the end of this notice.

4. Southern Natural Gas Company

[Docket No. CP89-814-000]
February 28, 1989.

Take notice that on February 13, 1989, Southern Natural Gas Company (Southern), Post Office Box 2563, Birmingham, Alabama 35202-2563, filed in Docket No. CP89-814-000 a request pursuant to §§ 157-205, 157.211 and 284.223(c) of the Regulations under the Natural Gas Act (18 CFR 157.205, 157.211 and 284.223(c)) for authorization to construct and operate a sales tap and to provide interruptible transportation service to Total Minatome Corporation (Total), under the blanket certificates issued in Docket Nos. CP82-406-000 and CP88-316-000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Southern states that it would provide interruptible transportation service to Total for use at its Eloi Bay facilities in Chandeleur Sound Block 49, offshore Louisiana. In order to deliver the gas to Total, Southern would construct, install and operate a new sales tap which would include a measurement station and appurtenant facilities to interconnect to Southern's 6-inch Eloi Bay Pipeline and would be located in Chandeleur Sound Block 49, offshore Louisiana. Southern estimates that the cost of constructing and installing the facilities would be approximately $24,880.

Southern states that it would transport natural gas from various receipt points located on Southern's system to the proposed interconnection with Total in Chandeleur Sound Block 49, offshore Louisiana. Southern states that it would transport gas on behalf of Total pursuant to its Rate Schedule IT. Southern further states that the installation of the proposed facilities would have no significant effect on its peak day or annual requirements.

Additionally, Southern states that the peak day quantities for delivery of natural gas to Total are estimated to be 5,000 MMBtu, that the average daily quantities are estimated to be 1,000 MMBtu resulting in an estimated annual quantity of 365,000 MMBtu.

Comment date: April 14, 1989, in accordance with Standard Paragraph G at the end of this notice.

5. Southern Natural Gas Company

[Docket No. CP89-874-000]
February 28, 1989.

Take notice that on February 21, 1989, Southern Natural Gas Company (Southern), Post Office Box 2563, Birmingham, Alabama 35202-2563, filed in Docket No. CP89-874-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to transport natural gas on behalf of Sonat Marketing Company (Sonat), a marketer of natural gas, under Southern's blanket certificate issued in Docket No. CP88-316-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Southern proposes to transport, on an interruptible basis, up to 50,000 MMBtu equivalent of natural gas on a peak day, 4,000 MMBtu equivalent on an average day, and 1,460,000 MMBtu equivalent on an annual basis for Sonat. It is stated that Southern would receive the gas at existing points on Southern's system in Louisiana, offshore Louisiana, Texas, offshore Texas, Mississippi, Alabama and Georgia. It is stated that Southern would deliver equivalent volumes at an existing point on Southern's system in Plaquemines Parish, Louisiana. It is asserted that Southern would utilize existing facilities and that no construction of additional facilities would be required. It is explained that the transportation service commenced December 20, 1988, under the automatic authorization provisions of § 284.223 of the Commission's Regulations, as reported in Docket No. ST89-1769.

Comment date: April 14, 1989, in accordance with Standard Paragraph G at the end of this notice.

6. Southern Natural Gas Company

[Docket No. CP89-876-000]
February 28, 1988.

Take notice that on February 21, 1989, Southern Natural Gas Company (Southern), Post Office Box 2563, Birmingham, Alabama 35202-2563, filed

in Docket No. CP89-876-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to transport natural gas on behalf of Stellar Gas Company (Stellar), a marketer of natural gas, under Southern's blanket certificate issued in Docket No. CP88-316-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Southern proposes to transport, on an interruptible basis, up to 150,000 MMBtu equivalent of natural gas on a peak day, 150,000 MMBtu equivalent on an average day, and 54,750,000 MMBtu equivalent on an annual basis for Stellar. It is stated that Southern would receive the gas at existing points on Southern's system in Louisiana, offshore Louisiana, Texas, offshore Taxas, Mississippi, Alabama and Georgia. It is stated that Southern would deliver equivalent volumes at existing points on Southern's system in Georgia, Tennessee, and South Carolina. It is asserted that Southern would utilize existing facilities and that no construction of additional facilities would be required. It is explained that the transportation service commenced November 1, 1988, under the automatic authorization provisions of § 284.223 of the Commission's regulations, as reported in Docket No. ST89-2143.

Comment date: April 14, 1989, in accordance with Standard Paragraph G at the end of this notice.

7. Trunkline Gas Company

[Docket No. CP89-869-000]

February 28, 1989.

Take notice that on February 21, 1989, Trunkline Gas Company (Trunkline), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-869-000 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 transport natural gas for Seagull Marketing Services, Inc. (Seagull), a marketer, pursuant to Trunkline's blanket certificate issued in Docket No. CP86-586-000 and section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Specifically, Trunkline requests authority to transport up to 125,00 dt equivalent of natural gas per day on behalf of Seagull on an interruptible basis pursuant to a transportation agreement dated December 22, 1988, between Trunkline and Seagull. Trunkline states that the transportation agreement provides for Trunkline to receive gas from various existing points of receipt on its system in Illinois, Texas, Louisiana, and Offshore Louisiana and redeliver the gas, less fuel used and unaccounted for line loss to Panhandle Eastern Gas Company in Douglas County, Illinois.

Trunkline indicates it would provide the service for a primary term of one month from the date of initial transportation and continue to provide the service on a month-to-month basis until terminated by either party upon at least thirty days' prior notice to the other. Trunkline states that it would charge the rates and abide by the conditions provided by its Rate Schedule PT.

It is indicated that the estimated maximum daily volume, average volume, and annual volume would be 125,000 dt equivalent of natural gas, 25,000 dt equivalent of natural gas, and 9,125,000 dt equivalent of natural gas, respectively. Trunkline states that it commenced a 120-day transportation service for Seagull on January 1, 1989, as reported in Docket No. ST89-1841. It is indicated that Trunkline would use existing facilities to implement the service.

Comment date: April 14, 1989, in accordance with Standard Paragraph G at the end of this notice.

8. Paiute Pipeline Company

[Docket No. CP89-907-000]

March 1, 1989.

Take notice that on February 27, 1989, Paiute Pipeline Company (Paiute), P.O. Box 94197, Las Vegas, Nevada, filed in Docket No. CP89-907-000 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 transport natural gas for Nevada Cement Company (NCC), an end-user, pursuant to Paiute's blanket certificate issued in Docket No. CP87-309-000 and section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Specifically, Paiute requests authority to transport up to seven billion Btu of natural gas per day on an interruptible basis on behalf of NCC pursuant to a transportation agreement dated December 2, 1988, between Paiute and NCC. Paiute states that the transportation agreement provides for Paiute to receive the gas at an existing point of interconnection between the facilities of Paiute and Northwest Pipeline Corporation located at the Nevada-Idaho border and redeliver the gas at an existing interconnection located in Lyon County, Nevada.

Paiute indicates it would provide the service for a primary term expiring October 31, 1991, but would continue the service on a month to month basis thereafter subject, however, to termination at expiration of the said primary term or upon the first day of any calendar month thereafter by either party hereto through written notice so stating and given to the other no less than thirty days in advance. Paiute states that it would charge the rates and abide by the terms and conditions of its Rate Schedule IT.

It is indicated that the estimated maximum daily volume, average volume, and annual volumes would be seven billion Btu of natural gas, 408 million Btu of natural gas, and 148.9 billion Btu of natural gas, respectively. Paiute states that it commenced a 120-day transportation service for NCC on December 20, 1988, as reported in Docket No. ST89-1813-000. It is also indicated that Paiute would use existing facilities to implement service.

Comment date: April 17, 1989, in accordance with Standard Paragraph G at the end of this notice.

9. United Gas Pipe Line Company

[Docket No. CP89-884-000]

March 1, 1989.

Take notice that on February 22, 1989, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77152-1478, filed in Docket No. CP89-884-000 an application pursuant to Section 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas on behalf of Houston Gas Exchange Corp. (Houston), a marketer of natural gas, under United's blanket certificate issued in Docket No. 88-6-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

United proposes to transport, on an interruptible basis, up to 103,000 MMBtu per day for Houston. United states that construction of facilities would not be required to provide the proposed service.

United further states that the maximum day, average day, and annual transportation volumes would be approximately 103,000 MMBtu, 103,000 MMBtu and 37,595,000 MMBtu respectively.

United advises that service under Section 284.223(a) commenced January 4, 1989, as reported in Docket No. ST89-2183.

Comment date: April 17, 1989, in accordance with Standard Paragraph G at the end of this notice.

10. Williams Natural Gas Company

[Docket No. CP89-899-000]

March 1, 1989.

Take notice that on February 24, 1989, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP89-899-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide a firm transportation service for Washburn University of Topeka (Washburn), an end user, under the blanket certificate issued in Docket No. CP86-631-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

WNG states that pursuant to a transportation agreement dated January 1, 1989, under its Rate Schedule FTS, it proposes to transport up to 300 MMBtu per day equivalent of natural gas for Washburn. WNG states that it would transport the gas from various existing receipt points in Kansas, Oklahoma and Wyoming, and deliver such gas at various delivery points on WNG's pipeline system located in Kansas.

WNG advises that service under § 284.223(a) commenced January 9, 1989, as reported in Docket No. ST89-2179-000. WNG further advises that it would transport 100 MMBtu on an average day and 36,500 MMBtu annually.

Comment date: April 17, 1989, in accordance with Standard Paragraph G at the end of this notice.

11. Williams Natural Gas Company

[Docket No. CP89-898-000]

March 1, 1989.

Take notice that on February 24, 1989, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP89-898-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for Victoria Gas Corporation (Victoria), a marketer, under the blanket certificate issued in Docket No. CP86-631-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

WNG states that pursuant to a transportation agreement dated January 1, 1989, under its Rate Schedule ITS, it proposes to transport up to 31,000 MMBtu per day equivalent of natural gas for Victoria. WNG states that it would transport the gas from various receipt points in Colorado, Kansas, Missouri, Oklahoma, Texas and Wyoming, and deliver such gas at various delivery points on WNG's pipeline system located in Kansas, Oklahoma, Texas and Wyoming.

WNG advises that service under § 284.223(a) commenced January 13, 1989, as reported in Docket No. ST89-2222-000. WNG further advises that it would transport 31,000 MMBtu on an average day and 11,315,000 MMBtu annually.

Comment date: April 17, 1989, in accordance with Standard Paragraph G 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 the subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary

[FR Doc. 89-5237 Filed 3-6-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CI64-26-030 et al.]

Chevron U.S.A. Inc. et al.; Applications for Certificates, Abandonment of Service and Amendment of Certificates [1]

March 1, 1989.

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to sell natural gas in interstate commerce, to abandon service or to amend certificates as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before March 15, 1989, file with the Federal Energy Regulation Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 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 protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

Filing Code

A—Initial Service

B—Abandonment

C—Amendment to add acreage

D—Amendment to delete acreage

E—Total Succession

F—Partial Succession

Docket No. and date filed	Applicant	Purchaser and location	Description
CI64-26-030, 2-8-89	Chevron U.S.A. Inc., P.O. Box 3725, Houston, TX 77253.	Texas Eastern Transmission Corporation, East Cameron Block 157, Offshore Louisiana.	Application to add a delivery point.
CI67-1834-002, 2-6-89	Kerr-McGee Corporation, Kerr-McGee Center, Oklahoma City, OK 73125.	Texas Gas Transmission Corporation, Cartwright, Calhoun and Tremont Fields, Lincoln, Ouachita and Jackson Parishes, Louisiana.	Application to add a delivery point.
CI82-213-003, B, 2-6-89	Amoco Production Company, P.O. Box 50879, New Orleans, LA 70150.	Stone County Compression Facility, Stone County, Mississippi.	Application to remove an electric driven compressor from the facility.
CI89-246-000, (CI65-360), B, 1-17-89.	ARCO Oil and Gas Company, Division of Atlantic Richfield Company, P.O. Box 2819, Dallas, TX 75221.	El Paso Natural Gas Company, Payton Field, Pecos County, Texas.	Well plugged and abandoned.
CI89-287-000, E, 2-6-89	Amoco Production Company, 1670 Broadway, Room 1754, Denver, CO 80202.	El Paso Natural Gas Company, Blanco Mesaverde Field, San Juan and Rio Arriba Counties, New Mexico.	Acreage acquired 12-31-87 from Crown Central Petroleum Corporation.
CI89-288-000, E, 2-6-89	Amoco Production Company	El Paso Natural Gas Company, Blanco Pictured Cliffs Field, San Juan County, New Mexico.	Acreage acquired 12-31-87 from Crown Central Petroleum Corporation.
CI89-289-000, E, 2-6-89	Amoco Production Company	El Paso Natural Gas Company, Blanco Mesaverde Field, San Juan County, New Mexico.	Acreage acquired 12-31-87 from Crown Central Petroleum Corporation.
CI89-290-000, E, 2-6-89	Amoco Production Company	Northwest Pipeline Corporation, Basin Dakota Field, San Juan County, New Mexico.	Acreaged acquired 12-31-87 from Crown Central Petroleum Corporation.
CI89-291-000, E, 2-6-89	Amoco Production Company	El Paso Natural Gas Company, Blanco Mesaverde Field, San Juan County, New Mexico.	Acreage acquired 12-31-87 from Crown Central Petroleum Corporation.
CI89-292-000, E, 2-6-89	Amoco Production Company	El Paso Natural Gas Company, Basin Dakota and Blanco Mesaverde Fields, San Juan County, New Mexico.	Acreage acquired 12-31-87 from Crown Central Petroleum Corporation.
CI89-293-000, E, 2-6-89	Amoco Production Company	El Paso Natural Gas Company, Blanco Pictured Cliffs Field, San Juan County, New Mexico.	Acreage acquired 12-31-87 from Crown Central Petroleum Corporation.
CI89-298-000, E, 2-13-89	ARCO Oil and Gas Company, Division of Atlantic Richfield Company.	Northern Natural Gas Company, Division of ENRON Corp. Mocane-Laverne Field, Beaver County, Oklahoma.	Acreage acquired 12-1-86 from Tenneco Oil Company.

[FR Doc. 89-5234 Filed 3-6-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CI85-673-005 et al.]

LaSER Marketing Co., a Division of LaSalle Energy Corp., et al., Applications for Extension of Blanket Limited-Term Certificates With Pregranted Abandonment [1]

March 2, 1989.

Take notice that each Applicant listed herein has filed an application pursuant to section 7 of the Natural Gas Act and the Federal Energy Regulatory Commission's (Commission) regulations thereunder for amendment of its blanket limited-term certificate with pregranted abandonment previously issued by the Commission for a term expiring March 31, 1989, to extend such authorization for the term listed herein, all as more fully set forth in the applications which are on file with the Commission and open for public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before March 21, 1989, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

Docket No.	Date filed	Applicant
CI85-673-005 [2]	2-22-89	LaSER Marketing Co., a Division of LaSalle Energy Corp., P.O. Box 3327, Houston, TX 77253.
CI86-503-003 [2]	2-21-89	Sonat Marketing Company, P.O. Box 2563, Birmingham, AL 35202-2563.
CI87-738-003 [3] [4]	2-21-89	Williams Gas Marketing Co., P.O. Box 3102, Tulsa, OK 74101.
CI88-648-001 [2]	2-17-89	Western Gas Marketing USA, Ltd., 2001 Bryan Tower, Suite 953, Dallas, TX 75201.

[2] Applicant requests extension for a three-year term.
[3] Applicant requests extension for an unlimited term.
[4] Applicant also requests authorization on behalf of others selling gas to Applicant or through Applicant as agent.

[FR Doc. 89-5240 Filed 3-6-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. G-5991-001 et al.]

Sun Exploration and Production Co. et al.; Applications for Termination or Amendment of Certificates [1]

March 1, 1989.

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to terminate or amend certificates as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before March 15, 1989, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

[Filing Code: A—Initial Service; B—Abandonment; C—Amendment to add acreage; D—Amendment to delete acreage; E—Total Succession; F—Partial Succession]

Docket no. and date filed	Applicant	Purchaser and location	Description
G-5991-001, D, Feb. 3, 1989	Sun Exploration and Production Company, P.O. Box 2880, Dallas, TX 75221.	El Paso Natural Gas Company, South Fullerton Plant, Andrews County, Texas.	Assigned 10-1-88 to Amoco Production Company.
G-7254-000, D, Feb. 6, 1989	Marathon Oil Company, P.O. Box 3128, Houston, TX 77253.	Tennessee Gas Pipeline Company, Heyser Field, Victoria and Calhoun Counties, Texas.	Assigned 10-1-88 to Paul F. Barnhart.
CI61-670-000, D, Feb. 6, 1989	ARCO Oil and Gas Company, Division of Atlantic Richfield Company, P.O. Box 2819, Dallas, TX 75221.	Tennessee Gas Pipeline Company, West Delta Block 83 Field, Plaquemines Parish, Louisiana.	Assigned 10-1-87 to Chevron U.S.A. Inc.
CI89-242-000 (CI78-612), D, Jan. 18, 1989.	Sohio Petroleum Company, P.O. Box 4587, Houston, TX 77210.	El Paso Natural Company, Lea County, New Mexico.	Assigned 10-1-88 to Presidio Oil Company.
CI89-244-000 (CI61-1662), D, Jan. 19, 1989.	Sohio Petroleum Company	Natural Gas Pipeline Company of America, Beaver County, Oklahoma.	Assigned 10-1-88 to Presidio Oil Company.
CI89-252-000 (CI77-102), D, Jan. 23, 1989.	Chevron, U.S.A. Inc., Box 3725, Houston, TX 77253.	Cities Service Gas Company, Hemphill County, Texas.	Assigned 1-3-89 to Shannon Energy.
CI89-256-000 (CI64-1062), D, Jan. 23, 1989.	Tenneco Oil Company, P.O. Box 52332, Houston, TX 77052.	Williams Natural Gas Company, NE Waynoka Field, Woods County, Oklahoma.	Assigned 12-1-85 to Redgate Petroleum, Inc.
CI89-294-000 (G-17411-000), D, Feb. 6, 1989.	ARCO Oil and Gas Company, Division of Atlantic Richfield Company.	United Gas Pipe Line Company, Sunrise Field, Terrebonne Parish, Louisiana.	Assigned 5-1-88 to Mobil Oil Exploration and Producing Southeast, Inc.
CI89-296-000 (CI81-060), D, Feb. 6, 1989.	ARCO Oil and Gas Company, Division of Atlantic Richfield Company.	Lone Star Gas Company, a Division of ENSERCH Corporation, Dexter East Field, Cooke County, Texas.	Assigned 1-1-87 to Hondo Oil & Gas Company.
CI89-297-000 (G-5991), D, Feb. 8, 1989.	Sun Exploration and Production Company	El Paso Natural Gas Company, S. Fullerton Field, Andrews County, Texas.	Assigned 10-1-88 to Exxon Corporation.

[FR Doc. 89-5235 Filed 3-6-89; 8:45 am]

BILLING CODE 6717-01-M

Office of Fossil Energy

[ERA Docket No. 88-71-NG]

Intalco Aluminum Corp.; Conditional Order Granting Blanket Authorization To Import Natural Gas

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of a Conditional Order Granting Blanket Authorization To Import Natural Gas.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice that it has issued a conditional order granting Intalco Aluminum Corporation (Intalco) blanket authorization to import natural gas from Canada. The order issued in ERA Docket No. 88-71-NG conditionally authorizes Intalco to import up to 2 Bcf per year of Canadian natural gas over a two-year period for use as fuel in its aluminum smelting plant located in Ferndale, Washington.

A copy of this order is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056, 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, February 28, 1989.

J. Allen Wampler,

Assistant Secretary, Fossil Energy.

[FR Doc. 89-5246 Filed 3-6-89; 8:45 am]

BILLING CODE 6450-01-M

Office of Hearings and Appeals

Cases Filed During Week of January 6 Through January 13, 1989

During the Week of January 6 through January 13, 1989, the appeals and applications for relief listed in the

Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy. Submissions inadvertently omitted from earlier lists have also been included.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

George B. Breznay,

Director, Office of Hearings and Appeals.

March 1, 1989.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARING AND APPEALS

[Week on Jan. 6 through Jan. 13, 1989]

Date	Name and location of applicant	Case No.	Type of submission
Dec. 14, 1988	Belridge/South Dakota, Pierre, SD	RM-8-141	Request for modification/rescission. If granted: The Jan. 24, 1987 decision and order issued to South Dakota would be modified regarding the state's plan submitted in the Belridge second stage refund proceeding.
Jan. 10, 1989	Alaska, Anchorage, AL	KFA-0254	Appeal of an information request denial. If granted: The Dec. 7, 1988, Freedom of Information request denial issued by the Office of Management and Information System, Ecomomic Regulatory Administration, would be rescinded and the State of Alaska would receive access to certain reports submitted by oil refiners in 1977-81 pursuant to the DOE's entitlements program.
Jan. 11, 1989	Glen Milner, Seattle, WA	KFA-0253	Appeal of an information request denial. If granted: The Dec. 15, 1988, Freedom of Information request denial issued by the Albuquerque Operations Office would be rescinded and Glen Milner would receive a waiver of fees and access to documents regarding the shipment of Trident nuclear warheads to Bangor.
Do	M.A. Malik, Hartford, CT	KFA-0252	Appeal of an information request denial. If granted: The Dec. 20, 1988 Freedom of Information request denial issue by the Oak Ridge Operations Office would be rescinded and M.A. Malik would receive access to certain documents that contain unclassified controlled nuclear information.
Do	Occupational Health Legal Rights Foundation, Washington, DC.	KFA-0255	Appeal of an information request denial. If granted: The Dec. 2, 1988, Freedom of Information request denial issued by the Oak Ridge Operations Office would be rescinded and the Occupation Health Legal Rights Foundation would receive a waiver of fees for requested information.
Jan. 12, 1989	Frank L. Bordell, Ballston, NY	KFA-0256	Appeal of an information request denial. If granted: The DOE's Naval Reactors Office, Schenectady, NY, would be required to respond to two requests submitted by Frank L. Bordell on July 7, 1988 and July 17, 1988 and Mr. Bordell would receive access to five documents regarding the separations process research unit and certain logbooks.
Do	Aminoil/Burling Sales Assoc., St. Louis, MO	RR139-42	Request for modification/rescission. If granted: The Dec. 13, 1988 decision and order (Case No. RF139-190) issued to the Burling Sales Assoc. would be modified regarding the firm's application for refund submitted in the Aminoil refund proceeding.
Do	Aminoil/City of Tulsa, St. Louis, MO	RR139-43	Request for modification/rescission. If granted: The Dec. 13, 1988 decision and order issued to the City of Tulsa (Case No. RF130-189) would be modified regarding the firm's application for refund submitted in the Aminoil refund proceeding.
Do	Aminoil/Enson Corp., St. Louis, MO	RR139-44	Request for modification/rescission. If granted: The Dec. 13, 1988 decision and order (Case No. RF139-201) issued to the Enson Corp. would be modified regarding the firm's application for refund submitted in the Aminoil refund proceeding
Do	Aminoil/Fred G. McKenzie Co., St Louis, MO	RR139-45	Request for modification/rescission. If granted: The Dec. 7, 1988 decision and order (Case No. RF139-159) issued to the Fred G. McKenzie Co. would be modified regarding the firm's application for refund submitted in the Aminoil refund proceeding
Do	Plaquemines/Shell Oil Co., Hardin, KY	RR305-2	Request for modification/rescission. If granted: The Dec. 14, 1988 decision and order (Case No. RF305-13) issued to the Shell Oil Co. would be modified regarding the firm's application for refund submitted in the Plaquemines refundproceeding.

REFUND APPLICATIONS RECEIVED

[Week of Dec. 30 through Jan. 4, 1989

Date received	Name of refund proceeding/ name of refund applicant	Case No.
Nov. 24, 1987	Marion Corporation.	RF253-61
Dec. 14, 1987	Amoco/South Dakota.	RQ21-494
Do.	Amoco/South Dakota.	RQ251-495
Do.	Vickers/South Dakota.	RQ1-496
Do.	Palo Pinto/ South Dakota.	RQ5-497
Do.	Bob's/South Dakota.	RQ38-498
Do.	Coline/South Dakota.	RQ2-499
Dec. 23, 1988	Gates Learject Corporation.	RF317-1
Jan. 6, 1989	Two-Sister's Grocery.	RF300-10655
Do.	A.T. Williams Company.	RF314-7
Jan. 9, 1989	Amoco/ Nebraska.	RQ251-493
Do.	Bob's Quality Service, Inc.	RF313-15
Do.	D&G Getty	RF265-2767
Do.	Wynn Horney	RF308-10
Do.	Carol Management Corporation.	RD272-74782
Do.	Teddy B. Vicars.	RF300-10656
Do.	Jery Schmechel.	RF300-10657

REFUND APPLICATIONS RECEIVED—Continued

[Week of Dec. 30 through Jan. 4, 1989

Date received	Name of refund proceeding/ name of refund applicant	Case No.
Do.	Earl's Gulf	RF300-10658
Do.	McCrary's Gulf	RF300-10659
Jan. 11, 1989	Lynch's Crown	RF313-16
Do.	Johnson Controls, Inc.	RC272-16
Jan. 12, 1989	Madden Oil Company.	RF310-337
Do.	Coline/ Wisconsin.	RQ2-500
Do.	Perry Gas/ Wisconsin.	RQ183-501
Jan. 6, 1989 thru Jan. 13 1989.	Crude Oil Refund Applications Received.	RF272-75204 thru RF272-75220
Do.	Murphy Oil Refund Applications Received.	RF309-733 thru RF309-733
Do.	Atlantic Richfield Refund Applications Received.	RF304-7626 thru RF304-7658
Do.	Exxon Refund Applications Received.	RF307-7497 thru RF307-7618

[FR Doc. 89-5247 Filed 3-6-89; 8:45 am]

BILLING CODE 6450-01-M

Cases Filed During the Week of December 30 Through January 5, 1989

During the Week of December 30 through January 5, 1989, the applications for relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

George B. Breznay,

Director, Office of Hearings and Appeals.

March 1, 1989.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of Dec. 30 through Jan. 5, 1989]

Date	Name and location of applicant	Case No.	Type of submission
Jan. 4, 1989	International Drilling & Exploration Corporation, Washington, D.C.	KEG-0036	Petition for Special Redress. If granted: The Office of Hearings and Appeals would restore to the Petrolane-Lomita escrow account a sum equal to the amount of a refund requested by International Drilling and Exploration Corporation.
Jan. 4, 1989	Marin Motor Oils, Inc., Parsippany, N.J.	RR272-22	Request for Modification/Recession. If granted: The December 1, 1988 Decision and Order issued to Marin Motor Oils, Inc. would be rescinded (Case No. RF272-69642) and the firm would receive a refund in the Crude Oil refund proceeding.

REFUND APPLICATIONS RECEIVED

[Week of Dec. 30 through Jan. 5, 1989]

Date received	Name of refund proceeding/name of refund applicant	Case No.
12/30/88 thru 1/5/89	Crude Oil Refund Applications Received	RF272-75191 thru RF272-75203
12/30/88 thru 1/5/89	Murphy Oil Refund Applications Received	RF309-718 thru RF309-732
12/30/88 thru 1/5/89	Atlantic Richfield Refund Applications Received	RF304-7604 thru RF304-7625
12/30/88 thru 1/5/89	Exxon Refund Applications Received	RF307-7383 thru RF307-7496
1/3/89	Highway Oil, Inc.	RF314-6
1/3/89	Remak's Beltway Gulf	RF300-10652
1/3/89	Gates Gulf Service	RF300-10653
1/3/89	City of Greensboro	RF300-10654
1/4/89	Hupp Oil Company	RF310-336

[FR Doc. 89-5248 Filed 3-6-89; 8:45 am]

BILLING CODE 6450-01-M

Issuance of Decisions and Orders During Week of January 23 Through January 27, 1989

During the week of January 23 through January 27, 1989, the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeal

Restrepo & Associates, 1/27/89, KFA-0250

Restrepo & Associates filed an Appeal from the denial of a Request for Information which the firm had submitted under the Freedom of Information Act (FOIA). In considering the Appeal, the Office of Hearings and Appeals (OHA) found that the FOIA officer incorrectly interpreted the request as one for the "creation of a statement by DOE" and therefore conducted a search for the wrong documents. The OHA remanded the case to the Office of Administrative Services and directed that Office to search for any existing documents responsive to Restrepo's request.

Request for Stay

Kenneth Walker, 1/26/89, KRS-0010

Kenneth Walker filed a submission with the Office of Hearings Appeals (OHA) of the Department of Energy (DOE) seeking a stay of an evidentiary hearing scheduled in connection with an enforcement proceeding involving Mr. Walker and Southwestern States Marketing Corporation. Specifically, Walker requested that OHA stay the evidentiary hearing pending disposition by OHA of a Petition for Special Redress which Walker had filed at the same time he tendered his stay request. Walker contended in his stay request that a favorable ruling on his Petition for Special Redress could make an evidentiary hearing in the enforcement case unnecessary. In considering Walker's request, DOE first found that Walker's request failed to address any of the criteria OHA considers and weighs in assessing a stay request. DOE further held that there is an important public interest in the expeditious consideration and disposition of case submitted to OHA and, for this reason, OHA generally adheres to a policy of declining to delay enforcement proceedings by linking them to other proceedings. DOE noted that the enforcement proceeding involving Mr. Walker has been pending before OHA for over four years and that OHA has attemped to establish the framework for an evidentiary hearing in that case on three separate occasions. Finding that any further delay in the enforcement proceeding would be contrary to the public interest, DOE denied Walker's request for stay of the evidentiary hearing.

Refund Applications

Art Lepak, et al., 1/25/89, RF272-34785 et al.

The DOE issued a Decision and Order approving 33 Applications for Refund filed in the crude oil refund proceeding. The DOE found that the applicants, all end-users, met the eligibility requirements by supplying their actual or estimated purchase volume information for their commercial or agricultural activities. The DOE granted the applicants a total refund of $5,983.

Bill Schlutt, et al., 1/23/88, RF272-5227 et al.

The DOE issued a Decision and Order granting refunds from crude oil overcharge funds to six applicants based on their respective purchases of refined petroleum products during the period August 19, 1973, through January 27, 1981. Each applicant used the products for various activities. Each applicant determined its volume claim either by utilizing actual purchase records from the crude oil price control period or by estimating its petroleum consumption during that period. Each applicant was an end-user of the products it claimed and was therefore found injured based upon the end-user presumption of injury. The sum of the refunds granted in this Decision is $133.

Bob L. Hartneff Exxon, et al., 1/25/89, RF272-63159, et al.

The DOE issued a Decision and Order denying 23 Applications for Refund filed in the Subpart V crude oil refund proceedings. Each applicant was a reseller or retailer during the period August 19, 1973 through January 27, 1981. Because none of the applicants demonstrated that it was injured due to the crude oil overcharges, each applicant was ineligible for a crude oil refund.

East End Gulf Service, et al., 1/24/89, RF272-64679, et al.

The DOE issued a Decision and Order denying 34 Applications for Refund filed in the Subpart V crude oil refund proceedings. Each applicant was a reseller or retailer during the period August 19, 1973 through January 27, 1981. Because none of the applicants demonstrated that it was injured due to the crude oil overcharges, each applicant was ineligible for a crude oil refund.

Erickson's Diversified Corp., 1/24/89, RF272-32551

The DOE issued a Decision and Order denying an Application for Refund filed by Erickson's Diversified Corp. (Erickson's) in the Subpart V crude oil proceedings. Erickson's was a reseller during the period August 19, 1973 through January 27, 1981. Because Erickson's did not demonstrate that it was injuried due to the crude oil overcharges, it was found to be ineligible for a crude oil refund.

Exxon Corporation/Benson Manor Garage, et al., 1/25/88, RF307-3038 et al.

The DOE issued a Decision and Order concerning six Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share was less than $5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $2,579 ($2,227 in principal and $352 in interest).

Exxon Corproation/City of Cayce, et al., 1/23/89, RF307-2203 et al.

The DOE issued a Decision and Order concerning 35 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share was less than $5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $18,375 ($15,872 in princcipal and $2,503 in interest).

Exxon Corporation/Devoe Bros., et al., 1/23/89 RF307-2043 et al.

The DOE issued a Decision and Order concerning 30 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share was less than $5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is

$23,909 ($20,651 in principal and $3,358 plus interest).

Exxon Corporation Frank's Exxon, et al., 1/27/89, RF307-228 et al.

The DOE issued a Decision and Order concerning eight Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share was less than $5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $2,274 ($1,965 in principal plus $309 in interest).

Exxon Corporation/Sampson Hamrick, et al., 1/27/89, RF307-5059 et al.

The DOE issued a Decision and Order concerning 29 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share was less than $5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $26,285 ($22,705 in principal plus $3,580 in interest).

Exxon Corporation/Shields Oil Co., et al., 1/27/89 RF307-5000 et al.

The DOE issued a Decision and Order concerning 40 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the Applicants purchased directly from Exxon and was either a reseller whose allocable share is less than $5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $34,570 ($29,860 principal plus $4,710 interest).

Exxon Corporation/Weir Fuel Co. Inc., RF 307-5044; Crockett Oil Co., RF 307-5078; Tri-County Oil Co., Inc., 1/27/89, RF 307-5086

The DOE issued a Decision and Order concerning Applications for Refund filed by Weir Fuel Co. Inc., Crockett Oil Co., and Tri-County Oil Co., Inc. in the Exxon Corporation special refund proceeding. All three firms, wholesale distributors of Exxon products, purchased directly from Exxon and their allocable shares exceed the $5,000 small claims threshold established in the Exxon proceeding. However, in the Exxon proceeding a reseller applicant whose allocable share exceeds $5,000 may elect to receive as its refund the larger of $5,000 or 40 percent of its allocable share up to $50,000. In the present cases, $5,000 is greater. Accordingly, the refund granted each firm in this Decision is $5,789 ($5,000 principal plus $789 interest). The refunds granted in this Decision total $17,367.

Gulf Oil Corporation/Baltimore Gas & Electric Company, RF300-6444; Atlantic City Electric Company, 1/26/89 RF300-6831

The DOE issued a Decision and Order concerning Applications for Refund filed by two public utilities in the Gulf Oil Corporation special refund proceeding. The applications were decided using a presumption of injury and the applicants were required to pass the refund received through to their respective customers and to notify their appropriate regulatory bodies of the receipt of the refund money. The total amount of the refunds granted in this Decision is $91,558.

Gulf Oil Corporation/H.L. Fuller & Son, Distr., et al., 1/26/89 RF 300-2490, et al.

The DOE issued a Decision and Order concerning five Applications for Refund submitted by consignees in the Gulf Oil Corporation special refund proceeding. Each application was approved using the 10 percent presumption of injury. The sum of the refunds granted in this Decision is $2,904.

Gulf Oil Corporation/Pickett's Gulf, et al., 1/25/89, RF300-6300, et al.

The DOE issued a Decision and Order concerning 85 Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury standard. The sum of the refunds granted in this Decision is $141,545.

Gulf Oil Corporation/Tennessee Valley Authority, 1/23/89, RF300-1998

The DOE issued a Decision and Order concerning an Application for Refund filed by Tennessee Valley Authority (TVA), a public utility, in the Gulf Oil Corporation special refund proceeding. The amount of the refund granted in this Decision, which includes both principal and interest, is $13,905.

Gulf Oil Corporation/Walnut Grove Shopette, 1/24/89, RF300-10660

On November 7, 1988, the Office of Hearings and Appeals (OHA) issued a Decision and Order in the Gulf Oil Corporation special refund proceeding to Dale Bower, *et al.* (Case Nos. RF300-4941, *et al.*) in which Walnut Grove Shopette, Case No. RF300-5112, was issued a refund of $500. It has come to OHA's attention that Walnut Grove Shopette's refund was based on an understatement of the firm's purchases from Gulf. Therefore, the OHA issued an additional refund to the firm on the basis of the difference between the purchase volume approved in *Gulf Oil Corp./Dale Bower* and the purchase volume the firm had demonstrated in its Application for Refund. The additional refund granted to Walnut Grove Shopette is $503.

Henderson Oil and Butane Co., et al. 1/25/89, RF272-379, et al.

The DOE issued a Decision and Order denying nine Applications for Refund filed in the Subpart V crude oil refund proceedings. Each applicant was a reseller or retailer during the period August 19, 1973 through January 27, 1981. Because none of the applicants demonstrated that it was injured due to the crude oil overcharges, each applicant was ineligible for a crude oil refund.

Leo Perk, et al., 1/25/89. RF272-6501, et al.

The DOE issued a Decision and Order denying 26 Applications for Refund filed in the Subpart V crude oil refund proceedings. Each applicant was a reseller or retailer during the period August 19, 1973 through January 27, 1981. Because none of the applicants demonstrated that it was injured due to the crude oil overcharges, each applicant was ineligible for a crude oil refund.

Martin Gas Sales, Inc., 1/27/89, RF272-31610

The DOE issued a Decision and Order denying an Application for Refund of Martin Gas Sales, Inc. (Martin) in the DOE's Subpart V crude oil refund proceeding. Martin was a reseller of liquified petroleum products (LPPs) during the period from August 19, 1973 through January 27, 1981. Martin purchased No. 2 diesel fuel for use in its trucks for delivery of LPPs from its terminal to its customers. Because the diesel fuel was not resold, Martin claimed it was an end-user and entitled to the end-user presumption of injury. The DOE rejected this claim, finding that as a reseller of LPPs, Martin was allowed to bank and pass through its non-product costs including transportation costs. Moreover, the DOE pointed out that, as a regulated petroleum products reseller, Martin should have records to demonstrate whether it was injured by any crude oil overcharges. Accordingly, Martin's Application for Refund was denied.

Mobil Oil Corp./Ultramar Petroleum, Inc., 1/26/89, RF225-9996

The DOE issued a Decision and Order partially granting an Application for Refund filed by Ultramar Petroleum, Inc. in the Mobil special refund proceeding that was implemented by *Mobil Oil Corp.*, 13 DOE ¶ 85.339 (1985) (*Mobil*). Ultramar, a reseller-retailer of various petroleum products, claimed a refund based on purchases of No. 6 residual fuel oil, No. 2 heating oil and motor gasoline from Mobil. An analysis of purchase volume schedules submitted by Ultramar indicated that the firm was a spot purchaser of No.6 oil. Ultramar did not attempt to rebut the presumption of non-injury with regard to those purchases. Accordingly, the DOE denied that portion of the firm's claim. Ultramar was a regular purchaser of Mobil motor gasoline and No. 2 oil. Under the relevant injury presumptions established in *Mobil*, the DOE granted Ultramar a refund of $6,269, representing $5,000 in principal and $1,269 in interest, on those purchases.

Murphy Oil Corporation/Morris Oil Co., et al., 1/27/89, RF309-207 et al.

The DOE issued a Decision and Order granting eight Applications for Refund filed in the Murphy Oil Corporation special refund proceeding. Each of the Applicants purchased directly from Murphy and was either a reseller whose allocable share was less than $5,000 or an end-user of Murphy products. Accordingly, each applicant was granted a refund equal to its full allocable share plus a proportionate share of the interest that has accrued on the Murphy escrow account. The sum of the refunds granted in the Decision was $8,087 ($7,112 principal plus $966 interest).

Murphy Oil Corporation/Rollette Oil Co., et al., 1/26/89, RF309-118 et al.

The DOE issued a Decision and Order concerning Applications for Refund filed by three claimants in the Murphy Oil Corporation special refund proceeding. The claimants, Rollette Oil Company (Rollette), Tadco, Inc., and Campbell Oil Company, are related through change in ownership and had filed applications in part on the basis of the same purchases. The DOE examined the Purchase and Sale Agreement governing the sale of Tadco, Inc. to Rollette and determined that Tadco, Inc.'s right to any refund had not been passed on to Rollette in the sale. Accordingly, the DOE denied the portion of Rollette's claim that was based on purchases made by Tadco, Inc. but approved the portion of Rollette's claim based on its separate purchases. The DOE also approved the refunds applications submitted by Tadco, Inc. and its related firm, Campbell Oil Company according to the procedures established in *Murphy Oil Corp.*, 17 DOE ¶ 85,782 (1988). The total amount of refunds approved in this Decision was $10,185, representing $8,966 in principal plus $1,219 in accrued interest.

Rex W. Anderson, 1/27/89, RF272-27711

The DOE issued a Decision and Order denying a refund to Rex W. Anderson in the crude oil Subpart V proceeding. Anderson was a retailer of petroleum products during the period August 19, 1973 through January 27, 1981. Because Anderson did not demonstrate that he was injured by the crude oil overcharges, he was found ineligible for a crude oil refund. Accordingly, the Application for Refund was denied.

Rutgers, The State University, 1/26/89, RF272-26005

The OHA approved the Application for Refund filed in the crude oil overcharge refund proceeding by Rutgers, The State University, an end-user of refined petroleum products. The refund granted to Rutgers is $6,329.

Standard Oil Co., (Indiana)/SOUTH DAKOTA, ET AL., 1/23/89, RM21-139 et al.

The DOE issued a Decision and Order granting a Motion for Modification and Second-Stage Application for Refund filed by the State of South Dakota in the Standard Oil Co. (Indiana), Belridge Oil Co., Vickers Energy Corp., Palo Pinto Oil and Gas, Bob's Oil Co., and Coline Gasoline Corp. special refund proceedings. South Dakota was given permission use to $63,000 of previously allocated *Amoco II* funds to finance a program of matching grants to homes, small businesses, and non-profit organizations for energy efficiency improvements. South Dakota was also permitted to use $61,425 of previously allocated *Amco II* funds to purchase a vehicle to test the volumetric accuracy of service station pumps. South Dakota's final proposal was for a program to assist low-income homeowners with furnace tune-ups or replacements. For this program, South Dakota was permitted to use a total of $141,698 of previously allocated *Amoco II, Amoco I,* and *Belridge* funds. In addition, it was permitted to use $74,381, derived from the following funds: $27 in undistributed *Amoco I* funds, $65,386 ($55,776 in principal plus $9,610 in interest) in undistributed *Amoco II* funds, $1,576 ($825 in principal plus $751 in interest) in undistributed *Vickers* funds, $1,059 ($427 in principal plus $632 in interest) in undistributed *Palo Pinto* funds, $2,159 ($986 in principal plus $1,173 in interest) in udistributed *Bob's* funds, and $4,174 ($1,457 in principal plus $2,717 in interest) in undistributed *Coline* funds.

Total Petroleum, Inc./Grohs Oil Co. Inc., et al., 1/26/89, RF310-110 et al.

The DOE issued a Decision and Order concerning 10 Applications for Refund filed by purchasers of motor gasoline and/or No. 2 oils from Total Petroleum, Inc. The applicants sought a portion of the settlement fund obtained by the DOE through a consent order entered into with Total. Under the standards established in *Total Petroleum Inc.*, 17 DOE ¶ 85,542 (1988), the DOE granted refunds in this proceeding which total $101,487 ($88,372 principal and $13,115 interest).

Crude Oil End-Users

The Office of Hearings and Appeals granted crude oil overcharge refunds to end-user applicants in the following Decisions and Orders:

Name	Case no.	Date	No. of applicants	Total refunds
Deback Farms, *et al*	RF272-45000	1/23/89	145	$3,698
Howard Batch, *et al*	RF272-3323	1/25/89	44	1,080
M. C. Jones Trucking Co., *et al*	RF272-47200	1/23/89	191	1,131
Rod Heinrichs, *et al*	RF272-47600	1/23/89	143	4,013

Dismissals

The following submissions were dismissed:

Name	Case No.	Name	Case No.
Alexander's Gulf Service Station	RF300-8142	Baker's Service Station	RF307-2054
Allyn Oil Company, Inc	RF307-7154	Bill York's Gulf Service	RF300-8910

Name	Case No.
Birchbook Realty Co	RF272-60594
Borough of Chambersburg	RF272-64037
Cathedral College of the Immaculate Conception	RF272-60595
Chaminade High School	RF272-74454
Charles M. Hardy	RF272-37574
Clarksville Oil & Gas Company	RF307-192
Clavebrack Rural Electric Coop, Inc	RF272-74808
Crowley Foods, Inc	RF272-74052
D. A. Kessler Construction Co., Inc	RF272-74728
David A. Knoche	RF307-4528
Edgehill Gulf	RF272-8911
Francis E. Wakely	RF272-73854
Genstar Stone Products	RF272-74240
Glen Milner	KFA-0253
Julian's Exxon	RF307-970
Levshire Realty Co	RF272-60593
Louis J. Kennedy Trucking Co	RF300-9416
McCandless Fuels, Inc	RF300-9416
Monterey Exxon	RF307-1016
O-AT-KA Milk Products Coop,Inc	RF272-63531
Pageland Exxon	RF307-929
Patton's Exxon	RF307-1959
Ralls County Electric Coop	RF272-48585
Riche Fuel Company, Inc	RF307-7136
Robbs Oil Company	RF300-10574
Ryan Brothers Coal Co	RF272-75104
Sequatchie County Highway Department	RF300-4257
W.S. Frey Co., Inc	RF272-73927
Witco Chemical Corp	RD272-69165
Witco Corporation	RF272-69165
1122 Realty Co	RF272-60596

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E-234, Forrestal Building, 1000 Independence Avenue, S.W., Washington, DC 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines*, a commercially published loose leaf reporter system.

March 1, 1989.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 89-5249 Filed 3-6-89; 8:45 am]

BILLING CODE 6450-01-M

EXPORT-IMPORT BANK OF THE UNITED STATES

Open Meeting of the Advisory Committee of the Export-Import Bank of the United States

Summary: The Advisory Committee was established by Pub. L. 98-181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank to the United States Congress.

Time and Place: Tuesday, March 21, 1989, from 9:30 a.m. to 12:00 noon. The meeting will be held at Eximbank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: The meeting agenda will include a discussion of the following topics: Financial/Budget Report, Congressional Status, Mixed Credit Report, City/State Report, Competitiveness Report Preview, 1989 Sub-Committee Topics, and other topics.

Public Participation: The meeting will be open to public participation; and the last 15 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. In order to permit the Export-Import Bank to arrange suitable accommodations, members of the public who plan to attend the meeting should notify Joan P. Harris, Room 935, 811 Vermont Avenue, NW., Washington, DC 20571, (202) 566-8871, not later than March 20, 1989. If any person wishes auxiliary aids (such as a language interpreter) or other special accommodations, please contact, prior to March 16, 1989, the Office of the Secretary, Room 935, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 566-8871 or TDD: (202) 535-3913.

Further Information: For further information, contact Joan P. Harris, Room 935, 811 Vermont Avenue, NW., Washington, DC 20571, (202) 566-8871.

Joan P. Harris,

Corporate Secretary.

[FR Doc. 89-5163 Filed 3-6-89; 8:45 am]

BILLING CODE 6690-01-M

FEDERAL HOME LOAN BANK BOARD

Elysian Federal Savings Bank Hoboken, NJ; Appointment of Conservator

Notice is hereby given that pursuant to the authority contained in section 5(d)(6)(A)(i), of the Home Owner's Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(A)(i), and 12 U.S.C. 1701c (c)(2) (1982), as amended, the Federal Home Loan Bank Board was duly appointed the Federal Savings and Loan Insurance Corporation as sole conservator for Elysian Federal Savings Bank Hoboken, NJ on February 16, 1989.

Dated: February 23, 1989

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary to the Board.

[FR Doc. 89-5253 Filed 3-6-89; 8:45 am]

BILLING CODE 6720-01-M

Horizon Federal Savings and Loan Association, Baton Rouge, LA; Appointment of Conservator

Notice is hereby given that, pursuant to the authority contained in section 5(d)(6)(A)(i), of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(A)(i) (1982), and 12 U.S.C. 1701c(c)(2) (1982), as amended, the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole conservator for Horizon Federal Savings and Loan Association, Baton Rouge, Louisiana, on February 16, 1989.

Dated: February 23, 1989

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89-5254 Filed 3-6-89; 8:45 am]

BILLING CODE 6720-01-M

Occidental/Nebraska Federal Savings Bank, Omaha, NE; Appointment of Conservator

Notice is hereby given that pursuant to the authority contained in section 5(d)(6)(A)(i), of the Home Owner's Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(A)(i), and 12 U.S.C. 1701c (c)(2)(1982), as amended, the Federal Home Loan Bank Board was duly appointed the Federal Savings and Loan Insurance Corporation as sole conservator for Occidental/Nebraska Federal Savings Bank, on February 16, 1989.

Dated: February 23, 1989.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89-5255 Filed 3-6-89; 8:45 am]

BILLING CODE 6720-01-M

Southwest Savings Loan Association, Phoenix, AZ; Appointment of Conservator

Notice is hereby given that pursuant to the authority contained is 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 conservator for Southwest Savings And Loan Association, Phoenix, Arizona, on February 16, 1989.

Dated: February 23, 1989.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89-5256 Filed 3-6-89; 8:45 am]

BILLING CODE 6720-01-M

Westwood Savings And Loan Association, Los Angeles, CA; Appointment of Conservator

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 conservator for Westwood Savings and Loan Association, Los Angeles, California, on February 16, 1989.

Dated: February 23, 1989.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89-5257 Filed 3-6-89; 8:45 am]

BILLING CODE 6720-01-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-200209-001.

Title: Port of Portland Terminal Agreement.

Parties: Port of Portland, Oregon Terminal Company (OTC).

Synopsis: The Agreement amends the basic agreement (Agreement No. 224-200209) by adding approximately 2,252 square feet in the Terminal No. 4 truck check-in facility to the area covered by the basic agreement. It also provides that OTC will pay a monthly rent of $1,463.80 for this area during the three (3) year term of the agreement.

Agreement No.: 224-200010-001.

Title: City of Milwaukee Terminal Agreement.

Parties: City of Milwaukee (CM), Meehan Seaway Service, Ltd., (MSS) and Meehan Seaway Service of Milwaukee, Ltd. (MSS of Milwaukee).

Synopsis: The Agreement provides for MSS of Milwaukee's sublease from MSS of certain real property and improvements on the South Harbor Tract of the City of Milwaukee which MSS leased from CM under Agreement No. 224-200010. MSS of Milwaukee agrees to perform all of the applicable terms and conditions of Agreement No. 224-200010 with the same effect as if it had originally executed that agreement.

By Order of the Federal Maritime Commission

Joseph C. Polking,

Secretary.

Dated: March 2, 1989.

[FR Doc. 89-5219 Filed 3-6-89; 8:45 am]

BILLING CODE 6730-01-M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice that the following agreement(s) has been filed with the Commission pursuant to section 15 of the Shipping Act, 1916, and section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit protests or comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments and protests are found in §§ 560.7 and/or 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Any person filing a comment or protest with the Commission shall, at the same time deliver a copy of that document to the person filing the agreement at the address shown below.

Agreement No.: 224-200143-001.

Title: Maryland Port Authority Terminal Agreement.

Parties: Maryland Port Administration (MPA), Puerto Rico Maritime Shipping Authority (PRMSA).

Filing Party: Robert E. Hellauer, Jr., Director of Governmental Affairs, Maryland Port Administration, The World Trade Center, Baltimore, Maryland 21202-3041.

Synopsis: The Agreement provides that MPA will grant PRMSA a discount of $50.00 per loaded container moved by PRMSA into and out of the Port of Baltimore (the Port) and drayed to and from either CSX or CONRAIL railheads in Baltimore. The $50 discount is restricted to containers moving between the Port and Chicago, Louisville, or Detroit.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: March 2, 1989.

[FR Doc. 89-5220 Filed 3-6-89; 8:45 am]

BILLING CODE 6730-01-M

Ocean Freight Forwarder License; Revocations; A Hartrodt (PACIFIC) Inc. et al.

Notice is hereby given that the following ocean freight forwarder licenses have been revoked by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of ocean freight forwarders, 46 CFR Part 510.

License Number: 2778
Name: A Hartrodt (PACIFIC) Inc.
Address: 1300 Beacon St., #212, San Pedro, CA 90731
Date Revoked: December 12, 1988.
Reason: Surrendered license voluntarily

License Number: 851
Name: Baldwin R. Schmid dba AD. M. Schmid & Co.
Address: #1109, One World Trade Center, N.Y., NY 10048
Date Revoked: January 31, 1989.
Reason: Surrendered license voluntarily

License Number: 2358
Name: Worldwide Expeditors, Inc.
Address: 191 Aldine Bender, Houston, TX 77060
Date Revoked: February 10, 1989.
Reason: Failed to maintain a valid surety bond

License Number: 607
Name: George G. Tapper dba Southern States Shipping Co.
Address: P.O. Box 280, Port St., Joe, FL 32456
Date Revoked: February 12, 1989.
Reason: Failed to maintain a valid surety bond

Robert G. Drew,

Director, Bureau of Domestic Regulation.

[FR Doc. 89-5179 Filed 3-6-89; 8:45 am]

BILLING CODE 6730-01-M

Ocean Freight Forwarder License; Applicants; George Robert Cowan, et al.

Notice is given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR Part 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarder and Passenger Vessel Operations, Federal Maritime Commission, Washington, DC 20573.

George Robert Cowan, 4701 Haygood Point Rd., Virginia Beach, VA 23455, Officer: Goerge Robert Cowan, Sole Proprietor

American Paragon, 315 Dahlia Pl., Corona Del Mar, CA 92625, Officer: Richard Wayne Johnson, Sole Proprietor

Customs and Trade Services, Inc., P.O. Box 52-7328, Miami, FL 33152-7328, Officers: Jan Mark Roher, President/Treasurer, Terri Ann Roher, Secretary

ACMETRANS Worldwide Cargo Services, Inc., 7350 NW. 12 ST., #102-103, Miami, FL 33126, Officers: Fabio C. Bedoya, President/Stockholder, Fabio A. Bedoya Ponce, 2nd Vice Pres./Stockholder, Jorge Luis Castilla, Senior Vice Pres./Stockholder, Lourdes Bedoya, Director/Stockholder

Global Transport Services, Inc., 10077 Wallisville Road, Houston, TX 77013, Officers: Curtis Sellentin, President/Treasurer/Director, R.D. Sellentin, Vice President, Diana Womack, Secretary

A&P Forwarding Company, 11950 Airline Dr., #302, Houston, TX 77037, Officer: Horng Min Lin, Sole Proprietor

International Forwarding Services, Inc., 6701 N.W. 84th Ave., Miami, FL 33166, Officer: Ramon Montesano, President

Evans, Wood and Mooring, Inc., 11222 LaCienega Blvd., #307, Inglewood, CA 90304, Officers: James Fletcher Mooring, Chairman of the Board, Floy Wood Evans, President/Director, Holland B. Evans, Jr., Vice Pres./Treas./Dir., Betty Lu Mooring, V. Pres./Sec./Dir.

Cargo Express International, Inc., 301 Route 17 No.—2nd Fl., Rutherford, NJ 07070, Officers: Luis Gilabert, Jr., Pres./Treas./Dir., Carlos Fontes de Albornoz, Secretary, F. Manuel Voigt, Vice President/Operations

Bok Kun Chung, 11222 LaCienega Blvd., #400, Inglewood, CA 90304, Officer: Bok Kun Chung, Sole Proprietor

By the Federal Maritime Commission.

Dated: March 2, 1989.

Joseph C. Polking,

Secretary.

[FR Doc. 89-5178 Filed 3-6-89; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Bancomer S.N.C.; Formation of, Acquisition by, or Merger of Bank Holding Companies

The company listed in this notice has 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 225.24) 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)).

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 to the Resereve Bank indicated for that application 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.

Comments regarding this application must be received not later than March 21, 1989.

A. Federal Reserve Bank of San Francisco (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *Bancomer S.N.C.*, Mexico City, Mexico; Bancomer Holding Company (Antilles), N.V., Curacao, Netherlands Antilles; Bancomer Holding Company (Netherlands), B.V., Rotterdam, Hollard; and Bancomer Holding Company, Los Angeles, California; to acquire 100 percent of the voting shares of Executive National Bank, San Antonio, Texas.

Board of Governors of the Federal Reserve System, March 3, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-5434 Filed 3-6-89; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse, and Mental Health Administration

Meetings

Summary: This notice sets forth schedules and proposed agendas of the forthcoming meetings of the agency's extramural science advisory boards in the month of April 1989. Attendance by the public will be limited to space available.

The Extramural Science Advisory Board, NIAAA, will discuss the business of the Board and its current program activities.

The Extramural Science Advisory Board, NIMH, will discuss the peer review process that evaluates all grant applications to the Institute's extramural research program.

Committee Name: Extramural Science Advisory Board, NIAAA

Date and Time: April 10: 9:00 a.m.-5:00 p.m.

Place: National Institutes of Health, Building 31, Conference Room 7, 9000 Rockville Pike, Bethesda, MD 20892

Status of Meeting: Open

Contact: Michael J. Lewis, Parklawn Building, Room 16C-26, 5600 Fishers Lane, Rockville, MD 20857, (301) 443-6106

Purpose: The Advisory Board advises the Secretary, Department of Health and Human Services, the Administrator, Alcohol, Drug Abuse, and Mental Health Administration and the Director, National Institute on Alcohol Abuse and Alcoholism, based on an ongoing review on the direction, scope, balance, and emphasis of the Institute's extramural science program.

Substantive program information may be obtained from the contact person listed above. The NIAAA Advisory Board Staff Coordinator will furnish summaries of the meeting and a roster of committee members upon request. Contact Ms. Nancy Colladay, Staff Coordinator, NIAAA, Room 16C-23, Parkland Building, 5600 Fishers Lane, Rockville, Maryland 20857.

Committee Name: Extramural Science Advisory Board, NIMH

Date and Time: April 17: 8:30 a.m.-5:00 p.m. April 18: 9:00 a.m..1:00 p.m.

Place: National Institutes of Health, Building 31, Conference Room 6, 9000 Rockville Pike, Bethesda, MD 20892

Status of Meeting: Open

Contact: Anthony Pollitt, Parklawn Building, Room 17C-26, 5600 Fishers Lane, Rockville, MD 20857, (301) 443-3175

Purpose: The Extramural Science Advisory Board, NIMH, advises the Secretary of Health and Human Services, the Administrator, Alcohol, Drug Abuse, and Mental Health Administration, and the Director, National Institute of Mental Health, on the direction scope, balance, and emphasis of the Institute's extramural programs.

Substantive program information may be obtained from the contact person listed above. The Institute Committee Management Officer who will furnish upon request summaries of the meeting and rosters of the Council members is Ms. Joanna Kieffer, Committee Management Officer, National Institute of Mental Health, Room 9-105, Parklawn Building, Rockville, Maryland 20857, (301) 443-4333.

Date: March 1, 1989

Peggy W. Cockrill,

Committee Management Officer, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 89-5183 Filed 3-6-89; 8:45 am]

BILLING CODE 4160-20-M

Food and Drug Administration

[Docket No. 89G-0016]

Novo Laboratories, Inc.; Filing of Petition for Affirmation of GRAS Status

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Novo Laboratories, Inc., has filed a petition (GRASP 7G0323) proposing to affirm that insoluble esterase/lipase enzyme preparation derived from *Mucor miehei,* which has been fixed by immobilization with a substance whose use is generally recognized as safe (GRAS) or an approved food additive, is GRAS for use as a direct human food ingredient.

DATE: Comments by May 8, 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: Daniel N. Harrison, Center for Food Safety and Applied Nutrition (HFF-334), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-426-5487.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5), 72 Stat. 1786 (21 U.S.C. 348(b)(5))) and the regulations for affirmation of GRAS status in § 170.35 (21 CFR 170.35), notice is given that a petition (GRASP 7G0323) has been filed by Novo Laboratories, Inc., 33 Turner Rd., Danbury, CT 06810-5101, proposing that insoluble esterase/lipase enzyme preparation derived from *Mucor miehei,* which has been fixed by immobilization with a substance whose use for this purpose is GRAS or an approved food additive, be affirmed as GRAS for use as a direct human food ingredient.

The petition has been placed on display at the Dockets Management Branch (address above).

Any petition that meets the requirements outlined in §§ 170.30 and 170.35 (21 CFR 170.30 and 170.35) is filed by the agency. There is no prefiling review of the adequacy of data to support a GRAS conclusion. Thus, the filing of a petition for GRAS affirmation should not be interpreted as a preliminary indication of suitability for GRAS affirmation.

The potential environmental impact of this action is being reviewed. If the agency finds that an environmental impact statement is not required, and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Interested persons may, on or before May 8, 1989, review the petition and/or file comments (two copies, identified with the docket number found in brackets in the heading of this document) with the Dockets Management Branch (address above). Comments should include any available information that would be helpful in determining whether the substance is, or is not, GRAS for the proposed use. A copy of the petition and received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 17, 1989.

Richard J. Ronk,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 89-5182 Filed 3-6-89; 8:45 am]

BILLING CODE 4160-01-M

Public Health Service

Health and Allied Health Professions Eligibility for Scholarship Consideration Under the Health Professions Preparatory and Pregraduate Scholarship Programs for Indians, and the Indian Health Service Scholarship Program

AGENCY: Indian Health Service, DHHS.

ACTION: Notice of health and allied health professions which will be eligible for scholarship support under the Indian Health Service Scholarship Program (IHSSP).

SUMMARY: The IHS is publishing a list of health and allied health professions for which support under the various scholarship programs administered by the IHS may be available for the 1989-1990 academic year and possibly beyond. Actual awards will be dependent upon the availability of funds. Awards may be available in health and allied health professional areas not listed pending the availability of funds and dependent upon the availability of qualified applicants in the priority areas. This list will remain in effect until superseded.

DATE: This IHS policy is effective on March 7, 1989.

FOR FURTHER INFORMATION: Please address inquiries to Mr. Larry Thomas, Chief, Indian Health Service Scholarship Branch, Parklawn Building, Room 6-12, 5600 Fishers Lane, Rockville, Maryland 20857; Telephone 301-443-6197. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Health Professions Preparatory and Pregraduate Scholarship Program for American Indians and Alaska Natives are authorized by section 103 of the Indian Health Care Improvement Act, Pub. L. 94-437 as amended by Pub. L. 96-537, Indian Health Care Amendments of 1980 and Pub. L. 100-713, Indian Health Care Amendments of 1988. The Indian Health Service Scholarship Program, formerly authorized by Section 3381 of the Public Health Service Act (42 U.S.C. 254r), is now authorized by section 104 of the Indian Health Care Amendments of 1988, Pub. L. 100-713. Both programs are intended to encourage American Indians and Alaska Natives to enter the health professions and to assure the availability of Indian health professionals to serve Indians. The list below is based upon the needs of the IHS as well as upon the needs of the

Indians for additional service by specific health professions.

Regulations at 42 CFR 36.304 provide that the IHS shall, from time to time, publish a list of health professions eligible for consideration for the award of Health Professions Preparatory and Pregraduate Scholarships for Indians and Health Scholarships. Also, section 104(b)(1) of the Indian Health Care Amendments of 1988, Pub. L. 100-713, authorizes the determination of specific health professions for which Indian Health Scholarships will be awarded.

Pending the availability of funds, consideration will be given to qualified applicants for scholarship support under the above-named scholarship programs in the following health profession categories:

Priority Categories

Health Professions Preparatory Scholarship Program for Indians

A. Pre-Nursing.
B. Pre-Engineering.
C. Pre-Pharmacy.
D. Pre-Medical Technology
E. Pre-Sanitation
F. Pre-Physical Therapy

Pre-Graduate Program (Priority given in the following manner based on academic level: Senior, Junior, Sophomore, Freshman)

A. Pre-Medicine.
B. Pre-Dentistry.

Indian Health Scholarship Program (Priority given in the following manner based on academic level unless specified: Graduate, Senior, Junior, Sophomore, Freshman)

A. Medicine: Allopathic and Osteopathic.
B. Nursing: ADN, BSN, and MS Degrees.
C. Pharmacy: (Priority given as follows: Senior, Junior, Sophomore and Freshman)
D. Engineering: Civil, Environmental and Mechanical; BS Degree. (Priority given as follows: Senior, Junior, Sophomore and Freshman)
E. Dietician: BS Degree. (Priority as follows: Senior, Junior, Sophomore and Freshman)
F. Sanitarian: Environmental Health, Environmental Science, and Occupational Safety and Health; BS Degree. (Priority as follows: Senior, Junior, Sophomore and Freshman)
G. Dentistry:
H. Dental Hygiene: Associate and BS Degree.
I. Health Education: Masters Level only.
J. Chemical Dependency Counseling: Masters level only.
K. Nurse Practitioner: RNA, CNM and FNP
L. Medical Technology: BS Degree. (Priority as follows: Senior, Junior, Sophomore and Freshman)
M. Public Health Nutrition: Masters level only.
N. Physician Assistants: (Priority as follows: Senior, Junior, Sophomore and Freshman)
O. Public Health: MPH only (Applicants must be enrolled or accepted in a school of public health and must have two (2) years of health delivery experience.
P. Clinical Psychology: PH.D. level only.
Q. Optometry:
R. Physical Therapy:
S. Sonography:
T. Health Records:
U. Radiologic Technology:

Interested individuals are reminded that the list of eligible health and allied health professions is initially effective for the applicants for the 1989-1990 academic year. These priorities will remain in effect until superseded. Applicants for health and allied health professions not on the above priority list will be considered pending the availability of funds and dependent upon the availability of qualified applicants in the priority areas.

The Health Professions Preparatory and Pregraduate Scholarship Program for Indians is listed as No. 13.971 in the OMB Catalog of Federal Domestic Assistance. The Indian Health Scholarship Program is listed as NO. 13.972 in the catalog.

Dated: February 28, 1989.

Everett R. Rhoades,
Assistant Surgeon General Director.

[FR Doc. 89-5184 Filed 3-6-89; 8:45 am]

BILLING CODE 4160-16-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Administration

[Docket No. N-89-1949]

Submission of Proposed Information Collection to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the Department of Housing and Urban Development has submitted to OMB, for emergency processing, an information collection package with respect to the Survey on Drug Abuse Elimination in Public and Indian Housing.

The information collection requirements in this package are necessary to meet the requirements of section 5143 of the Drug-Free Public Housing Act of 1988 (Pub. L. 100-690, Chapter 3, November 18, 1988). Under section 5143, the Department is required to establish a clearinghouse to receive, collect, process, and assemble information regarding the abuse of controlled substances in public housing projects. The Department has requested OMB to complete its paperwork review of the Survey of Drug Abuse Elimination Efforts in Public and Indian Housing in one day. Any control number issued by OMB to cover this emergency clearance would be valid for no more than 90-days.

The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: March 2, 1989.

John T. Murphy,

Director, Information Policy and Management Division.

Proposal: Survey on Drug Abuse Elimination Efforts in Public and Indian Housing.

Office: Administration.

Description of The Need For The Information And Its Proposed Use: This information collection requests Public and Indian Housing authorities to report to the Secretary regarding actions taken to deny drug abusers and dealers access to public housing. The collection also solicits ideas for fighting drugs in public housing projects.

Form Number: None.

Resondents: Non-Profit Institutions.

Frequency of Submission: Single-time.

Reporting Burden:

	Number of resondents	X	Frequency of response	X	Hours per response	=	Burden hours
Survey	3,400		1		1		3,400

Total Estimated Burden Hours: 3,400.

Status: New.

Contact: David S. Cristy, (202) 755-6050, John Allison, OMB, (202) 395-6880.

Date: March 2, 1989.

[FR Doc. 89-5232 Filed 3-6-89; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA-650-4120-02]

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related forms and explanatory materials may be obtained by contacting the Bureau's clearance office at the phone number listed below. Comments and suggestions should be made directly to the Bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1004-0073), Washington, DC 20503

Title: Federal Coal Management Program Regulations, 43 CFR 3400-3470.

OMB Approval Number: (1004-0073).

Abstract: Respondents supply information relevant to the extent and quality of the coal resource being proposed for coal leasing or exploration, the types and potential impacts on other natural resources of leasing the coal, and their qualifications for holding Federal coal leases or licenses. This information allows the Bureau to determine if leasing the Federal coal would be in the public interest and to assure that prospective lessees are complying with all applicable statutes and regulations.

Additional Information: This information collection currently has OMB approval. The approval expires in February, 1989. This proposal would extend the information approval, without change, through February, 1992.

Bureau Form Numbers: None.

Frequency: On request.

Description of respondents: Prospective holders of Federal coal leases, exploration licenses, and licenses to mine.

Estimated completion times

Exploration License: 30 hours.

Call for Coal and Other Resource Information: 10 hours.

Surface Owner Consultation: 1 hr.

Expression of Leasing Interest: 6.6 hours.

Notice of Sale: 3 hours.

Leasing on Application: 200 hours.

Surface Owner Consent: 10 hours.

PRLA (Initial & Final Showings): 160 hours.

Lease Modification: 35 hours.

License to Mine: 5 hours.

Special Leasing Qualifications: 4 hours.

Bonding Requirements: 40 hours.

Annual responses: 202.

Annual burden hours: 5410.

Bureau clearance officer: Rick Iovaine.

Dated: November 23, 1988.

Robert H. Lawton,

Assistant Director, Energy and Mineral Resources.

[FR Doc. 89-5250 Filed 3-6-89; 8:45 am]

BILLING CODE 4310-84-M

[CO-930-09-4214-10; COC-48697]

Notice of Proposed Withdrawal and Proposed Public Meeting; Colorado; Correction

February 27, 1989.

SUMMARY: The Notice of Proposed Withdrawal and Proposed Public Meeting; published on Tuesday, August 16, 1988, in **Federal Register** Volume 53, No. 158, page 30873, is hereby corrected as follows: In column three under Sixth Principal Meridian, White River National Forest, T. 10. S., R. 85 W., Sec. 19, reading "N½N½N½, N½S½NW¼;" should be corrected to read "N½;"

Jenny Saunders,

Acting Chief, Branch of Realty Programs.

[FR Doc. 89-5167 Filed 3-6-89; 8:45 am]

BILLING CODE 4310-JB-M

Fish and Wildlife Service

Extension of Comment Period; National Wildlife Refuges Management

AGENCY: Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of extension of comment period of a draft environmental impact statement for the management of the national wildlife refuges.

SUMMARY: On December 12, 1989, the U.S. Fish and Wildlife Service released, for public review, a Draft Environmental Impact Statement for the Management of the National Wildlife Refuges pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969. The Statement describes four alternatives for managing the national wildlife refuges and the environmental consequences of implementing each alternative.

DATES: The comment period is being extended from 90 to 120 days. The

extended comment period will close on April 13, 1989.

FOR FURTHER INFORMATION CONTACT: Sean Furniss, Division of Refuges, U.S. Fish and Wildlife Service, Washington, DC 20240; telephone (202) 343-4944.

SUPPLEMENTARY INFORMATION: A summary of the environmental impact statement has been prepared and sent to all persons and organizations who participated in any part of the review process, such as scoping meetings or in other types of communication with the planning team. Copies of the complete draft environmental impact statement have been sent to Federal and State agencies, local governments, and other organizations and individuals who had already requested copies. A limited number of copies of both documents are available upon request from the environmental impact statement coordinators listed below.

To be considered in the preparation of the final environmental impact statement all comments should be received by no later than April 13, 1989.

Copies of the Draft Environmental Impact Statement are available for public review at the office listed below:

Refuges and Wildlife, Refuge EIS Coordinator, U.S. Fish and Wildlife Service, 500 NE. Multnomah Street, Suite 1692, Portland, OR 97232.

Refuges and Wildlife, Refuge EIS Coordinator, U.S. Fish and Wildlife Service, P.O. Box 1306, 500 Gold Avenue, SW., Room 1306 Albuquerque, NM 87103.

Refuges and Wildlife, Refuge EIS Coordinator, U.S. Fish and Wildlife Service, Federal Building, Fort Snelling, Twin Cities, MN 55111.

Refuges and Wildlife, Refuge EIS Coordinator, U.S. Fish and Wildlife Service, Room 1200, Richard B. Russell Federal Building, 75 Spring Street, SW., Atlanta, GA 30303.

Refuges and Wildlife, Refuge EIS Coordinator, U.S. Fish and Wildlife Service, One Gateway Center, Suite 700, Newton Corner, MA 02158.

Refuges and Wildlife, Refuge EIS Coordinator, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Refuges and Wildlife, Refuge EIS Coordinator, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, AK 99503.

Refuges and Wildlife, Refuge EIS Coordinator, U.S. Fish and Wildlife Service, 18th and C Sts., NW., Washington, DC 20240.

Dated: February 27, 1989.

Frank Dunkle,

Director.

[FR Doc. 89-5158 Filed 3-6-89; 8:45 am]

BILLING CODE 4310-55-M

Minerals Management Service

Outer Continental Shelf Advisory Board, Gulf of Mexico Regional Technical Working Group Meeting

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of Gulf of Mexico Regional Technical Working Group (RTWG) meeting.

SUMMARY: Notice of this meeting is issued in accordance with the Federal Advisory Committee Act (Pub. L. No. 92-463). The Gulf of Mexico RTWG meeting will be held March 21-23, 1989, at the Gulf of Mexico OCS Regional Office, Rooms 111 and 115, 1201 Elmwood Park Boulevard, New Orleans, Louisiana. Dates and times are as follows: March 21, 1989—9:30 a.m. to 4:00 p.m.; March 22, 1989—9:00 a.m. to 5:00 p.m.; and March 23, 1989—9:00 a.m. to 12:00 noon.

The RTWG business meeting will be held in conjunction with the Spring Ternary Studies Meeting. Tentative agenda items for the business meeting include:

Gulf of Mexico Current Activities
Status of Environmental Studies Program
Update on Dispersants: Studies and Use
Review of Draft Regional Studies Plan for FY 1991
Election of 1989 State Co-Chair

FOR FURTHER INFORMATION CONTACT: This meeting is open to the public. Individuals wishing to make oral presentations to the Committee concerning agenda items should contact Eileen P. Angelico of the Gulf of Mexico OCS Regional Office at (504) 736-2959 by March 17, 1989. Written statements should be submitted by the same date to the Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123. A taped cassette transcript and complete summary minutes of the Business Meeting will be available for public inspection in the Office of the Regional Director at the above address not later than 60 days after the meeting.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico RTWG is one of six such Committees that advises the Director of the Minerals Management Service on technical matters of regional concern regarding offshore prelease and postlease sale activities. The RTWG membership consists of representatives from Federal Agencies, the coastal States of Alabama, Florida, Louisiana, Mississippi, and Texas, the petroleum industry, the environmental community, and other private interests.

Date: February 27, 1989.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 89-5169 Filed 3-6-89; 8:45 am]

BILLING CODE 4310-MR-M

Development Operations Coordination Document; Corpus Christi Oil and Gas Co.

AGENCY: Minerals Management Service, Interior

ACTION: Notice of the receipt of a Proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that Corpus Christi Oil and Gas Company has submitted a DOCD describing the activities it proposes to conduct on Lease OCS-G 9495, Block 153, Vermilion Area, offshore Louisiana. Proposed plans for the above area provide for the development and production of hydrocarbons with support activities to be conducted from an existing onshore base located at Cameron, Louisiana.

DATE: The subject DOCD was deemed submitted on February 24, 1989. Comments must be received within 15 days of the publication date of this Notice or 15 days after the Coastal Management Section receives a copy of the plan from the Minerals Management Service.

ADDRESSES: A copy of the subject DOCD is available for public review at the Public Information Office, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). A copy of the DOCD and the accompanying Consistency Certification are also available for public review at the Coastal Management Section Office located on the 10th Floor of the State Lands and Natural Resources Building, 625 North 4th Street, Baton Rouge, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). The public may submit comments to the Coastal Management Section, Attention OCS Plans, Post Office Box 44487, Baton Rouge, Louisiana 70805.

FOR FURTHER INFORMATION CONTACT: Mr. W. Williamson; Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section, Exploration/Development Plans Unit; Telephone (504) 736-2874.

SUPPLEMENTARY INFORMATION: The purpose of this Notice is to inform the public, pursuant to section 25 of the OCS Lands Act Amendments of 1978, that the Minerals Management Service is considering approval of the DOCD and that it is available for public review. Additionally, this Notice is to inform the public, pursuant to § 930.61 of Title 15 of the CFR, that the Coastal Management Section/Louisiana Department of Natural Resources is reviewing the DOCD for consistency with the Louisiana Coastal Resources Program.

Revised rules governing practices and procedures under which the Minerals Management Service makes information contained in DOCDs available to affected States, executives of affected local governments, and other interested parties became effective May 31, 1988 (53 FR 10595).

Those practices and procedures are set out in revised § 250.34 of Title 30 of the CFR.

Date: February 27, 1989.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 89-5168 Filed 3-6-89; 8:45 am]

BILLING CODE 4310-MR-M

National Park Service

National Capital Region; Public Workshop; Harpers Ferry National Historical Park

Notice is hereby given in accordance with the Federal Advisory Committee Act that a public workshop will be hosted by the National Park Service, Saturday, March 11, from 9:00 a.m. to 12 noon, at the training facility on the grounds of the U.S. Fish and Wildlife Service in Leetown, West Virginia. The purpose of the meeting is to gather ideas on the special park boundary study as authorized by Congress.

This study of lands adjacent to the park is to consist of two (2) parts; the first is to focus on protection alternatives for the largely undeveloped lands comprising School House Ridge just west of the National Park; the second is to focus on protection alternatives for largely undeveloped lands in the down river view of the Potomac from Jefferson Rock located in the Harper Ferry National Historical Park.

The number of acres involved are approximately 800 acres in Jefferson County, West Virginia; 100 acres in Washington County, Maryland and; 100 acres in Loudoun County, Virginia.

The study excludes developed lands in and around the towns of Harpers Ferry and Bolivar, West Virginia and Sandy Hook, Maryland.

There will be a forty-five (45) day comment period following the workshop. Comments may be sent to the following address: Superintendent Donald Campbell, Harpers Ferry National Historical Park, Harpers Ferry, West Virginia 25425.

FURTHER INFORMATION CONTACT: Resource Manager Bill Hebb at (304) 535-6371 Ext. 6224.

Dated: March 1, 1989.

Robert Stanton,

Regional Director, National Capital Region.

[FR Doc. 89-5215 Filed 3-6-89; 8:45 am]

BILLING CODE 4310-70-M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before February 24, 1989. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by March 22, 1989.

Carol D. Shull,

Chief of Registration, National Register.

CALIFORNIA

Monterey County

Outlands in the Eighty Acres, 25800 Hatton, Carmel By-the-Sea, 89000228.

Stanislaus County

Whitmore, Daniel, House, 2928 Fifth St., Ceres, 89000230.

MASSACHUSETTS

Barnstable County

Pond Hill School, US 6, Wellfeet, 89000222.

Berkshire County

Lenox Railroad Station, Housatonic St. and Willow Creek Rd., Lenox, 89000225.

Hampshire County

Fort Hill Historic District, Roughly South St. from Lyman to Monroe, Northampton, 89000223.

Middlesex County

Manning, Joseph K., House, 35-37 Forest St., Medford, 89000224.

Plymouth County

Lower Union Street Historic District, Union St. from Water St. to Market St., Rockland, 89000219.

Phoenix Building, 315-321 Union St., Rockland, 89000220.

Rockland High School, 394 Union St., Rockland, 89000217.

Rockland Memorial Library, 382 Union St., Rockland, 89000221.

Rockland Trust Company, 288 Union St., Rockland, 89000218.

Suffolk County

Linwood Historic Distric, Roughly Linwood Ave., Maple Ct., and Pine Ct., Northbridge, 89000226.

NEW JERSEY

Atlantic County

Bay Front Historic District, Roughly bounded by Decatur Ave., Egg Harbor Bay, George Ave., and Shore Rd., Somers Point, 89000227.

Warren County

Great Meadows Railroad Station, Cemetery Rd., Great Meadows vicinity, 89000229.

The following property is also being considered for listing in the National Register:

KENTUCKY

Hopkins County

Jackson, Beckley, House (Hopkins County MPS) Rt. 1069, .2 mi. S of jct. with Jones Rd. Hanson vicinity 88002733.

[FR Doc. 89-5216 Filed 3-6-89; 8:45 am]

BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31405]

Arkansas Central Railway Co., Inc.; Operation Exemption Line of Herzog Stone Products Inc.

Decided: March 2, 1989.

Arkansas Central Railway Co., Inc. (ACR), a noncarrier, has filed a notice of exemption to operate 1.3 miles of rail line in Polk County, AK, that is owned by a corporate affiliate, Herzog Stone Products, Inc. (Herzog Stone).[1] ACR has also filed a motion to dismiss this notice together with a request that the motion be denied.[2] The line connects with

[1] Both Herzog Stone and ACR are under the common control of Herzog Services, Inc. Because Herzog Stone is presently the only shipper over the line, ACR has filed, concurrently with this notice, a petition for exemption from 49 U.S.C. 10746, the commodities clause, in Finance Docket No. 31410, *Arkansas Central Railway Co., Inc.—Petition for Exemption From Regulation Under 49 U.S.C. 10746.*

[2] In its motion to dismiss, ACR has effectively asked the Commission to address and resolve the

Continued

Kansas City Southern Railway Co. (KCS), at KCS milepost 405 on its Kansas City to New Orleans mainline. Herzog Stone constructed the line in 1986 as an unregulated industrial spur, but petitioner points out that KCS presently provides through service over the line from Herzog's South Hatton facility to consignees throughout the country, and that the subject track is no longer an industrial spur within the meaning of 49 U.S.C. 10907(b).

Any comments must be filed with the Commission and served on John D. Heffner, Gerst, Heffner, Foldes and Podgorsky, Suite 1107, 1700 K Street, NW., Washington, DC 20006.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89-5289 Filed 3-6-89; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-303 (Sub-No. 1X)]

Wisconsin Central, Ltd: Abandonment Exemption; In Price and Taylor Counties, WI

Applicant has filed a notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to abandon its 25.9-mile line of railroad between milepost 343.3 near Prentice, in Price County, WI, and milepost 317.4 near Medford, Taylor County, WI.

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 a user of rail service on the line (or a Stae 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 abandoment 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 April 6, 1989 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[1] 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 March 17, 1989.[3] Petitions for reconsideration and requests for public use conditions under 49 CFR 1152.28 must be filed by March 27, 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:

William C. Sippel, 233 N. Michigan Ave., Suite 2400.

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 March 10, 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: February 28, 1989.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89-5174 Filed 3-6-89; 8:45 am]

BILLING CODE 7035-01-M

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issue of whether the line in question is a line of railroad subject to agency jurisdiction or whether it remains in industrial spur. This notice does not resolve that question, but is issued because ACR has met the requirements of 49 CFR 1150.31. The Commission will address the motion to dismiss in a separate decision.

[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 exmeption. *See Exemption of Out-of-Service Rail Lines*, 4 I.C.C.2d 400 (1988). Any entity seeking a stay involving environmental concerns is 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.

DEPARTMENT OF JUSTICE

Lodging of Consent Order Pursuant to the Clean Air Act; SCA Services, Inc.

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Order in *United States v. SCA Services, Inc.* has been lodged on February 21, 1989 with the United States District Court for the Northern District of Indiana. The Consent Order addresses alleged violations by SCA Services, Inc., of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9604 (a) and (b), 9606, and 9607(a), to abate a release or substantial threat of release of hazardous substances from the Ft. Wayne Reduction facility.

The proposed Consent Order provides that SCA shall perform the remedy selected by U.S. EPA to remediate contamination at the Ft. Wayne Reduction Site in Ft. Wayne, Indiana. The settling PRP agrees to perform the entire remedy required by the Record of Decision ("ROD"), valued at approximately $10.2 million. Additionally, the settling PRP agrees to reimburse 30% of U.S. EPA's oversight costs, up to a maximum of $200,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Order. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. SCA Services, Inc.*, D.J. Ref. #90-11-2-382.

The proposed Consent Order may be examined at the office of the United States Attorney, Northern District of Indiana, 220 Federal Building, 1300 South Harrison Street, Ft. Wayne, Indiana 46802, and at the Office of Regional Counsel, United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604. Copies of the

Consent Order may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Room 1748, Ninth Street and Pennsylvania Ave., NW., Washington, DC 20530. A copy of the proposed Consent Order may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice. In requesting a copy, please refer to the referenced case name and D.J. Ref. number and enclose a check in the amount of $18.50 (ten cents per page reproduction cost) payable to the Treasurer of the United States.

Donald A. Carr,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-5172 Filed 3-6-89; 8:45 am]

BILLING CODE 4410-01-M

Lodging of a Final Judgment by Consent Pursuant to the Clean Water Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on February 27, 1989 a proposed Consent Decree in *United States of America* v. *City of St. George and the State of Utah,* Civil Action No. 88-C-910G, was lodged with the United States District Court for the District of Utah, Central Division.

The complaint filed by the United States alleged that St. George violated sections 301(a) and 309(a) of the Clean Water Act (the "Act"), 33 U.S.C. 1311(a) and 1319(a), by discharging pollutants from its publicly owned treatment works ("POTW") in excess of the limitations allowed by St. George's NPDES permit and three Administrative Orders ("AO's") issued by EPA, and by failing to comply with the milestones for planning and construction of its new regional wastewater treatment facility imposed by the NPDES permit and AO's. The United States alleged that the State of Utah was liable for any judgment against St. George to the extent that its laws prevented St. George from raising revenues needed to comply with any such judgment pursuant to section 309(e) of the Act, 33 U.S.C. 1319(e). The United States sought an injunction and civil penalties of up to $25,000 per day of violation against St. George.

St. George and the State of Utah have executed the Consent Decree. St. George has agreed to pay a civil penalty of $75,000 to resolve past violations of the Act, complete construction of its new wastewater treatment facility by March 1, 1990, and achieve operational status at the new facility no later than April 1, 1990. St George will decommission its old facilities upon completion of the new facility and pay stipulated penalties for any future violations of the Consent Decree or the Act. The United States has reserved its claim against the State of Utah under section 309(e) of the Act, 33 U.S.C. 1319(e).

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty days from the date of publication of this notice. Comments should be addressed to the Acting Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *City of St. George and the State of Utah,* Civil Action No. 88-C-910G, DOJ Ref. No. 90-5-1-1-3204. The proposed Consent Decree may be examined at the office of the United States Attorney, District of Utah, 350 South Main Street, Room 476, Salt Lake City, Utah. Copies of the Consent Decree may also be examined and obtained in person at the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Room 1517, Tenth and Pennsylvania Avenue, NW., Washington, DC. A copy of the proposed Consent Decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Box 7611, Ben Franklin Station, Washington, DC 20044. When requesting a copy, please present or enclose a check in the amount of $2.60 (ten cents per page reproduction costs) payable to the Treasurer of the United States.

Donald A. Carr,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-5243 Filed 3-6-89; 8:45 am]

BILLING CODE 4410-01-M

Lodging of a Final Judgment by Consent Pursuant to the Clean Air Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on February 27, 1989 a proposed Consent Decree in *United States of America and the State of Maryland* v. *Signode Corporation,* Civil Action No. HAR-88-2326 was lodged with the United States District Court for the District of Maryland.

The complaint filed by the United States alleged that Signode Corporation operated its Magnus 2 metal surface coating line in Baltimore, Maryland, in violation of the Clean Air Act, 42 U.S.C. 7411, 7413, and 7414 and the standards for new stationary sources (NSPS), 40 CFR Part 60, Subpart A. The United States sought an injunction and civil penalties of up to $25,000 per day of violation. Signode Corporation has executed the Consent Decree and agreed to pay a penalty of $50,000, $25,000 to the United States and $25,000 to the State of Maryland, to resolve past violations of the NSPS and the Act, plus pay stipulated penalties for any future violations of the NSPS and various recordkeeping and reporting requirements of the Consent Decree. Signode also agreed to conduct a performance test of its volatile organic compound thermal incinerator and to otherwise comply with the Clean Air Act and the NSPS.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty days from the date of publication of this notice. Comments should be addressed to the Acting Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States and the State of Maryland* v. *Signode Corporation,* Civil Action No. HAR-88-2326, DOJ Ref. No. 90-5-1-1-1218. The proposed Consent Decree may be examined at the office of the United States Attorney, District of Maryland, 101 Lombard Street, 9th Floor, Baltimore, Maryland. Copies of the Consent Decree may also be examined and obtained in person at the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Room 1517, Tenth and Pennsylvania Avenue, NW., Washington, DC. A copy of the proposed Consent Decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Box 7611, Ben Franklin Station, Washington, DC 20044. When requesting a copy, please present or enclose a check in the amount of $4.00 (ten cents per page reproduction costs) payable to the Treasurer of the United States.

Donald A. Carr,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-5242 Filed 3-6-89; 8:45 am]

BILLING CODE 4410-01-M

Office of Justice Programs

Crime Victim Assistance Grants

March 2, 1989.

AGENCY: Office of Justice Programs, Justice.

ACTION: Notice of proposed program guideline.

SUMMARY: The Office for Victims of Crime (OVC), Office of Justice Programs (OJP), U.S. Department of Justice (DOJ), is publishing for public comment proposed Program Guidelines to implement the victim assistance grant program authorized by the Victims of Crime Act of 1984 (VOCA), Pub. L. 98-473, as amended by the Children's Justice and Assistance Act of 1986 (CJA), Pub. L. 99-401, and as amended by the Anti-Drug Abuse Act of 1988, Title VII, Subtitle D, of Pub. L. 100-690 (hereinafter referred to as the "Act"). The Victims of Crime Act has been codified at 42 U.S.C. 10601, *et seq.* These proposed Guidelines when published in final will supersede all previous Program Guidelines issued by the Office for Victims of Crime to implement the Victims of Crime Act victim assistance grant program.

The Act provides Federal financial assistance to States for the purpose of compensating and otherwise assisting victims of crime, and also provides funds for training and technical assistance and assisting victims of Federal crimes. These proposed Guidelines provide program background, eligibility requirements, and administrative procedures for the implementation of the crime victim assistance grant program as outlined in Section 1404 (a) of the Act. These proposed Guidelines are based on the experience gained during the first four years of the program's implementation and are responsive to the amendments to the Victims of Crime Act of 1984.

The Victims of Crime Act was amended in 1988 to provide funding to previously underserved victim populations. (Subsection 1404 (a)(2)(B). However, the Act does not recommend any specific level of funds to be provided to underserved populations. After careful consideration of the legislative history, the Office for Victims of Crime is recommending that at least 10% of a State's victim assistance grant funds be utilized for programs providing services to this population. Comment is especially invited on this provision of the proposed Guidelines. (See Section III of this proposed Program Guideline.) The Office for Victims of Crime is interested in the views of state administrators, victim service providers, advocates, and other interested parties.

DATE: Comments are due on or before April 6, 1989. Comments received after the due date cannot be considered.

ADDRESS: Send comments to Duane Ragan, Ph.D., Office for Victims of Crime, Office of Justice Programs, 633 Indiana Avenue, NW., Room 1352, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Duane Ragan, Ph.D., (202) 724-5947. (This is not a toll free number).

SUPPLEMENTARY INFORMATION: On November 18, 1988, President Reagan signed into law the Anti-Drug Abuse Act of 1988, Public Law 100-690. Title VII, Subtitle D, of this Act reauthorized the Victims of Crime Act of 1984 through Federal Fiscal Year 1994.

The Office for Victims of Crime was established in 1984 within the Department of Justice to serve as the Federal focal point for victim issues and to administer the Victims of Crime Act of 1984, as amended. For the first time, section 1411 of the Act legislatively established an Office for Victims of Crime within the Office of Justice Programs, U.S. Department of Justice. The Director reports to the Attorney General through the Assistant Attorney General for the Office of Justice Programs, and has the final authority for all grants, cooperative agreements, and contracts awarded by the Office of Victims of Crime. The Director is responsible for administering funds made available under section 1402, 1403 and 1404 of the Act; establishing programs in accordance with section 1404(c) on terms and conditions determined by the Director to be consistent with that subsection; and cooperating with and providing technical assistance to States, units of local government, and other public and private organizations or international agencies involved in activities related to crime victims.

The fundamental approach of these Program Guidelines is to maximize State authority within the context of congressional intent of the Act. In this way, Federal intrusion on the States decision-making authority will be appropriately limited. Indeed, from its inception, the Act has strongly favored State autonomy within Federally determined guidelines. Program application, reporting, and evaluation requirements have been established at a level necessary to maintain proper Federal stewardship for the funds and to report to the President and Congress on the impact of the funding.

These Guidelines do not constitute a "major" rule as defined by Executive Order 12291 as they do not result in: (a) An effect on the economy of $100 million or more; (b) a major increse in any costs or prices; or (c) adverse effects on competition, employment, investment, productivity, or innovation among American enterprises.

In addition, because these Guidelines will not have significant economic impact on a substantial number of small entities, no analysis of the impact of these rules on such entities is required by the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

The collection of information requirements contained in Section V of the Program Guidelines has been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act, 44 U.S.C. 3504(h).

Proposed Guidelines for the compensation and the Federal grant programs will be published separately in the **Federal Register.**

Discussion of Victim Assistance Grant Program, Background, Legislative Changes and Program Policy

The primary purpose of the VOCA victim assistance grant program is to assist states in providing high quality services that directly improve the health and well-being of victims of crime. A wide range of services for victims of crime are supported by this Act. They include, but are not limited to, ensuring that victims receive timely notification about the various proceedings involved in prosecuting the person accused of the crime and counseling to help the victim overcome the emotional trauma of victimization. Congress has supported the view that some services are more directly related to the emotional healing and recovery of the victim than others.

Since there are not enough dollars available in the Crime Victims Fund to permit funding of all victims services, it is the intent of VOCA to ensure that services that directly improve the health and well-being of the victim receive first consideration when planning the distribution of limited Crime Victims Fund monies. The Office for Victims of Crime encourages State administrators to consider first the funding of programs that offer counseling services, shelter, and other emergency assistance that address the devastating psychological and emotional consequences experienced by victims of crime and their families. Consequently, programs meeting the immediate, short-term emergency needs of crime victims should be considered for funding over programs offering other types of services.

Crime Victims Fund Distribution

The reauthorization legislation establishes a ceiling of $125 million in Fiscal Years 1989-1991 and $150 million in Fiscal Years 1992-1994 for the Crime

Victims Fund (hereinafter referred to as the "Fund").

Monies deposited in the Fund shall be made available in the following manner. Of the first $100 million deposited in the Fund: 49.5% shall be made available for victim compensation program grants; 45% shall be made available for victim assistance program grants; 1% shall be available for support of services to Federal crime victims (of which up to 0.5% may be made available for training and technical assistance projects for eligible victim assistance programs), and 4.5% shall be made available under the provisions of the Children's Justice and Assistance Act of 1986. Of the 4.5% made available to the Department of Health and Human Services to improve the investigation and prosecution of child abuse, especially child sexual abuse cases, 15% shall be made available for assisting Native American tribes in developing, establishing, and operating programs designed to similarly improve the handling of child abuse cases, especially child sexual abuse cases in Indian country. This 15% shall be administered by the Office for Victims of Crime.

The next $5,500,000 deposited in the Fund above the first $100 million (i.e., any amounts between $100 million and $105.5 million) shall be made available for Children's Justice Act grant purposes. Deposits in excess of $105,500,000, but *not* in excess of the $110 million ceiling for Fiscal Years 1989, 1990, and 1991, shall be made available for victim assistance program grants.

Of deposits in excess of the $110 million and up to the ceiling, 47.5% shall be made available for victim compensation program grants, 47.5% shall be made available for victim assistance program grants, and 5% shall be made available for services to victims of Federal crimes.

If the total deposited in the Fund during a particular year reaches the ceiling, the excess shall *not* be a part of the Fund. The first $2.2 million of such excess shall be available to the Federal judicial branch for administrative costs to carry out the functions of the Administrative Office of the U.S. Courts with respect to the collection of criminal fines and penalty assessments. (Subsection 1402(c)(1)(A).) The remaining monies shall be deposited in the General Fund of the United States Treasury.

No deposits shall be made in the Fund after September 30, 1994, under the current reauthorization.

Recent Changes in the Distribution of Victim Assistance Funds to the States

The 1988 amendments to the Victims of Crime Act increased the base amount each State shall receive in victim assistance funds from $100,000 to $150,000 for Fiscal Year 1989, 1990, and 1991, and to $200,000 for Fiscal Years 1992, 1993, and 1994. (Section 1404(a)(5)(A) and (B).)

In addition, for the purposes of allocating the base amounts to the States, the United States Virgin Islands and all territories and possessions of the United States are to be included along with the District of Columbia and Puerto Rico. (Section 1404(d)(1).)

Priority Categories and "Underserved" Victim Populations

The Victims of Crime Act of 1984 requires each State to certify that "priority" will be given to programs serving victims of sexual assult, spousal abuse and child abuse. In reporting to the President and Congress on the impact of the Victims of Crime Act grant program, the Office of Justice Programs indicated that 76% of the monies allocated to State victim assistance programs went to programs serving victims of sexual assault, spousal abuse and child abuse. These monies funded 82% of the VOCA supported programs. The remaining VOCA funds supported a variety of specialized and generic victim services. This determination was made after a subgrant-by-subgrant review of all awards made in Fiscal Year 1986 by the States was conducted. (See *Report to Congress by the Attorney General*, April 1988.)

During reauthorization, there was considerable discussion of the extent to which funds were utilized to support victims in the three priority categories. After reviewing available data and hearing testimony from national organizations, programs, and individuals representing victims of other violent crimes, Congress amended VOCA to require that each State "certify that funds shall be made available for grants to programs which serve previously underserved populations of victims of violent crime." (See Section 1404(a)(2(B).) In doing so, Congress reaffirmed the special needs of the priority category victims, but also recognized the needs of victims of violent crimes who have received little support through VOCA victim assistance grant funds.

OVC is aware that the Congressional Record reflects a discrepancy in the views of members of the House of Representatives and the Senate regarding the underserved populations amendment contained in the VOCA reauthorization (Section 1404(a)(2)(b)). The following is a colloquy between Mr. Biden and Mr. Kennedy:

[Mr. Biden:] Do you anticipate that this priority will be implemented by the Department of Justice in a manner similar to the other priority programs listed in the Victims of Crime Act?

[Mr. Kennedy:] Yes. As the section-by-section analysis of the Senate bill clearly stated the Department of Justice shall require that States devote approximately 10 percent of their funds to this new priority category, as with the existing priority programs.

[Mr. Biden:] "That was also my understanding. I thank the Senator." (See Congressional Record—Senate, page 17324, October 21, 1988.)

However, the Section-By-Section Analysis of this amendment inserted by Mr. Conyers, Chairman of the House Subcommittee on Criminal Justice, reflects a different view:

The Senate-passed bill contained a provision similar to new section 1404(a)(2)(B). During the debate on the Senate bill, it was indicated that it was intended that that provision be interpreted to require a chief executive to use at least 10% of the State's funds under section 1404 for those programs. The clear language of the provision in the Senate-passed bill did not require that, however.

Such an interpretation was unacceptable, and a provision with that interpretation would not have been agreed to. The language of new section 1404(a)(2)(B) imposes no requirement upon the chief executive of a State to allocate a specified minimum percentage of Crime Victims Fund money to programs serving 'underserved populations of victims of violent crime'. We agreed to new section 1404(a)(2)(B) with no intention that the provision be interpreted to impose such a minimum requirement. (Congressional Record—House, page 11261, October 21, 1988)

Mr. Fish added:

This is intended to promote the broadest effort possible to assist victims of violent crime and to ensure that no category of victim is ignored." (Congressional Record—House, page 11240, October 21, 1988).

In addition Mr. Miller stated:

As one who was involved in the negotiations between the House and the other body, I would like to make clear for the record that, in that form, this provision was not acceptable. The representatives of the other body verbally agreed, however, that such a requirement was not mandated by the statutory language and that it would not insist upon such a requirement. The House concurrence in this provision—with some changes in language—was with the explicit understanding that the provision did not bind the chief executive to allocate any given percentage of crime victims fund money to programs serving previously underserved populations of victims of violent crime."

(Congressional Record—House, page 11263, October 21, 1988)

In implementing this new requirement, the Office for Victims of Crime has considered the conflicting perspectives expressed by members of Congress and constituency groups. With regard to the degree financial support that should be made available for "previously underserved victims," OVC believes that an interpretation which results in increased attention to previously underserved populations of victims and sets a minimum level of funding will best meet the unmet needs of a broad range of victims of violent crime. Therefore, States are directed in these proposed guidelines to allocate at least 10% of their VOCA assistance funds to such programs. In this way, previously underserved victims of violent crime identified by each State will constitute a single category for which at least 10% of the States' VOCA assistance funds must be allocated.

OVC does not intend to define what constitutes "previously underserved populations." Rather, it is expected that States will have flexibility in determining which groups of victims would be "underserved."

Each State must identify previously underserved victim populations in their State and develop specific plans to address the availability of victim assistance service grants in these areas. The Office for Victims of Crime encourages States not to solely consider underserved victim populations which were mentioned in congressional discussions of the amendment, i.e., homicide survivors, victims or survivors of victims of drunk driving. States should also consider the broad range of unmet victims' needs and the obstacles which prevent the delivery of services.

OVC recognizes the specialized needs of priority area victims and the skills required of service providers in assisting these victims. In Fiscal Years 1985, 1986, 1987, and 1988 States were given three options for meeting the three priority area requirements of the Victims of Crime Act legislation. These options were provided to meet the variety of State needs and to maximize State flexibility in implementing the Victims of Crime Act victim assistance grant program.

As in the development of any new program, knowledge is granted from experience. While preparing the Report to Congess, and in correspondence from State administrators and service providers, and during the reauthorization hearings, OVC learned of many concerns regarding the allocation of Victims of Crime Act victim assistance grant funds. Therefore, the Office for Victims of Crime has reviewed the options which were presented to States during the first four fiscal years of the program, the number of States which selected the various options, and the States' reports regarding their ultimate allocation of funding to priority services. As a result of this analysis, the Office for Victims of Crime has determined that a single approach which reflects a combination of elements from the three previous options would serve to clarify elements from the three previous options would serve to clarify this program requirement and better effectuate the intent of Congress. Henceforth,

Each State shall allocate at least ten percent of its total Victims of Crime Act victim assistance grant to each of the three priority categories, and at least ten percent to programs which serve victims determined by the State to have been previously underserved.

States are encouraged to engage in discussion with victims, victim advocates, and services providers throughout the State and to assess the needs of underserved populations. Each State is further required to discuss in its application to the Office for Victims of Crime the method used to identify previously underserved victim populations and its plan for funding services to such groups.

The ten percent figure provided in these proposed Program Guidelines is intended to represent a base amount of funding to the priority areas, and to give each State discretion to determine the level of additional funding needed. The Office for Victims of Crime believes it is incumbent upon each State, not the Federal Government, to determine if funding in excess of the minimum base amount level established by the Office for Victims of Crime is needed in a particular priority area. In no way is the 30% base amount targeted for programs serving priority victims nor the 10% base amount targeted for programs serving previously underserved victim populations intended to establish a cap on the amount allocated to programs serving these categories of crime victims. Experience has shown States have allocated the vast majority of VOCA funds to programs which serve victims of child abuse, spouse abuse, and sexual assault. However, it is also noted that the requirement to give priority to services for victims of spouse abuse, sexual assault, and child abuse has not been and is not intended to convey that States may not provide funding for other types of services.

For purposes of this program, the Office for Victims of Crime defines a priority program as one whose *principal mission* is providing services to one or more of the priority victim categories. While programs which provide services to all victims of crime are needed in communities these are not considered to be priority programs. However, many priority programs provide services to more than one priority group. For example, many sexual assault programs serve adult victims of sexual assault and child victims of sexual abuse and molestation, and many shelter programs also provide services to victims of child abuse who accompany their mothers who are victims of spouse abuse/family violence. This definition reflects OVC's understanding of the intent of VOCA and is meant to clarify priority programs for purposes of funding decisions and reporting requirements.

OVC also wishes to clarify that there is no requirement that each program designated as a priority program provide what are termed as "generic" victim services. Further, there is no requirement that all VOCA funded programs must serve all types of victims in all ways.

Clarification of Allowance Costs and Eligible Programs

Section 1404(b)(1) of the Victims of Crime Act of 1984, as amended, provides specific criteria for programs to be eligible for victim assistance grant funds.(See Section III of these proposed Program Guidelines.) The reauthorization and issuance of these proposed Program Guidelines provide an opportunity to clarify several issues which have emerged regarding the appropriate use of Victim of Crime Act victim assistance grant funds. The Office for Victims of Crime is mindful of the fact that we now have had four years of experience administering VOCA victim assistance grants. After careful review of the subgrants made in prior fiscal years, the Office for Victims of Crime believes it is necessary to articulate policy positions concerning certain allowable costs and program eligibility.

One area of central importance in this discussion is the relationship between VOCA crime victim compensation and VOCA victim assistance programs. In their initial years of grants, some States used victim assistance grant funds to supplement crime victim compensation awards to victims of crime. In these cases, some programs receiving VOCA victim assistance grant funds supplemented crime victim compensation claims when a particular loss or expense was not covered by the State crime victim compensation program. This is not an appropriate use

of limited VOCA victim assistance funds. It is clear in the legislative history that the crime victim compensation provision of the Act was intended as the sole source of VOCA funding for reimbursement to victims for out-of-pocket expenses relating to a compensable crime. VOCA victim assistance grant funds, on the other hand, are intended to support the provision of direct services to victims of crime.

Questions have also arisen as to whether local legal services corporation-funded offices are eligile as victim assistance subgrantees. Legal services, especially legal advocacy services, are not the types of victim services envisioned when the Victims of Crime Act was enacted. The "court related services" eligible for VOCA funding include, but are not limited to, assisting victims with filing temporary restraining orders, explaining court procedures, accompanying a crime victim to court, providing child care services for crime victims while they participate in essential court proceedings, providing transportation to and from court, and providing emotional support to crime victims during a trial. However, a legal services agency is not deemed ineligible as long as it provides the emergency services discussed above, e.g. securing temporary restraining orders, etc. Such programs may seek VOCA funding for the above-described emergency services.

Crime victim assistance funds may be used only to provide direct services to victims of crime. Any costs for activities not directly related or essential to the delivery of assistance to crime victims may not be charged to a VOCA victim assistance subgrant. The following activities are ineligible for VOCA funding.

(1) *Community Education.* The community education activities eligible to receive VOCA funds are limited to efforts describing direct services available and how to obtain a program's assistance, e.g., publication of brochures, pamphlets, etc. General public awareness campaigns designed to raise the public's consciousness of victims issues do not qualify as direct services to crime victims and are ineligible for support with VOCA funds.

(2) *Crime Prevention.* Also ineligible for funding are those programs in which crime victims are not the sole or primary beneficiaries of funded activities. The crime prevention activities eligible to receive VOCA funds are limited to those prevention efforts specifically included in providing emergency assistance after a victimization incident such as services to prevent the immediate reburgularization of a home or an apartment, e.g. boarding up of windows, replacement or repair of security locks, etc. Other more generalized crime prevention efforts are not allowable.

(3) *Lobbying, Legislative and Administrative Advocacy.* Lobbying for particular victim legislation or administrative reform, whether conducted directly or indirectly, is another activity that is an ineligible for funding with VOCA victim assistance grant funds. Chapter 5, paragraph 74, subsection 3, of the Office of Justice Programs' *Financial and Administrative Guide for Gants,* M7100.1 ((effective edition) hereinafter referrred to as M 7100.1), lists the following activities as not allowable: "Any attempt to influence: (i) the introduction of Federal or State legislation; or (ii) the enactment or modification of any pending Federal or State legislation through communication with any member or employee of the Congress or State legislature (including efforts to influence State or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation." Refer to paragraph 74 of M 7100.1 for further information on allowable and unallowable activities.

(4) *Perpetrator Rehabilitation.* The Office for Victims of Crime has taken the position that perpetrator counseling and/or rehabilitation is not a direct service to a victim of crime as intended by VOCA and is, therefore, not an eligible service or activity to be supported by victim assistance grant funds. However, VOCA funds may be used to support family treatment programs that provide direct services to crime victims and rehabilitation or treatment of perpetrators. It is the intention of the Office for Victims of Crime to support such programs which seek to reunite the family through treatment of victims of family violence along with perpetrator rehabilitation. It is *not* our intention to provide VOCA victim assistance funds to support programs which are primarily perpetrator/offender treatment programs. This represents a change in OVC's previous policy which prohibited the funding of any perpetrator related activities.

(5) *Needs Assessments, Surveys, Manuals and Protocols.* The Office for Victims of Crime has further taken the position that the use of VOCA funds to conduct needs assessments, surveys, develop manuals and protocol, or to perform general administrative tasks does not fall within the intent of the Act and is outside the scope of the Program Guidelines.

(6) *Fundraising.* Chapter 5, Paragraph 75 of M7100.1 lists fund raising as an unallowable expense: "Cost of organized fund raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred solely to raise capital or obtain contribution, may not be charged either as direct or indirect cost against the grant. Neither the salary of persons engaged in such activities nor indirect costs associated with those salaries can be charged to the grant, except insofar as such persons perform other grant-related activities."

(7) *Equipment Purchases/Capital Expenditures.* Section 1404(b)(2) provides that Victims of Crime Act victim assistance grant funds may only be used to provide services to victims of crime. Services to victims of crime means those activities that *directly* benefit individual crime victims, including the required coordination of such activities, i.e., coordination of volunteers and/or coordination of public and private efforts to aid crime victims. However, equipment that is necessary and essential to the delivery of direct service is deemed by the Office for Victims of Crime as an allowable cost.

(8) *Professional Services of Doctors and Lawyers.* The payment of fees for professional services rendered by lawyers and doctors extends beyond the intent of the Act and are, therefore, ineligible for VOCA victim assistance funding. Except for the purposes of providing reimbursement for forensic medical examinations, as provided in section III, D(2)(e) of the Act, victims treated for crime related injuries are encouraged to seek reimbursement for medical services rendered by doctors from their State crime victims compensation program. This provision, however, does not prohibit direct service programs from hiring as staff salaried medical/mental health professionals to provide services on site to clients. This differs significantly from a case by case fee-for-service type arrangement.

(9) *Witness Management and Notification Programs.* Projects whose primary objectives are to improve the prosecutorial efficiency of a prosecutor's office and whose goals are primarily witness management and notification are identified as administrative in nature and are, therefore, ineligible for support with Victims of Crime Act victim assistance grant funds. However, victim/witness programs in prosecutors offices, which provide both victim services such as escort and support

during trials and other type of services, can receive VOCA funding support only for that portion of the program that provides direct services to crime victims.

(10) *Criminal Justice Improvements.* General criminal justice agency improvements or programs where crime victims are not the sole or primary beneficiaries are not eligible for support with VOCA victim assistance grant funds.

Program Match

Required Match for New and Existing Programs. The Office for Victims of Crime has initiated a new policy with respect to the required match for "new" and "existing" programs; the program match has been reduced for both. The Act requires that "existing" programs have a record of providing effective services to victims of crime and financial support from other sources and requires that "new" programs that have not yet demonstrated a record of effective services have substantial financial support from other sources. The Office for Victims of Crime believes that the current match requirements are too stringent and may have inhibited the development of much needed specialized services in underserved or remote areas. Therefore, the match requirement for "existing" programs has been lowered from 25% to 20% cash or in-kind; and for "new" programs, the match has been lowered from 50% to 35% cash *or in-kind.* In addition to the lower match requirement for new programs, the provision for in-kind match for new programs has been added. The Office for Victims of Crime believes these new match requirements will better reflect the intent of the Act regarding the continuity of existing crime victim assistance programs while also addressing recent Congressional concern for the development of new victim services programs for previously underserved victim populations.

New Match Requirements for Native American Tribes or Native American Organizations on Indian Reservations. The Office for Victims of Crime has initiated a policy to permit a 5 percent minimum "match" of cash or in-kind for grants to Indian tribes or native American organizations on reservations under the Victims of Crime Act victim assistance grant program. OVC has decided to implement this provision in response to the unique situation of native American Indian tribes in our nation, and their special problems and needs. In the past, we have found that the victim assistance match requirement are virtually impossible for Indian tribes to meet because of the tribes' meager financial resources. The result has been that the tribes have been unable to achieve full participation in the VOCA victim assistance program and significant Indian victim needs have gone unattended. This policy is intended to respond to the difficulties experienced by Indian tribes in providing matching funds. This is further intended to remind the States of their obligations to Indian tribes and similar groups to involve Indian tribes and such groups in full participation in this Federal assistance program.

Note.—This policy is limited to native American Indian tribes or native American organizations on Indian reservations.

Overmatch. In a number of the States' subgrant award reports, the Office for Victims of Crime has noted that subgrantees designated a substantial protion or all of their non-Federal dollars as match. States and subgrantees should be mindful that any funds designated as matching funds for Federal dollars are restricted to the same uses outlined in the Program Guidelines for Federal funds. Therefore, it is suggested that subgrantees only provide match at the level required by the Program Guidelines (i.e., 20% for existing programs, and 35% for new programs). In that way, there are no Federal restrictions on the non-Federal dollars not used by subgrant programs as match.

Basis of Match. The proposed Program Guidelines will continue to require match on a project-by-project basis. *No exceptions will be granted to this policy.* Programs receiving block funds must maintain records which clearly show the source, the amount, and the timing of all matching contributions. The M7100.1 also places primary responsibility on the State to ensure subgrantee compliance with this requirement.

Seed Money

The Office for Victims of Crime has received numerous inquiries from programs in States where State administrators have established a policy limiting the number of years a program may receive a VOCA victim assistance grant from the State. OVC has given consideration to these inquiries and the policies adopted by these States and has decided not to issue a formal policy/guideline regarding this practice. Instead, OVC encourages States to take into consideration in developing program funding policy, the range of victim services needed throughout the State, the track record of funded programs and the extent to which other sources of funding are available to new proposed projects and previously funded VOCA projects. However, the recent amendment to VOCA which mandates attention to underserved populations indicates Congressional concern about the extent to which victim services are available to victims outside the priority areas. Thus, States are encouraged to carefully examine their various victim service needs and expand into new service areas as crime victim funds increase.

I. General Provisions

A. *Eligible Applicants*: All States including the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and all other territories and possessions of the United States are eligible to apply for and receive Victims of Crime Act victim assistance grants. (See Section 1404 (d)(1) of the Act.) For the purposes of these proposed Guidelines, the term "State" includes the District of Columbia, Puerto Rico, the United States Virgin Islands, and any other territory or possession of the United States [See Section 1404 (d)(1) of the Act.]

B. *State Office*: The chief executive of each participating State must designate or establish a State office for the purpose of preparing an application for funds and administering the funds received, including fund accounting and disbursement monitoring, reporting, and audit.

II. Allocation of Funds

A. *Fund Availability*: Section 1404(a)(1) of the Victims of Crime Act of 1984, as amended, provides that crime victim assistance grants shall be made from the portion of the Fund not used for crime victim compensation grants, or reserved for training and technical assistance activities, or for financial support to victims of Federal crime [See Section 1404 (c)(1) of the Act], or for grants under the Children's Justice Act [See Section 1404 A of the Act.] Funds are available for expenditures in the Federal fiscal year of award and in the next succeeding fiscal year. Note: The Federal fiscal year begins on October 1 and ends on September 30 of the following year.

B. *Allocation to States*: Each State, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory and possession shall receive a base amount of $150,000 in fiscal years 1989 through 1991, and a base amount of $200,000 thereafter through fiscal year 1994, and that portion of the then remaining available money to each State that results from a distribution among the States on the basis of each State's

population in relation of all States. They shall, also, receive a portion of the available remaining monies based on their share of the total population using the most recent data of the U.S. Bureau of Census.

C. *Allocation of Funds within the States*: Funds granted to the States are to be further subgranted within the State to eligible victim services programs. The State has sole discretion as to which programs providing direct services to crime victims receive funds, so long as the eligibility criteria set-out in the Act and enumerated in these proposed Guidelines are met.

III. Program Requirements

A. *Priority*. Under the Act, the chief executive of the State must certify that the State shall give priority to eligible crime victim assistance programs which as their principle mission provide direct assistance to victims of sexual assault, spousal abuse, or child abuse, and to programs serving previously underserved populations of victims of violent crime as determined by each State. [See Section 1404 (a)(2)(A) and (B) of the Act.] To meet this requirement, each State shall allocate at least ten percent of its total Victims of Crime Act victim assistance grant to each of the three priority categories and at least ten percent to programs which serve victims determined by the State to have been previously underserved. Each State is further required to describe in its application the procedures used to identify previously underserved victim populations and the method planned for allocating VOCA funding for these services.

B. *Non-supplanting*. The chief executive of the State or his/her designated State Administrator must certify that crime victim assistance grant funds will not be used to supplant State and local funds that would otherwise be available for crime victim services. [See Section 1404(a)(2)(B) of the Act.] Federal grant funds are intended to enhance or expand services, not substitute for other sources of support.

C. *Eligibility Criteria*. States must use crime victim assistance grant funds to support programs that provide direct services to crime victims. Each individual victim assistance project receiving a crime victim assistance subgrant must meet the following eligibility requirements:

(1) Be operated by a public agency or nonprofit organization or a combination thereof that provides direct services to crime victims;

(2) If it is an existing program, have a record of providing effective services to victims of crime and financial support from other sources. In determining whether or not a program has a "record of providing effective services," the State shall consider whether the program has been providing services to victims of crime for a minimum of one year, has the support and approval of its services by the community, and whether or not an analysis of its activities and financial history shows that it achieves its intended results in a cost-effective manner. An existing program shall be considered to have "financial support from other [non-Federal] sources" if at least 20% of its support (including in-kind contributions) is from non-Federal sources, or an appropriation, as provided in Chapter 2, paragraph 14 (c)(2)(b) of the M 7100.1. (See Section 1404 (b)(1)(B)(i) of the Act.)

Note.—Funds subgranted to Indian tribes or Native American organizations on Indian reservations will require only a 5 percent minimum match (cash or in-kind) of the total costs of the VOCA supported victim assistance program or project.

(3) If it is a new program that has not yet demonstrated a record of effective services as required under (2) above, it may be eligible for funding if it demonstrates substantial financial support from non-Federal sources. "Substantial financial support" means that at least thirty-five percent (35%) of its budget is in the form of a *cash or in-kind* contributions from non-Federal sources or an appropriation as provided in Chapter 2, paragraph 14(c)(2)(b) of the M 7100.1. [See Section 1404(b)(1)(B)(ii) of the Act.]

Note.—Funds subgranted to Indian tribes or Native American organizations on Indian reservations will require only a 5 percent minimum match (cash or in-kind) of the total costs of the VOCA supported victim assistance program or project.

(4) Utilizes volunteers unless, and to the extent, the State chief executive determines compelling reasons exist to waive this requirement. A "compelling reason" may include statutory or contractual provisions that bar the use of volunteers for certain positions or a lack of persons volunteering after a sustained and aggressive recruitment effort has been conducted.

(5) Promotes within the community served coordinated public and private efforts to aid crime victims. (See Section 1404(b)(1)(D) of the Act.) Because of the various kinds of services needed by victims of crime, services are usually provided by a variety of agencies. Therefore, it is essential that these services be coordinated to ensure continuity of support to the victim and to avoid duplication of effort. In determining whether or not a program meets this requirement, the State shall consider the extent to which the program demonstrates that it will coordinate its activities with other service providers in the community, including Federal victim witness coordinators, so that the best interests of the crime victims are served and interagency communication is enhanced.

(6) Assists victims in seeking available crime victim compensation benefits. (See Section 1404(b)(1)(E) of the Act.) Such assistance may be achieved by identifying and notifying potential recipients of the availability of compensation and assisting them with application forms and procedures. An eligible program must demonstrate that it will coordinate its activities with the State compensation program, where one exists.

D. Crime victim assistance funds shall be used only to provide direct services to victims of crime. (Section 1404(b)(2).) For purposes of these proposed Guidelines, services to victims of crime means those activities that directly benefit individual crime victims including the required and necessary coordination of such activities, i.e., coordination of volunteers and/or coordination of services to the victim which must be provided by other community agencies. Activities unrelated or only tangentially related to the provision of direct services to victims are not eligible for support. Likewise, indirect costs which are often imposed by Indian tribes on Federal grants are not permissible in VOCA funded victim assistance grants.

(1) Examples of ineligible activities include (see earlier discussion of each of the following activities):

(a) Community education;

(b) Crime prevention programs;

(c) Lobbying, legislative or administrative advocacy for particular victim legislation or administrative reform;

(d) Perpetrator rehabilitation or counseling except for those programs which treat family violence victims and perpetrators, and are aimed at the reunification of the family;

(e) Needs Assessments, Surveys, Manuals, and Protocols;

(f) Fundraising

(g) Equipment purchases/capital expenditures

(h) Professional services of doctors an lawyers

(i) Witness management or notification program;

(j) Criminal justice improvements.

(2) "Services to victims of crime" include, but are not limited to, the following;

(a) Crisis intervention services that meet the urgent short-term emotional or physical needs of crime victims. Crisis intervention services programs are encouraged to coordinate the provision of 24 hour services which may include the operation of a crisis hotline that provides emergency counseling or referral for crime victims;

(b) Emergency services that provide temporary shelter for crime victims who cannot safely remain in their current lodgings offer measures such as repair of locks, or boarding-up of windows to prevent the immediate reburglarization of a home or an apartment, or provide crime victims with petty cash for meeting immediate needs related to transportation, food, shelter, and other necessities;

(c) Support services that include follow-up counseling following the initial traumatic event; reassurance, empathetic listening, and guidance for resolving practical problems created by the victimization experience; acting on the victims behalf vis-a-vis other social services and criminal justice agencies; assistance in obtaining the swift return of property being kept by police as evidence; intervention, as appropriate, with landlords, creditors or employers; and referral to other sources of assistance, as needed;

(d) Court-related services that assist crime victims in participating in criminal justice proceedings including transportation to court, child care, and escort services;

(e) Payment of all reasonable costs for a forensic medical examination of a crime victim, to the extent that such costs are not otherwise reimbursed or paid by a third party.

Note.—Funds may only be used to pay for those forensic medical examinations that conform to standards adopted by the State or meet the evidentiary requirements of the local prosecutor.

E. The State must establish procedures to assure that funds subgranted to an eligible crime victim assistance program are expended only for providing services to victims of crime. These procedures shall require a program to demonstrate to the State that the assistance funds it requested are directly related to the delivery of services to crime victims. Any costs, with the exception of audit expenses at the subgrant level, not directly related to service delivery for crime victims must not be charged to a subgrant. Programs that serve both victims and non-victims must resonably prorate their costs to assure that crime victims funds, are used only for victim services.

IV Application Requirements

A. *Application Submission.* Applications for crime victim assistance grants must be submitted by the chief executive officer or his/her designee. The Office for Victims of Crime will provide a program Instruction and Application Kit to each State. The application kit shall include: SF 424-Application for Federal Assistance, a list of assurances, a table of Fund allocations, and additional guidance on how to prepare and submit an application for crime victim assistance grants. The Program Instruction and Application Kit will serve as the guidance document regarding application submission and content.

B. *Application Specificity.* Applications from the State need not specify the subgrants the State intends to make with the Federal crime victim assistance funds it receives. However, in the application, States must identify the "previously underserved" crime victim population to be served in the State with Federal victim assistance grant funds and discuss how the determination was made.

V. Reporting Requirements

A report to the President and Congress from OVC on the monies collected for the Crime Victims Fund from each source described in section 1402 and on the effectiveness of the activities supported by the Fund is due on December 31, 1990, and on December 31, every two years thereafter.

Reporting requirements for this program are designed to provide the Office for Victims of Crime with meaningful information about the use of VOCA funds, progress in the delivery of victim services nationwide, and compliance with VOCA Program Guidelines.

Section 1407(b) of the Victims of Crime Act, as amended, requires each recipient of Federal victim assistance grant funds to maintain records as the Director of the Office for Victims of Crime may prescribe including records that fully disclose the amount and disposition by the recipient of sums, the total cost of the undertaking for which such sums are used, and that portion of the cost of the undertaking supplied by other surces, and any other records that will facilitate an effective audit. Section 1407(f) permits the Director to: (1) Terminate payments to a State; (2) suspend payments to a State until the Director is satisfied that noncompliance has ended; or take other action as appropriate towards any State failing to comply substantially with any provision of the Victims of Crime Act or Program Guidelines requirement.

A. *Subgrant Award Report.* The State is required to notify the Office for Victims of Crime within thirty (30) days of an award of a subgrant, or of a change in an award to a subgrant recipient, and provide all information required to complete a Subgrant Award Report form provided by the Office for Victims of Crime. This information is required on each individual project which receives Federal Crime victim assistance funds. If Federal victim assistance grant funds are passed through to another agency to further determine the distribution of funds, a Subgrant Award Report form must be completed for each program receiving Federal Victim assistance grant funds. This report provides the Office for Victims of Crime with information necessary to determine compliance with the Victims of Crime Act, Program Guidelines, and provides information necessary to determie the status of VOCA funded victim services in each State. Each State Administrator must notify OVC in their application of the approximate number of Subgrant Award Report forms they will need to meet this program requirement.

Note.—OVC will provide the State with blank forms with the notification of award or at a later date, if not available at that time.

B. *Performance Report.* The State crime victim assistance agency receiving Federal victim assistance grant funds under the Victims of Crime Act is required to submit a performance report 90 days after the end of each annual grant, in the format and on the form provided by the Office for Victims of Crime. The State Administrator is responsible for compiling the information and submitting a report to the Office for Victims of Crime. The performance report provides information on the effect the Federal funds have had on services to crime victims in the State. This report should be submitted to the Office for Victims of Crime, Office of Justice Programs, 633 Indiana Avenue NW., Washington, DC 20531, by December 30.

Note.—OVC will provide each State with a copy of the program performance report form with the notification of award, or at a later date, if not available at the time of the award.

c. *Financial Status Report.* A Financial Status Report (Form H-1) is required for all grants. This report shall be submitted by the grantee within 45 days after the end of each calendar quarter. Final reports are due 90 days after the end of the grant. Failure to comply with this requirement may result in administrative action such as the

withholding of payments, cancellation of a Letter of Credit, or noncertification of new grant awards. In lieu of using the H-1, grantees may satisfy the financial reporting requirements by completing the H-1 turnaround document. This document is a facsimile of the H-1 extracted from the grantor agency's computer files and sent directly to each grantee. Pertinent information such as grantee name, address, grant number, and the previously submitted financial information (if any) is printed on the form by the computer.

Note.—Obligation and expenditure data must be reported at the subgrantee level.

VI. Financial Requirements

A. *Payment of Grant Funds*

1. *Annual Requirements Under $120,000.* Grantees whose annual fund requirement is less than $120,000 will receive Federal funds on a "Check Issued" basis. Upon receipt, review and approval of a Request for Advance or Reimbursement, H-3 Report (OJP, Form 7160/3) by the grantor agency, a voucher and a schedule for payment is prepared for the amount approved. This schedule is forwarded to the U.S. Treasury requesting issuance and mailing of the check directly to the grantee or its designated fiscal agent. A request must be limited to the grantee's immediate cash needs and submitted at least monthly.

2. *Annual Requirements Over $120,000.* Grantees whose annual fund requirement exceeds $120,000 generally receive Federal funds by utilizing the "Letter of Credit" procedures. This funding method is a cash management process prescribed by the U.S. Treasury for all major grant-in-aid recipients.

3. *Check Issuance.* All checks drawn for the payment of fund requests, either under the "Check Issued" or the "Letter of Credit" process, are prepared and disbursed by the U.S. Treasury and *not* by the grantor agency.

4. *Termination of Advance Funding.* If a grantee organization receiving cash advances by letter of credit or by direct Treasury check demonstrates an unwillingness or inability to establish procedures that will minimize the time elapsing between cash advances and disbursement, the grantor agency may terminate advance funding and require the grantee organization to finance its operations with its own working capital. Payments to grantee will then be made by the direct Treasury check method to reimburse the grantee for actual cash disbursements. It is essential that the grantee organization maintain a minimal amount of cash on hand and that drawdowns of cash are made only when necessary for disbursements.

B. *Cost Allowability.* The Victims of Crime Act of 1984, as amended, specifically states that crime victim assistance grant funds may be used only for providing direct services to victims of crime. Only those costs directly related and essential to providing direct services to crime victims can be charged to the VOCA funded subgrant. The following items require specific discussion. For further guidance, see Office of Justice Programs' *Financial and Administrative Guide for Grants,* M7100.1, Chapter 5.

(1) *Audit costs:* Although under OMB Circular A-128 audit costs are generally allowable charges under Federal grants, audit costs incurred at the grantee (State) level are determined to be an administrative expense and, therefore, *cannot* be paid for with crime victim assistance grant funds. Reasonable audit costs incurred at the subgrantee level are, however, considered directly related and essential to the operation of the program and may be reimbursed as allowable costs.

(2) *Training:* An eligible subgrantee of crime victim assistance grant funds may only include as a budget item the reasonable cost of staff development for those persons (salaried and volunteer) staff who provide direct services to crime victims. Also included as an allowable cost are the necessary and reasonable travel expenses related to the participation of direct service staff in eligible training programs. Such costs are, however, permitted only within the State or a comparable geographic regon;

(3) *Printing and Postage:* An eligible subgrantee of crime victim assistance grant funds may include as a budget item reasonable costs of printing and distributing brochures and similar announcements to describe their program's victim services and how to obtain these services.

(4) *Examples of Ineligible Costs include:* the administrative costs associated with conducting surveys and needs assessments, developing manuals and protocols, fees for professional services rendered by doctors and lawyers, and those costs associated with fundraising activities.

c. *Audit Responsibilities.* Pursuant to the Office of Management and Budget (OMB) Circular A-128, "Audits of State and Local Governments," grantees, subgrantees, and subrecipients have the responsibility to provide for an audit of their activities. These audits shall be made annually, unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. Note: Institutions of higher education, hospitals, and other nonprofit organizations have the responsibility to provide for an audit of their activities not less than every two years. While governments (state and local) receiving less than $25,000 in any fiscal year are exempt from a single audit, there is no audit exclusion for private nonprofit organizations. However, where state and local governments and nonprofit organizations received grants or other agreements less than $100,000 and do not obtain audits that meet the requirements of OMB Circulars A-110 and A-128, DOJ grantor organizations shall ensure that Federal funds are spent in accordance with applicable laws and regulations. Techniques to use to determine recipient compliance with Federal requirements are:

(1) Recipient obtained audits made in accordance with the Standards for Audit of Governmental Organizations, Programs, Activities, and Functions issued by the Comptroller General;

(2) Previous audits performed on recipients' operations;

(3) Desk reviews by program officials of project documentation;

(4) Project audits by Federal auditors or auditors obtained by recipients;

(5) Evaluations of recipients' operations by program officials.

These audits shall be made by an independent auditor in accordance with generally accepted government auditing standards governing financial and compliance audits. The required audits are to be performed on an organization-wide basis as opposed to a grant-by-grant basis. The audit reports must include:

(1) The auditor's reprot on financial statements of the recipient organization and a schedule of financial assistance showing the total expenditure for each Federal assistance program;

(2) The auditor's report on compliance containing:

(A) A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;

(B) a negative assurance of those items not tested and a summary of all instances of noncompliance; and

(C) the auditor's report on the study and evaluation of internal control systems, which must identify the organization's significant internal accounting controls designed to provide reasonable assurance that Federal programs are being managed in compliance with applicable laws and regulation. It must also identify the

controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of that evaluation.

D. *Audit Objectives.* Grants and other agreements are awarded subject to conditions of fiscal, program and general administration to which the recipient expressly agrees. Accordingly, the audit objective is to review the recipient's administration of grant funds and required non-Federal contributions for the purpose of determining whether the recipient has:

(1) Financial statements of the government, department, agency, or establishment that present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each Federal assistance program.

E. *Audit Implementation.* Grantees are required to specify their arrangement for complying with the provisions of OMB Circular A-128 and include in their grant application, to the extent possible, the following information:

(1) The identity of the organization that will conduct the audit;

(2) Approximate timing of when the audit will be performed;

(3) Audit coverage to be provided. Where the audit will not provide the coverage requirements as specified previously, the audit policy or procedures must describe the specific arrangements for obtaining audit services that will meet the requirements;

(4) An identification of the audit standards, if any, with which the grantee will not comply;

(5) Receipt and appropriate distribution of the resultant audit report; and

(6) Audit resolution policies and procedures to be followed in resolving the audit report.

F. *Fund Suspension or Termination.* If, after notice and opportunity for a hearing, the Office for Victims of Crime, Office of Justice Programs finds that a State has failed to substantially comply with the Victims of Crime Act, M7100.1, these proposed implementing Guidelines, or any implementing regulation, the Office for Victims of Crime, Office of Justice Programs may suspend or terminate funding to the State, or take other appropriate action. Only States may request a hearing; Subgrantees in the State may not.

VII. Additional Requirements

A. *Civil Rights*

(1) *General.* The Act provides that no person shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in connection with any activity receiving funds under the Act on the basis of race, color, religion, national origin, handicap, or sex. (See Section 1407(e) of the Act.) Recipients of funds under the Act are also subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (prohibiting discrimination in Federally-funded programs on the basis of race, color, or national origin), Section 504 of the Rehabilitation Act of 1973, 2 U.S.C. 794 (prohibiting discrimination in such programs on the basis of handicap), the Age Discrimination Act of 1975, 42 U.S.C. 6101, *et seq.*, and the Department of Justice Nondiscrimination Regulations, 28 CFR Part 42, Subparts C, D, and G.

(2) *Required Assistance and Information.* To be eligible for funding under the Act, a crime victim assistance program must submit the following assurances and information:

(a) An assurance that the program will comply with all applicable nondiscrimination requirements;

(b) An assurance that in the event a Federal or state court or Federal or state administrative agency makes a finding of discrimination after a due process hearing, on the grounds of race, color, religion, national origin, sex, age or handicap against the program, the program will forward a copy of the finding to the Office of Justice Programs, Office for Civil Rights (OCR);

(c) The name of the civil rights contact person who has lead responsibility in ensuring that all applicable civil rights requirements are met and who shall act as liaison in civil rights matters with OCR;

(d) An assurance that programs will maintain information on victim services provided by race, national origin, sex, age and handicap. Note: States are not required to submit this information as part of their program performance report.

B. *Confidentiality of Research Information.* No recipient of monies under the Victims of Crime Act of 1984, as amended, shall use or reveal any research or statistical information furnished under this program by any person and identifiable to any specific private person for any purpose other than the purpose for which such information was obtained in accordance with this program and Act. Such information shall be immune from legal process and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceeding. (See section 1407(d) of the Act.) This provision is intended, among other things, to assure the confidentiality of information provided by crime victims to crisis intervention counselors working for victim services programs receiving funds provided under this Act. Whatever the scope of application given this provision, it is clear that there is nothing in the Act or its legislative history to indicate that Congress intended to override or repeal, in effect, a State's existing law governing the disclosure of information which is supportive of the Act's fundamental goal of helping crime victims. For example, this provision would not act to override or repeal, in effect, a State's existing law pertaining to the mandatory reporting of suspected child abuse. See *Pennhurst State School and Hospital* v. *Halderman, et al.*, 451 U.S.1 (1981).

Approved:

Jane Nady Burnley,

Director, Office for Victims of Crime.

[FR Doc. 89-5217 Filed 3-6-89; 8:45 am]

BILLING CODE 3-6

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-416]

System Energy Resources, Inc., et al.; Grand Gulf Nuclear Station, Unit 1 Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-29, issued to Systems Energy Resources, Inc., *et. al.* (the licensee), for operation of the Grand Gulf Nuclear Station, Unit 1, located in Claiborne County, Mississippi.

Environmental Assessment

Identification of Proposed Action

The Technical Specifications (TS) Section 4.7.4 concerning surveillance requirements for snubbers contain three alternative sampling plans, one of which must be selected prior to surveillance testing of snubbers. Plan No. 1 requires at least 10% of the total number of each type of snubber to be functionally

tested. If acceptance criteria are not met, an additional 5% are required to be tested until no failures are found or until all snubbers are tested. Plan No. 2 requires an initial sample of at least 37 snubbers to be tested. The plan contains criteria for acceptance of the remainder of the untested population. Criteria for continued testing, and rejection criteria. Rejection criteria require that if the number of failures exceeds a specified small percentage of snubbers tested (7.5% to 10%), then all the remainder of the snubbers must be tested. Plan No. 3 requires an initial sample of at least 55 snubbers to be tested. For each snubber which fails to meet acceptance criteria another sample of at least ½ the size of the initial sample is required to be tested until the total number tested equals the initial sample size times the factor $(1+C/2)$ where C is the number of failed snubbers. Testing continues until acceptance criteria are met or until all snubbers are tested.

The proposed amendment would revise the provisions in the Technical Specifications (TS) relating to Section 4.7.4 concerning surveillance requirements for snubbers by: (1) changing sampling plan No. 2 to eliminate the requirement to test all snubbers if the number of test failures exceeds a specified number, and (2) deleting sampling plan No. 3. In addition, the Bases for TS 3/4.7.4 would be changed to reflect the TS changes.

The proposed action is in accordance with the licensee's application for amendment dated July 25, 1989.

The Need for the Proposed Action

The proposed change to snubber sampling plan No. 2 is needed to reduce radiation exposure to testing personnel by eliminating unnecessary surveillance testing of 100% of the snubbers. The surveillance testing verifies that the snubbers are capable of maintaining the structural integrity of safety related systems during an earthquake or other events resulting in dynamic loads. Sampling plan No. 2 would still require an initial sample of 37 snubbers and continued testing until either the acceptance criteria are met or all the snubbers are tested. The proposed change does not change the acceptance criteria for continued snubber testing. The proposed change would eliminate the rejection criteria, which require testing of 100% of the snubbers if a small number of the sample tested do not meet the acceptance criteria. The elimination of the rejection criteria without changing acceptance criteria will result in an insignificant increase in the probability of accepting snubbers that do not meet acceptance criteria. The radiation exposure accumulated during the first refueling outage for snubber inspections using sampling plan No. 2 was 3.2 man-rem and during the second refueling outage the radiation exposure for snubber inspection was 29 man-rem. The projected potential exposure for the third refueling outage, without the proposed change is 60.2 man-rem. The proposed change to sampling plan No. 2 will reduce radiation exposure by eliminating unnecessary surveillance testing of snubbers.

The proposed elimination of sampling plan No. 3 is requested to simplify the TS. This plan has not been used and there is no need for it in future testing.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed revision to the TS and concludes that the proposed TS would provide a small increase in the probability of operating with snubbers that do not pass functional tests, but the increase is not significant. Therefore, the proposed amendment does not significantly increase the probability or consequences of any accident. The Commission also concludes that the amendment involves no significant increase in the amounts and no significant change in the types of any effluents that may be released offsite and that there should be no significant increase in individual or cumulative occupational radiation exposure because the proposed change would reduce radiation exposure of testing personnel. Accordingly, the Commission concludes that this proposed action would result in no significant radiological environmental impact.

With regard to potential non-radiological impacts, the proposed change to the TS involves requirements with respect to installation or use of a facility component located within the restricted area as defined in 10 CFR Part 20. It does not affect non-radiological plant effluents and has no other environmental impact. Therefore, the Commission concludes that there are no significant non-radiological environmental impacts associated with the proposed amendment.

Alternative to the Proposed Action

Since the Commission concluded that there are no significant environmental effects that would result from the proposed action, any alternatives with equal or greater environmental impacts need not be evaluated.

The principal alternative would be to deny the requested amendment. This would not reduce environmental impacts of plant operation and would result in increased radiation exposure of snubber testing personnel.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the "Final Environmental Statement related to the operation of Grand Gulf Nuclear Station, Units 1 and 2," dated September 1981.

Agencies and Persons Consulted

The NRC staff reviewed the licensee s request and did not consult other agencies or persons.

Finding of No Signficant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed license amendment.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the application for amendment dated July 25, 1988, which is available for public inspection at the Commission's Public Document Room, 2120 L Street, N.W., Washington, DC and at the Hinds Junior College, McLendon Library, Raymond, Mississippi 39154.

Dated at Rockville, Maryland, this 1st day of March 1989.

For the Nuclear Regulatory Commission.

Edward A. Reeves,

Acting Director, Project Directorate II-1, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 89-5207 Filed 3-6-89; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Reactor Safeguards Instrumentation and Control Systems; Meeting

The ACRS Subcommittee on Instrumentation and Control Systems will hold a meeting on March 29, 1989, Room P-110, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, March 29, 1989—1:00 p.m. until the conclusion of business

The Subcommittee will review the proposed resolution of Generic Issue 101, "BWR Water Level Redundancy."

Oral statements may be presented by members of the public with the

concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, its consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Medhat El-Zeftawy (telephone 301/492-9901) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Date February 28, 1989.

Morton W. Libarkin,

Asistant Executive Director for Project Review.

[FR Doc. 89-5200 Filed 3-6-89; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Reactor Safeguards Joint Subcommittees on Materials and Metallurgy and Structural Engineering; Meeting

The ACRS Subcommittees on Marterials and Metallurgy and Structural Engineering will hold a joint meeting on March 23, 1989, Room P-422, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting will be as follows:

Thursday, March 23, 1989-8:30 a.m. Until the Conclusion of Business

The Subcommittees will review the proposed amendment to the pressurized thermal shock (PTS) rule updating the formula given in the PTS rule for calculating the level of radiation embrittlement in reactor vessel beltline and the staff's position on reactor support embrittlement.

Oral statement may be presented by member of the public with the concurrence of the Subcommittee Chairman; written statement will be accepted and made available to the Committee. Recordings will be permitted only druing those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommitee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS Staff member named below as far in advance as is practicable so that apropriate arrangements can be made.

During the inital protion of the meeting, the Subcommittees, along with any of their consultants who may be present, may exchange preliminary views regarding maters to be considered during the balance of the meeting.

The Subcommittees will than hear presentations by and hold discussions with representatives of the NRC Staff, their consultants, and other interested persons regrading this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS Staff member, Mr. Elpidio Igne (telephone 301/492-8192) Between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Date: February 28, 1989.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 89-5201 Filed 3-6-89; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Reactor Safeguards Maintenance Practices and Procedures; Meeting

The ACRS Subcommittee on Maintenance Practices and Procedures will hold a meeting on March 30, 1989, Room P-110, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting will be as follows:

Thursday, March 30, 1989-8:30 a.m. Until the Conclusion of Business

The Subcommittee will review the proposed maintenance rule.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, their consultants, and other interested persons regrading this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS Staff member, Mr. Herman Alderman (telephone 301/492-7750) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Date: February 28, 1989.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 89-5202 Filed 3-6-89; 8:45 am]

BILLING CODE 7590-01-M

Regulatory Guide; Issuance and Availability

The Nuclear Regulatory Commission has issued a new guide in its Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the Commission's regulations, techniques used by the staff in evaluating specific

problems or postulated accidents, and data needed by the staff in its review of applications for permits and licenses.

Regulatory Guide 3.61, "Standard Format and Content for a Topical Safety Analysis Report for a Spent Fuel Dry Storage Cask," provides guidance on the type of information needed by the NRC staff for its evaluation of a Topical Safety Analysis Report for a spent fuel storage cask. The guide also provides a format for submitting this information.

Comments and suggestions in connection with (1) items for inclusion in guides currently being developed or (2) improvements in all published guides are encouraged at any time. Written comments may be submitted to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Regulatory guides are available for inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC. Copies of issued guides may be purchased from the Government Printing Office at the current GPO price. Information on current GPO prices may be obtained by contacting the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013-7082, telephone (202) 275-2060 or (202) 275-2171. Issued guides may also be purchased from the National Technical Information Service on a standing order basis. Details on this service may be obtained by writing NTIS, 5285 Port Royal Road, Springfield, VA 22161.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland this 28th day of February 1989.

For the Nuclear Regulatory Commission.

Eric S. Beckjord,

Director, Office of Nuclear Regulatory Research.

[FR Doc. 89-5208 Filed 3-6-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-369 and 50-370]

Duke Power Co.; Issuance of Amendments to Facility Operating Licenses and Opportunity for Hearing

The United States Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License No. NPF-9 and Facility Operating License No. NPF-17 issued to Duke Power Company (the licensee), for operation of the McGuire Nuclear Station, Units 1 and 2, located in Mecklenburg County, North Carolina.

The proposed amendments would revise Technical Specification (TS) 4.8.1.1.2.e to allow certain 18-month diesel generator surveillances that are presently required to be performed during unit shutdown, to also be conducted during unit operation (i.e., without restriction to the shutdown mode). Specifically, the existing mode restriction would be removed from the following subparagraphs of TS 4.8.1.1.2.e: 2, 3, 5, 8.c, 8, 11, 12, 13, 14, and 15. The remaining subparagraphs would retain the shutdown mode restriction, but the restriction would be designated separately for each subparagraph, rather than collectively. The amendments were requested in a letter dated February 10, 1989.

Prior to issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By April 6, 1989, the licensee may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rule of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene, which must include a list of the contentions that are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, United States Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street, NW. Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner or representative for the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-800-325-6000 (in Missouri 1-800-342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to David B. Matthews, Director, Project Directorate II-3; (petitioner's name and telephone number); (date petition was mailed); (plant name); and (publication date and page number of this Federal Register notice). A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and to Mr. Albert Carr, Duke Power Company, 422 South Church Street, Charlotte, North Carolina 28242.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

If a request for hearing is received, the Commission's staff may issue the amendment after it completes it technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated February 10, 1989, which is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC 20555, and at the Atkins Library, University of North Carolina, Charlotte (UNCC Station), North Carolina 28242.

Dated At Rockville, Maryland, this 1st day of March 1989.

For the Nuclear Regulatory Commission.

Darl S. Hood

Project Manager, Project Directorate II-3, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 89-5205 Filed 3-6-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-282 and 50-306]

Northern States Power Co.; Issuance of Amendments to Facility Operating Licenses and Opportunity for Hearing

The United States Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating Licenses Nos. DPR-42 and DPR-60, issued to the Northern States Power Company (the licensee), for operation of the Prairie Island Nuclear Generating Plant, Units Nos. 1 and 2, located in Goodhue County, Minnesota.

In accordance with the licensee's application for amendments dated October 24, 1988, the amendments would change the operating license to permit the transfer of by-product material to Prairie Island Nuclear Generating Plant facility from other Northern States Power Company job sites for volume reduction and decontamination.

Prior to issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By April 6, 1989, the licensee may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition, and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene, which must include a list of the contentions that are sought to be litigated in the matter and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendments under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-800-325-6000 (in Missouri 1-800-342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Theodore R. Quay (petitioner's name and telephone number); (date petition was mailed); (plant name); and (publication date and page number of this **Federal Register** notice). A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

If a request for hearing is received, the Commission's staff may issue the amendments after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its intent to make a no significant hazards consideration finding in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendments dated October 24, 1988, which is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC 20555, and at the Minneapolis Public Library, Technology and Science Department, 300 Nicollet Mall, Minneapolis, Minnesota 55401.

Dated at Rockville, Maryland, this 28th day of February 1989.

For the Nuclear Regulatory Commission.

Albert W. De Agazio,

Acting Director, Project Directorate III-1, Division of Reactor Projects—III, IV, V & Special Projects.

[FR Doc. 89-5206 Filed 3-6-89; 8:45 am]

BILLING CODE 7590-01-M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Areas #2343]

Declaration of Disaster Loan Area; Kentucky

As a result of the President's major disaster declaration on February 24, 1989, I find that Anderson, Bourbon, Bullitt, Butler, Casey, Franklin, Hardin, Harrison, Henry, Jessamine, Larue, Mercer, Nelson, Owen, Pendleton,

Trimble, Washington, and Woodford Counties, constitute a disaster loan area due to severe storms and flooding beginning on or about February 13, 1989. Eligible persons, firms, and organizations may file applications for physical damage until the close of business on April 27, 1989, and for economic injury until the close of business on November 24, 1989, at the address listed below:

Disaster Area 2 Office, Small Business Administration, 120 Ralph McGill Blvd., 14th Fl., Atlanta, Georgia 30308

or other locally announced locations. In addition, applications for economic injury from small businesses located in the contiguous counties of Adair, Boyle, Bracken, Breckinridge, Campbell, Carroll, Clark, Edmonson, Fayette, Gallatin, Garrard, Grant, Grayson, Green, Hart, Jefferson, Kenton, Lincoln, Logan, Madison, Marion, Meade, Montgomery, Muhlenberg, Nicholas, Ohio, Oldham, Pulaski, Robertson, Russell, Scott, Shelby, Spencer, Taylor, and Warren in the State of Kentucky; Clark, Harrison, and Jefferson Counties in the State of Indiana; and Clermont County in the State of Ohio may be filed until the specified date at this location.

The interest rates are:

Homeowners with credit available elsewhere	8.000%
Homeowners without credit available elsewhere	4.000%
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000%
Businesses and non-profit organizations (EIDL) without credit available elsewhere	4.000%
Others (including non-profit organizations) with credit available elsewhere	9.125%

The number assigned to this disaster for physical damage is 234306 for the State of Kentucky. For economic injury the numbers are 673100 for the State of Kentucky; 673200 for the State of Indiana; and 673300 for the State of Ohio.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Date: February 28, 1989.

Bernard Kulik,

Deputy Associate Administrator for Disaster Assistance.

[FR Doc. 89-5226 Filed 3-6-89; 8:45 am]

BILLING CODE 8025-01-M

[Declaration of Disaster Loan Areas #2340, #2341, & #2342]

Pennsylvania (And Contiguous Counties in the States of Maryland & Delaware); Declaration of Disaster Loan Area

The Borough of Phoenixville, Chester County, and the contiguous counties of Berks, Delaware, Lancaster, and Montgomery, in the State of Pennsylvania; Cecil County, in the State of Maryland; and New Castle County, in the State of Delaware, constitute a disaster area as a result of damage from a fire in the Wallblock Inn, in the Borough of Phoenixville, which occurred on February 10, 1989. Applications for loans for physical damage as a direct result of this fire may be filed until the close of business on May 1, 1989 and for economic injury as a direct result of this fire until the close of business on December 1, 1989 at the address listed below: Disaster Area 2 Office, Small Business Administration, 120 Ralph McGill Blvd., 14th Fl., Atlanta, GA 30308; or other locally announced locations.

The interest rates are:

	Percent
Homeowners With Credit Available Elsewhere	8.000
Homeowners Without Credit Available Elsewhere	4.000
Businesses With Credit Available Elsewhere	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
Businesses and Non-Profit Organizations (EIDL) Without Credit Available Elsewhere	4.000
Others (Including Non-Profit Organizations) With Credit Available Elsewhere	9.125

The numbers assigned to this disaster for physical damage are 234005 for the State of Pennsylvania; 234105 for the State of Maryland; and 234205 for the State of Delaware. For economic injury the numbers are 672800 for the State of Pennsylvania; 672900 for the State of Maryland, and 673000 for the State of Delaware.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: March 1, 1989.

James Abdnor,

Administrator.

[FR Doc. 89-5225 Filed 3-6-89; 8:45 am]

BILLING CODE 8025-01-M

Region IX Advisory Council; Public Meeting

The U.S. Small Business Administration, Region IX Advisory Council, located in the geographical area of San Diego, will hold a public meeting at 10:00 a.m. on Tuesday, March 21, 1989, at the Federal Building, 880 Front Street, San Diego, California 92188, Room 2-S-14, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call George P. Chandler, Jr., District Director, U.S. Small Business Administration, 880 Front Street, Suite 4-S-29, San Diego, California 92188, 619/557-7252.

Jeannette M. Pauli,

Acting Director, Office of Advisory Councils.

February 28, 1989.

[FR Doc. 89-5222 Filed 3-6-89; 8:45 am]

BILLING CODE 8025-01-M

Region VII Advisory Council; Public Meeting

The U.S. Small Business Administration, Region VII Advisory Council, located in the geographical area of Des Moines, will hold a public meeting at 10:00 a.m. on Wednesday, May 3, 1989, at the Grinnell City Hall, 927 4th Avenue, Grinnell, Iowa, to meet jointly with the Advisory Council for the U.S. Small Business Administration District Office located in Cedar Rapids, Iowa, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Conrad Lawlor, District Director, U.S. Small Business Administration, Grinnell City Hall, 927 4th Avenue, Grinnell, Iowa, 515/284-4567.

Jeannette M. Pauli,

Acting Director, Office of Advisory Councils.

February 28, 1989.

[FR Doc. 89-5224 Filed 3-6-89; 8:45 am]

BILLING CODE 8025-01-M

Region VII Advisory Council; Public Meeting

The U.S. Small Business Administration, Region VII Advisory Council, located in the geographical area of St. Louis and Eastern Missouri, will hold a public meeting at 9:00 a.m. on Tuesday, March 21, 1989, at Peat Marwick Main & Co., 1010 Market Street, 20th Floor Conference Room, St. Louis, Missouri 63101, to discuss such matters as may be presented by

members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Robert L. Andrews, District Director, U.S. Small Business Administration, 815 Olive St., Room 242, St. Louis, Missouri 63101, 314/539-6600.

Jeannette M. Pauli,

Acting Director, Office of Advisory Councils.

February 28, 1989.

[FR Doc. 89-5223 Filed 3-6-89; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket 45951]

Application of Nashville Eagle, Inc., d/b/a American Eagle for Certificate Authority Under Subpart Q

AGENCY: Department of Transportation.

ACTION: Notice of order to show cause, Order 89-3-3.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Nashville Eagle, Inc., fit and awarding it a certificate of public convenience and necessity to engage in domestic scheduled air transportation of persons, property, and mail.

DATES: Persons wishing to file objections should do so no later than March 17, 1989.

ADDRESSES: Objections and answers to objections should be filed in Docket 45951 and addressed to the Documentary Services Division (C-55, Room 4107), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Mrs. Janet A. Davis, Air Carrier Fitness Division (P-56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-9721.

Dated: March 1, 1989.

Patrick V. Murphy, Jr.,

Deputy Assistant Secretary for Policy and International Affairs.

[FR Doc. 89-5203 Filed 3-6-89; 8:45 am]

BILLING CODE 4910-62-M

[Docket No. 45613]

Brazil Cargo Charter Allocations (1989); Invitation to Apply

AGENCY: Department of Transportation.

ACTION: Invitation to apply for Brazil Cargo Charter Allocations (Order 89-3-2).

SUMMARY: On January 16, 1989, delegations of Brazil and the United States initialled a draft agreement which substantially expands charter air transportation opportunities for carriers of both countries. The charter provision of the *ad referendum* agreement provides for 100 round-trip cargo charters for carriers of each side to be operated during the 12-month period beginning April 1, 1989. Because of an earlier allocation which overlaps this period (Order 88-12-43), 69 charters now are available for distribution. The Department has decided to invite applications from carriers interested in operating some or all of these charters.

DATES: Applications shall be filed by March 16, 1989. Answers shall be filed not later than 7 calendar days thereafter.

ADDRESSES: Applications should be filed in Docket 45613, addressed to the Documentary Services Division, U.S. Department of Transportation, 400 Seventh Street, SW., Room 4107, Washington, DC 20590, and should be served on all parties in Docket 45613.

Dated: March 1, 1989.

Patrick V. Murphy,

Deputy Assistant Secretary for Policy and International Affairs.

[FR Doc. 89-5204 Filed 3-6-89; 8:45 am]

BILLING CODE 4910-62-M

Federal Highway Administration

Environmental Impact Statement

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 on the Lower Columbia River Highway (U.S. 30) in Columbia County, Oregon.

FOR FURTHER INFORMATION CONTACT: Elton Chang, Environmental Coordinator and Safety Programs Engineer, Federal Highway Administration, Equitable Center, Suite 100, 530 Center NE, Salem, Oregon 97301. Telephone: (503) 399-5749.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Oregon Department of Transportation, will prepare an environmental impact statement (EIS) on a proposal to reconstruct a 6.3-mile section of the Lower Columbia River Highway (U.S. 30) in Columbia County, Oregon. The project would upgrade the existing two-four-lane roadway to a continuous four-lane section with a turning median and shoulder bicycle lanes included throughout. A sidewalk on one side would be provided in the urban sections of this improvement. The project is located on a highway which has been designated for improvement to promote economic development in Oregon ("Access Oregon Highway"). The project follows the Columbia River and passes through the small cities of St. Helens and Columbia City. The proposed improvement is considered necessary to provide for the existing and projected traffic demand and a safe and efficient highway meeting modern design standards.

Alternatives under consideration include the no-build and two alignment-shift options for the build alternative. One option would reduce project encroachment on adjacent residences and businesses by acquiring land from the Burlington Northern Railroad which abuts the existing highway right-of-way on one side throughout most of the project. The difference between the two build alignment options would be approximately a 10-foot shift in the proposed center line of the roadway.

Information describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies. Public meetings will be held during project development, and a public hearing will be held. No formal scoping meeting is planned at this time.

Comments or questions concerning this proposed action and the EIS 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 provisions of Executive Order 12372, "Intergovernmental Review of Federal Programs" apply to this program.)

Issued on: February 27, 1989.

Elton H. Chang,

Environment Coordinator/Safety Program Engineer, Oregon Division, Salem, Oregon.

[FR Doc. 89-5175 Filed 3-6-89; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF THE TREASURY

Fiscal Service

[Dept. Circ. 570, 1988 Rev., Supp. No. 7]

Surety Companies Acceptable on Federal Bonds SCOR Reinsurance Co.

A Certificate of Authority as an acceptable surety on Federal Bonds is

hereby issued to the following company under sections 9304 to 9308, Title 31, of the United States Code. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1988 Revision, on page 25074 to reflect this addition:

SCOR Reinsurance Company. Business Address: 110 William Street, 15th Floor, New York, New York 10038. Underwriting Limitation [b]: $10,122,000. Surety Licenses [c]: AL, AR, CO, DE, FL, ID, IL, IA, LA, MD, MA, MN, MS, NE, NM, NY, OH, OR, PA, SC, TX, VT, WA, WY. Incorporated in: New York. Federal Process Agents [d].

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR Part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

Copies of the Circular may be obtained from the Surety Bond Branch, Finance Division, Financial Management Service, Department of the Treasury, Washington, DC 20227, telephone (202) 287-3921.

Dated: March 1, 1989.

Mitchell A. Levine,

Assistant Commissioner, Comptroller, Financial Management Service.

[FR Doc. 89-5171 Filed 3-6-89; 8:45 am]

BILLING CODE 4810-35-M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 43
Tuesday, March 7, 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 DEPOSIT INSURANCE CORPORATION

Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 3:07 p.m. on Wednesday, March 1, 1989, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session, by telephone conference call, to consider the following matters:

Recommendation regarding an administrative enforcement proceeding.

Recommendation concerning a request for certification under the Technical and Miscellaneous Revenue Act of 1988.

Recommendation concerning the Corporation's assistance agreement with an insured bank pursuant to section 13(c) of the Federal Deposit Insurance Act.

Recommendation regarding the Corporation's liquidation activities.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Director Robert L. Clarke (Comptroller of the Currency), concurred in by Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

Dated: March 2, 1989.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 89-5368 Filed 3-3-89; 3:41 pm]

BILLING CODE 6714-01-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

March 1, 1989.

TIME AND DATE: 10:00 a.m., Thursday, March 9, 1989.

PLACE: Room 600, 1730 K Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. *Tennessee Chemicals, Inc.*, Docket No. SE 85-63-M. (Issues include consideration of whether a violation occurred and whether it was the result of the operator's gross negligence.)
2. *Consolidation Coal Company*, Docket No. VA 87-27. (Issues include consideration of whether a violation occurred.)

Any person intending to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen, (202) 653-5639/(202) 566-2673 for TDD Relay.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 89-5269 Filed 3-3-89; 12:38 pm]

BILLING CODE 6735-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 11:00 a.m., Monday, March 13, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. 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: March 3, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-5359 Filed 3-3-89; 3:41 pm]

BILLING CODE 6210-01-M

UNITED STATES INTERNATIONAL TRADE COMMISSION

TIME AND DATE: Wednesday, March 8, 1989 at 3:00 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda
2. Minutes
3. Ratifications
4. Petitions and Complaints:
   Certain Crystalline Cefadroxil Monohydrate Products (D/N 1488).
5. Any items left over from previous agenda.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary, (202) 252-1000.

Kenneth R. Mason,

Secretary.

February 24, 1988.

[FR Doc. 89-5382 Filed 3-3-89; 4:02 pm]

BILLING CODE 7020-02-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of March 6, 13, 20, and 27, 1989.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of March 6

Monday, March 6

10:00 a m.
Briefing on Operator Training (Public Meeting)

2:30 p.m.
Briefing on Status of Generic Issues (Public Meeting)

Week of March 13—Tentative

Monday, March 13

2:00 p.m.
Classified Security Briefing (Closed—Ex. 1)

Wednesday, March 15

10:00 a.m.
Briefing on Acceptance by DOE of Greater Than Class C Waste (Public Meeting)

2:00 p.m.
Preliminary Briefing on the Status of NUREG-1150 (Public Meeting)

Thursday, March 16

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of March 20—Tentative

Wednesday, March 22

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of March 27—Tentative

Tuesday, March 28

2:00 p.m.
Discussion/Possible Vote on Full Power Operating License for South Texas, Unit 2 (Public Meeting)

Wednesday, March 29

10:00 a.m.
Briefing on Staff Proposal on Continuity of Government Program (Closed—Ex. 1)
2:00 p.m.
Briefing on Status of West Valley Project (Public Meeting)

Thursday, March 30

10:00 a.m.
Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)
2:00 p.m.
Discussion/Possible Vote on Full Power Operating License for Vogtle, Unit 2 (Public Meeting)
3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting)

ADDITIONAL INFORMATION: Affirmation of "Final Rulemaking—Fitness-for-Duty Programs" scheduled for March 2, *postponed.*

By a vote of 4–0 (Commissioner Curtiss not participating) on March 2, 1989, the Commission determined pursuant to 5 U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that Commission business required that "Affirmation of Commission Decision—Shoreham Sanction Issue" (Public Meeting) scheduled for March 3, 1989, be held on less than one week's notice to the public.

Note.—Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING): (301) 492–0292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 492–1661.

William M. Hill, Jr.,
Office of the Secretary.
March 2, 1989.

[FR Doc. 89–5365 Filed 3–3–89; 3:41 pm]
BILLING CODE 7590–01–M

UNITED STATES INTERNATIONAL TRADE COMMISSION

USITC SE–89–09

TIME AND DATE: Wednesday, March 15, 1989 at 12:00 p.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda
2. Minutes
3. Ratifications
4. Petitions and Complaints:
   Certain Carrier Material Bearing Thermally Transferable Ink Compositions Used in a Process for Dry Adhesive-Free Thermal Transfer of Said Ink Compositions (D/N 1493).
5. Inv. No. 731–TA–389 (F) (3.5 Inch Microdisks and Media Therefor from Japan)—briefing and vote.
6. Inv. No. 731–TA–410 (F) (Certain Light-Walled Rectangular Pipes and Tubes from Taiwan)—briefing and vote.
7. Any items left over from previous agenda.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary, (202) 252–1000.

Kenneth R. Mason,
Secretary.

March 2, 1988.

[FR Doc. 89–5383 Filed 3–3–89; 4:17 pm]
BILLING CODE 7020–02–M

Corrections

Federal Register
Vol. 54, No. 43
Tuesday, March 7, 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 HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 522

Implantation or Injectable Dosage Form New Animal Drugs Not Subject to Certification; Progesterone and Estradiol Benzoate

Correction

In rule document 89-3936 appearing on page 7406 in the issue of Tuesday, February 21, 1989, make the following correction:

In the second column, in the authority citation, in the first and second lines, "(21 U.S.C. 3606(i))" should read "21 U.S.C. 360b(i))".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 88N-0319]

Blood Collection Kits Labeled For Human Immunodeficiency Virus Type I (HIV-1) Antibody Testing; Home Test Kits Designed To Detect HIV-1 Antibody; Open Meeting

Correction

In notice document 89-3734 beginning on page 7279, in the issue of Friday, February 17, 1989, make the following corrections:

1. On page 7280, in the second column, in the first complete paragraph, in the first line, "receiving" should read "reviewing,".

2. On the same page, in the third column, in the paragraph designated "4", in the sixth line, "kid". should read "kit".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

14 CFR Part 241

[Docket No. 45529; Amdt. No. 241-58]

RIN 2137-AA99

Aviation Economic Regulations; Updating the Accounting Provisions for Changes in GAAP

Correction

In the issue of Monday, February 27, 1989, on page 8261, the headings of the correction document that appeared in the third column, were innaccurate and should read as they appear above.

BILLING CODE 1505-01-D

federal register

Tuesday
March 7, 1989

Part II

Environmental Protection Agency

Filing System Guidance for Implementing 1506.9 and 1506.10 of the CEQ Regulations

ENVIRONMENTAL PROTECTION AGENCY

Filing System Guidance for the Implementation of 1506.9 and 1506.10 of the CEQ Regulations Implementing the Procedural Provisions of the NEPA

Preamble

In 1978, the Council of Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) entered into a Memorandum of Agreement on the allocation of responsibilities of the two agencies for assuring the government-wide implementation of the National Environmental Policy Act of 1969 (NEPA). These responsibilities are consistent with the 1978 CEQ NEPA-Implementing Regulations (40 CFR Parts 1500–1508).

The Memorandum of Agreement transferred to EPA operational duties associated with the administrative aspects of the environmental impact statement (EIS) filing process. The Office of Federal Activities has been designated the official recipient in EPA of all EISs. It should be noted that the operational duties associated with the administrative aspects of the EIS process are totally separate from the substantive EPA reviews performed pursuant to both NEPA and section 309 of the Clean Air Act.

The purpose of the EPA Filing System paper is to provide guidance to federal agencies on filing EISs, including draft, final, and supplemental EISs. Information is provided on (1) Where to file; (2) number of copies required; (3) information required in the transmittal letter; (4) steps to follow when a federal agency is adopting an EIS or when an EIS is being withdrawn, delayed or reopened; (5) review periods; (6) notice of availability in the **Federal Register**; and, (7) retention of filed EISs.

On August 10, 1988, following consultation with CEQ, EPA sent the draft paper to 26 federal agencies for comment prior to its submission to the **Federal Register** for formal publication and implementation. EPA received comment letters from 16 agencies. Although this preamble does not respond to each comment individually all were carefully considered. A synopsis of the comments, other than editorial, and EPA's response follow:

Section 3—Filing an EIS-Draft, Final and Supplemental

As requested, clarification has been made that completion of the transmittal of an EIS is accomplished simultaneously with the filing with EPA.

It was recommended that the cover letter include the official issuing agency number for the EIS being filed. EPA does not use an agency's number for the EIS being filed; therefore, it is not needed in the cover letter. An agency may, if it wishes, include the number because of internal requirements.

Information has been added to clarify that, in the case of filing an EIS that is not hand carried, the cover letter should state that transmittal has been completed. In addition, EPA will telephone the filing agency to verify that EPA has received the EIS.

At the recommendation of a commenter, EPA will now include a reference in the Notice of Availability when an agency adopts an EIS that does not require recirculation. This will not reopen the public comment period, but will complete the public record.

Several agencies commented on EPA's role in checking an EIS for "completeness and compliance." In response the specific subsection of the CEQ Regulations that recommends the standard format that an agency should follow unless the agency determines that there is a compelling reason to do otherwise has been identified—§ 1502.*10* of the CEQ Regulations—for clarification. EPA's review is to assure that the document meets certain minimum administrative requirements, i.e., there is a cover sheet, a summary of the statement, a table of contents, the name, address and telephone number of the agency is included, cooperating agencies are listed, etc. The format and explanation of each is found in § 1502.10 of the CEQ regulations. The review does *not* address the quality of the document's substance. Further, it is totally independent of EPA's review on environmental impacts under Section 309 of the Clean Air Act.

One commenting agency suggested deleting the sentence concerning reopening an EIS review period after a substantial amount of time has passed since the original review period closed. The commenting agency objected to the use of the word "substantial" without defining the term. EPA believes that the word substantial stands on its own merits and suggests that agencies use their best judgment in deciding what is reasonable. The intent is to keep the public informed. EISs reopened for review will be published in the Notice of Availability to inform all interested parties and to keep the public record current.

Section 4—Notice in the **Federal Register**

Language has been added to clarify that the Notice of Availability is published each Friday in the **Federal Register** for those EISs filed during the preceding week—e.g., the notice is published on January 13th for EISs filed between January 2nd and January 6th.

The last paragraph of this section has been deleted at the request of CEQ. CEQ will remain solely responsible for notification to the public of referral actions due to the process timeframes called for in the current CEQ Regulations.

Section 5—Time Periods

The section heading and opening paragraph have been edited to address many comments requesting clarification of time periods for draft and final EISs. The time period for review and comment on draft EISs shall not be less than 45 "calendar" days. CEQ Regulations do not address a review period for a final EIS. It is a 30 "calendar" day wait period during which no decision may be made to proceed with the proposed action.

Additional information has been added to address the question concerning calculated time periods ending on non-work days. When a calculated time period ends on a non-working day, the assigned time period will be the next working day.

Section 1506.10(b) of the CEQ Regulations allows for an exception to the rules of timing. Language has been included on exceptions relating to cases of an agency decision which is subject to a formal internal appeal. When exceptions are made by an agency, it is important to inform EPA so that it is accurately reflected in the Notice of Availability.

It was requested that the paper cite examples where both extensions and reductions of time periods have been granted by EPA and where CEQ has approved special cases. EPA appreciates the point but has declined to present examples since these are done on a case-by-case basis and each case is considered on its individual merits.

One commenting agency was concerned with having to request reductions and extensions of time periods in writing to EPA. The agency felt this put too much stress on a formal, and possibly time-consuming, process. Language has been added indicating EPA will accept these requests by telephone, but agencies should follow up in writing to ensure that EPA can maintain a complete record of the decision-making process.

One commenting agency requested that guidance be provided for filing of non-federal EISs, i.e., those prepared by state and local governments where

federal statutes specifically identify these governments as the "federal official for the purposes of NEPA compliance." EPA's position is that EISs prepared by state and local governments for these federal programs are considered "federal" EISs by virtue of the fact that they are prepared in response to a federal statute—NEPA. Therefore, the same filing procedures apply to the filing of these "non-federal EISs" as those that apply to filing of federal EISs.

General Comments

EPA appreciates the comment concerning the length of the guidance and that it "burdens rather than provides useful guidance." However, EPA believes that the narrative format is easier to follow and more useful as a reference than a step by step outline or flow diagram of the process.

As indicated by one commenter, it should be noted that this guidance is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officials, or any person.

Dated February 28, 1989.

Richard E. Sanderson,

Director, Office of Federal Activities.

EPA Filing System Guidance

1. Purpose.

These guidelines provide information on filing environmental impact statements (EISs) required by the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500–1508) for implementing the procedural provisions of NEPA. Sections 1506.9 and 1506.10 of the CEQ regulations set forward EPA's basic responsibilities for the filing process and authorize the Agency to issue guidelines to implement its responsibilities under these sections. The process of filing includes the following: (a) Reviewing and recording of the EISs so that information on them can be incorporated into EPA's computerized data base; (b) establishing the beginning and ending dates when draft and final EISs are officially available to the public; (c) publishing these dates in a "Notice of Availability" in the **Federal Register**; (d) retaining the EISs in a central repository; and (e) determining whether time periods can be lengthened or shortened for "compelling reasons of national policy."

EPA duties do not include responsibility for the distribution of EISs or for providing additional copies of already distributed EISs. These are the obligation of the lead agency preparing an EIS and are not addressed in this guidance. Nevertheless, EPA will assist the public and other federal agencies by providing agency contacts on, and information about, EISs.

2. Background

The official EIS filing system was transferred from the Council on Environmental Quality (CEQ) to the Environmental Protection Agency (EPA) effective December 5, 1977, as part of the reorganization of the Executive Office of the President. The functions of the filing system were further delineated by a Memorandum of Understanding between CEQ and EPA, dated March 29, 1978. CEQ promulgated its regulations for implementing the National Environmental Policy Act (NEPA) on November 29, 1978 (see 43 FR 55978).

The EPA filing system was created to provide an official log and public announcement of EISs received by EPA and to guarantee that the requirements of NEPA and the CEQ regulations are satisfied. It is a complete and separate filing system from the Environmental Review Process System which fulfills separate requirements under section 309 of the Clear Air Act for EPA to review and comment on EISs (and other actions) of federal agencies.

3. Filing an EIS—draft, final and supplemental

Federal agencies are required to prepare EISs in accordance with section 1502 of the Regulations and to file the EISs with EPA as specified in § 1506.9. The EISs must be filed no earlier than they are transmitted to commenting agencies and made available to the public. If an EIS is hand carried to EPA, the person delivering the document must complete a form stating that transmittal to all agencies is being made simultaneously with the filing with EPA. This will assure that the EIS is received by all interested parties by the time the EPA Notice of Availability appears in the **Federal Register**, and therefore allows for the full minimum review periods prescribed in § 1506.10. EPA will acknowledge by a phone call to the sender that it has received an EIS forwarded by means other than hand carried.

If EPA receives a request to file an EIS and transmittal of that EIS is not complete, the EIS will not be filed until assurances have been given that the transmittal process is complete. Similarly, if EPA discovers that a filed EIS has not been transmitted, EPA will retract the EIS from filing and not re-file the EIS until the transmittal process is completed. Once the agency has fulfilled the requirements of § 1506.9 and has completed the transmittal process, EPA will reestablish the filing date and the minimum time period, and will publish this information in the next Notice of Availability. Requirements for circulation of EISs appear in § 1502.19 of the regulations.

Federal agencies file an EIS by providing EPA with five (5) copies, including appendices. Material which is incorporated into the EIS by reference is not required to be filed with EPA. The agency filing the EIS (usually the lead agency if more than one is involved) should prepare a letter of transmittal to accompany the five copies of the EIS. The letter should identify the name and telephone number of the official responsible for both the distribution and contents of the EIS; should state that the transmittal has been completed; and should be addressed to:

U.S. Environmental Protection Agency, Attention, Office of Federal Activities, EIS Filing Section (Mail Code A–104), Room 2119 Waterside Mall, 401 M Street SW., Washington, DC 20460.

Telephone inquiries can be made to (202) 382–5076 or FTS 382–5076.

EPA should be notified in writing of all situations where a federal agency is adopting an EIS, whether the document is recirculated and filed or adopted under the provisions of § 1506.3(c) of the regulations. If a federal agency chooses to adopt an EIS written by another agency and it was not a cooperating agency in the preparation of the original EIS, then the EIS must be re-transmitted and filed with EPA according to the requirements set forth in § 1506.3 of the CEQ regulations. In those cases where an agency can adopt an EIS without recirculating it, there is no necessity to file the EIS again with EPA. EPA should be notified, however, in order to ensure that the official log is accurate, and to include this information as a separate section within the Notice of Availability. This will not establish a comment period, but will complete the public record.

EPA also should be notified of all situations where an agency has decided to withdraw, delay or reopen a review period on an EIS. All such notices to EPA will be published in the **Federal Register**. In the case of reopening EIS review periods, the lead agency should notify EPA as to what measures will be taken to ensure that the EIS is available to all interested parties. This is especially important for EIS reviews that are being reopened after a

substantial amount of time has passed since the original review period closed.

Once received by EPA, each EIS is stamped with an official filing date and checked for completeness and compliance with § 1502.10 of the CEQ regulations. If the EIS is not "complete" (i.e., if the documents do not contain those elements outlined in § 1502.10 of the regulations), EPA will contact the lead agency to obtain the omitted information or to resolve any problems prior to publication of the Notice of Availability in the **Federal Register**.

Agencies often publish (either in their EISs or individual notices to the public) a date by which all comments on an EIS are to be received. Agencies should ensure that the date they use is based on the date of publication of the Notice of Availability in the **Federal Register**. If the published date gives reviewers less than the minimum review time computed by EPA, then EPA will send the agency contact a letter explaining how the review period is calculated and the correct date by which comments are due back to the lead agency. This letter also encourages agencies to notify all reviewers and interested parties of the corrected review periods.

4. Notice in the Federal Register

EPA will prepare a weekly report of all EISs filed during the preceding week for publication each Friday under a Notice of Availability in the **Federal Register**. At the time EPA sends its weekly report for publication in the **Federal Register**, the report will also be sent to the CEQ. Information included in the report for each EIS is the same as the data entered in EPA's computerized data file. This includes an EIS Accession number (created by EPA), EIS status (draft, final, supplemental), date filed with EPA, the agency or bureau that filed the EIS, the state and county of the action that prompted the EIS, the title of the EIS, the date comments are due and the agency contact. Amended notices may be added to the Notice of Availability to include corrections, changes in time periods of previously filed EISs, withdrawals of EISs by lead agencies, and recision of EISs by EPA. A recision including nullifying the date the EIS was filed can occur, as explained earlier, if, after a filed EIS is published in the **Federal Register**, EPA is subsequently informed that the EIS has not been made available to commenting agencies and the public by the lead agency.

5. Time Periods

The minimum time periods set forth in § 1506.10(b), (c), and (d) are calculated from the date EPA publishes the Notice of Availability in the **Federal Register**. Review periods for draft EISs, draft supplements, and revised draft EISs shall extend 45 calendar days unless the lead agency extends the prescribed period or a reduction of the period has been granted. The wait periods for final EISs and final supplements shall extend for 30 calendar days unless the lead agency extends the period or a reduction or extension in the period has been granted. If a calculated time period would end on a non-working day, the assigned time period will be the next working day (i.e., time periods will not end on weekends or federal holidays).

It should be noted that § 1506.10(b) allows for an exception to the rules of timing. An exception may be made in the case of an agency decision which is subject to a formal internal appeal. Agencies should assure that EPA is informed so that the situation is accurately reflected in the Notice of Availability.

Under § 1506.10(d) EPA has the authority to both extend and reduce the time periods on draft and final EISs based on a demonstration of "compelling reasons of national policy." A lead agency request to EPA to reduce time periods or another federal agency request to formally extend a time period normally takes the form of a letter to the Director, Office of Federal Activities (OFA), EPA, outlining the reasons for the request. EPA will accept telephone requests; however, agencies should follow up such requests in writing so that the documentation supporting the decision is complete. A meeting to discuss the consequences for the project and any decision to change time periods may be necessary. For this reason EPA asks that it be made aware of any intent to submit requests of this type as early as possible in the NEPA process. This is to prevent the possibility of the time frame for the decision on the time period modification from interfering with the lead agency's schedule for the EIS. EPA will notify CEQ of any reduction or extension granted.

CEQ has the authority under section 1502.9(c)(4) to approve alternative procedures for preparing, circulating and filing supplemental draft and final EISs. The council will notify EPA of any such alternative procedures that are granted.

6. Retention

Filed EISs are retained in the EPA/OFA office for a period of two years and are made available for reviewing only. After two years the EISs are sent to the National Records Center. However, the EPA Library, Room 2904 Waterside Mall, 401 M Street, SW., Washington, DC 20460, houses a microfiche collection of final EISs issued from 1970 through 1977 and all draft, final and supplemental EISs filed from 1978 to the present time. Facilities for limited reproduction of the EISs are available.

A comprehensive collection of EISs is available for viewing and individual EISs are available on a loan basis at:

Northwestern University, Transportation Library–NEPA, 1935 North Sheridan Road, Evanston, Illinois 60201, Telephone: (312) 492–2913.

Final EISs prepared from 1970 through 1977, and any draft, final or supplemental EIS prepared from 1978 to the present time may be purchased in either microfiche or hardback copy from:

Information Resources Press, Herner and Company, 1700 North Moore Street, Arlington, Virginia 22209, Telephone: (703) 558–8275.

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Tuesday
March 7, 1989

Part III

Environmental Protection Agency

40 CFR Parts 124 and 270

Changes to Interim Status Facilities for Hazardous Waste Management; Modifications of Hazardous Waste Management Permits; Procedures for Post-Closure Permitting; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 124 and 270

[FRL-3506-4]

Changes to Interim Status Facilities for Hazardous Waste Management; Modifications of Hazardous Waste Management Permits; Procedures for Post-Closure Permitting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating amendments to the hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) governing changes at interim status and permitted facilities, including redesignation of certain permit modifications as Class 1. Today's rule also amends the hazardous waste permitting regulations to clarify the Agency's authority to deny permits for the active life of a facility while a permit decision with respect to the post-closure period remains pending.

EFFECTIVE DATE: March 7, 1989.

ADDRESS: The public docket for this rulemaking is available for public inspection in Room S-212, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. The docket number is F-87-RIPP-FFFFF. The public must make an appointment to review docket materials by calling (202) 475-9327. The public may copy a maximum of 50 pages of material from any one regulatory docket at no cost; additional copies cost $0.20 per page.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline at (800) 424-9346 (in Washington, DC call 382-3000) or Barbara Foster, Office of Solid Waste, (OS-341), U.S. Environmental Protection Agency, Washington, DC 20460, telephone (202) 382-4751.

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I. Authority

These regulations are issued under the authority of sections 2002(a), 3004, 3005, and 3006 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6912(a), 6924, 6925, and 6926.

II. Background

Subtitle C of the Resource Conservation and Recovery Act (RCRA) creates a "cradle-to-grave" management system intended to ensure that hazardous waste is identified and properly transported, stored, treated, and disposed. Subtitle C requires EPA to identify hazardous waste and to promulgate standards for generators and transporters of such wastes. Under section 3004 of RCRA, owners and operators of treatment, storage, and disposal facilities are required to comply with standards "necessary to protect human health and the environment." These standards are generally implemented initially through interim status standards and later through permits that are issued under authorized State programs or by EPA.

Under section 3005(a) of RCRA, all treatment, storage, and disposal of hazardous waste are prohibited, except in accordance with a permit that implements the section 3004 standards. However, recognizing that the issuance of permits can be time consuming, Congress created "interim status" for facilities in existance on the effective date of EPA's permitting regulations (November 19, 1980). Under section 3005(e), owners and operators of hazardous waste treatment, storage, and disposal facilities in existance on that date who submitted a Part A permit application and a section 3010 notification are treated as having been issued permits until an authorized State or EPA takes final administrative action on their permit applications.

On August 14, 1987, the Agency proposed amendments to its regulations regarding changes at interim status facilities, procedures on post-closing permitting, and permit modifications. On November 17, 1988 the Agency issued a **Federal Register** notice soliciting public comment on the need to further amend its regulations on permit modification procedures. Those proposed amendments are discussed below.

A. Changes at Interim Status Facilities

An interim status facility generally may change its waste management operations without notification or prior Agency approval, except for changes specifically identified at 40 CFR 270.72. Under previous regulations, these changes were: (1) The handling of wastes not previously identified in Part A of the permit application; (2) increase in design capacity of processes where there is a lack of available capacity at other waste management facilities; (3) changes in or addition of processes if necessary to protect human health and the environment or to comply with Federal regulations or State or local laws; and (4) changes in ownership or operational control of a facility. Section 270.72 specifies procedures and criteria for each of these changes. Prior approval by the Director is required before facilities can increase design capacity, add or make changes in processes, or change ownership under § 270.72. Prior to today's rule, the reconstruction limit (the former § 270.72(c)) prohibited any of the above changes to an interim status facility that required a capital expenditure equaling or exceeding 50 percent of the cost of constructing a

comparable new hazardous waste management facility, except for changes necessary to comply with the recently promulgated tank standards (51 FR 25422, July 14, 1986) and certain changes to treat or store in tanks or containers hazardous wastes subject to land disposal restrictions (52 FR 25760, July 8, 1987).

EPA believes that these regulations may in some cases unnecessarily restrict interim status facilities' flexibility, particularly in complying with new regulatory requirements. The consequences include a potential delay for some facilities in complying with new requirements and, in some cases, increased risk to human health and the environment. In fact, some interim status facilities may have no means to operate in compliance with the RCRA regulations while EPA or an authorized State reviewed their application for a RCRA permit. To avoid these undesirable results, the Agency proposed several regulatory changes on August 14, 1987 (52 FR 30570) to increase flexibility for owners and operators of interim status facilities to make changes necessary to comply with Federal, State, or local regulatory requirements. Today's notice promulgates this proposal as a final rule.

B. Post-Closure Permitting

The permitting regulations specify that RCRA permits cover both the active life (including the closure period) of a facility and, where applicable, the post-closure care period.

A permit applicant required to obtain an operating permit must include all necessary post-closure information in its Part B permit application for the application to be "complete" and thus initiate the review process. When the application is complete, EPA's decision to issue a permit applies to the whole permit, including the portion of the permit concerning post-closure care. In practice, however, EPA has found it necessary to separate the decision to deny a permit to operate a unit from the decision to issue a permit covering post-closure conditions. As the August 14, 1987 proposal stated, this practice has been necessary to ensure prompt closure of facilities that fail to meet the regulatory standards. The former regulations, however, did not specifically provide for a separation of the permit decision for the active life of the facility from post-closure permit decision.

In the August 14, 1987 **Federal Register** notice, the Agency proposed to amend its permitting regulations to clarify its authority to deny permits for the active life (including the closure period) of a facility while a permit decision with respect to the post-closure period remains pending.

C. Permit Modifications

1. Newly Listed or Identified Wastes

Whenever EPA lists a new hazardous waste or identifies a new hazardous characteristic, facilities handling that waste must come into compliance with Subtitle C requirements. Unpermitted facilities may continue to handle the waste without Agency approval if they comply with interim status requirements in Part 265 and they submit to EPA a Part A application and a section 3010 notice. Permitted facilities, however, were required to secure a permit modification incorporating the newly listed or identified waste before the effective date of the new listing or identification. Under previous regulations, such a change required a "major" permit modification. The major modification procedures of the former § 270.41 included the full administrative procedures that apply to issuance of a permit; the only significant difference was that, for a major modification, only those conditions of the permit to be modified were reopened.

Because of concerns over inequitable treatment of permitted versus interim status facilities, EPA proposed in the August 14 **Federal Register** notice to allow newly listed or identified wastes, and the units handling such wastes, to be added to permits as minor permit modifications if the facility owner or operator requested a major modification within 180 days.

Today's rule, however, does not finalize this proposal because the Agency has already addressed this problem as part of the recent amendments to the permit modification regulations (53 FR 37912, September 28, 1988). Comments received on the August 14 proposal for today's rule were addressed in the September 28 final permit modification rule. As a result of the permit modification rule, permitted facilities can now more easily modify permits to allow for handling of newly listed or identified wastes in a manner more consistent with interim status facilities.

2. Land Disposal Restrictions

The permit modification regulations that EPA published on September 28, 1988 (53 FR 37912) established a new three-tiered system of permit modifications. In that rule, specific facility changes were classified as either Class 1, 2, or 3 modifications. This rule did not specifically address changes necessary to comply with the land disposal restrictions. However, in the course of developing land disposal restrictions for the First Third scheduled wastes (53 FR 31138, August 17, 1988) and the California list wastes (52 FR 25760, July 8, 1987), EPA received several comments on the need to provide increased flexibility for permitted facilities that need to make changes to comply with these requirements. Therefore, on November 17, 1988 (53 FR 46474), the Agency reopened the comment period on the facility changes rulemaking to solicit comment on whether certain facility changes stemming from the land disposal restrictions program should be Class 1 permit modifications.

The permit modifications addressed in the November 17 **Federal Register** notice are similar to two previous minor modifications that were superseded by the new permit modification procedures adopted on September 28, 1988. Former § 270.42(o) allowed facilities to add new waste codes to their permits if the wastes were restricted under Part 268, met the applicable treatment standards, and were not substantially different from currently handled wastes. Similarly, § 270.42(p) allowed the addition of new treatment processes used to treat restricted wastes to Best Demonstrated Available Technology (BDAT) levels as long as those processes took place in tanks and containers and the facility requested a major permit modification. (*See* 52 FR 25760, July 8, 1987).

III. Section by Section Analysis

A. Summary

Today's rule generally adopts the provisions of the proposed rule of August 14, 1987 related to changes at interim status and permitted facilities and post-closure permitting. It provides greater flexibility to interim status facilities to: (1) Increase design capacity, if approved by the Director as necessary to comply with Federal, State, or local requirements, and (2) make changes specified in section 3008(h) corrective action orders or similar orders issued by State or local authorities or by a court. It also lifts the "reconstruction" limit for: (1) Changes to certain units so long as they are necessary to comply with Federal, State, or local requirements; (2) changes necessary to allow continued handling of newly listed or identified hazardous wastes; (3) changes made in accordance with an approved closure plan; and (4) changes made pursuant to a corrective action order. In addition, it promulgates the proposed clarification that EPA can deny permits for the active

life of a facility while a decision on post-closure permitting is pending.

As part of today's changes to § 270.72, the Agency also reorganized that entire section. Under the new organization, paragraph (a) lists the changes that are regulated under § 270.72 and paragraph (b) contains all provisions related to the reconstruction limit. Note that a requirement that new land disposal units at interim status facilities certify compliance with groundwater and financial responsibility requirements within a year was proposed in § 270.72(c) but is promulgated today at § 270.73(e) in this final rule. The following chart cross references the former § 270.72 with today's rule.

RELATIONSHIP OF TODAY'S RULE TO THE FORMER SECTION 270.72

Previous citation	Today's rule
(a)	(a)(1)
(b)	(a)(2)
(c)	(a)(3)
(d)	(a)(4)
(e)	(b)

It should also be noted that the Agency made a minor clarification to the section now designated as § 270.72(a)(1). That section provides that an interim status facility may continue to handle a newly listed or identified waste not previously identified in the Part A permit application if the owner or operator submits a revised Part A. The Agency has added language in today's rule to remove any possible ambiguity that the unit currently handling the newly listed or identified waste may be added under that provision as well. Thus, when EPA lists or identifies a new waste, the facility may continue to handle the waste in the same unit without obtaining prior Director approval. This situation for interim status facilities is analogous to that of unpermitted and permitted facilities handling newly identified wastes, both of which can make this change without prior Director approval.

Because today's rule has no substantive effect on former § 270.72(a) (now § 270.72(a)(1)) and § 270.72(d) (now § 270.72(a)(4)) the Agency did not address public comments related to those sections in this notice. Although only portions of § 270.72 are being amended by today's rule, it is printed in its entirety for the convenience of the reader.

Today's publication of § 270.72(b) also serves to correct a technical error created by a final rule published on July 8, 1987 (52 FR 25760). In another final rule published on July 14, 1986, the Agency amended the former § 270.72(e) to eliminate the reconstruction limit for changes made solely to comply with the requirements of § 265.193 for tanks and ancillary equipment. In the July 8, 1987 rule, the Agency again amended the former § 270.72(e) to lift the reconstruction limit for certain changes at interim status facilities made to implement the land disposal restrictions and, at the same time, inadvertently omitted the July 14, 1986 amendment. Today's publication of § 270.72(b) incorporates all amendments to the reconstruction limit to date; the amendment related to tanks and ancillary equipment is found in § 270.72(b)(1) and the land disposal restriction amendment is found in § 270.72(b)(6).

In addition to adopting the interim status and post-closure permitting provisions of the proposed rule, today's rule also modifies the regulations at § 270.42 to reclassify as Class 1 certain permit modifications necessary to enable facilities to comply with the land disposal restrictions. Specifically, it allows owners and operators of permitted facilities to add new waste codes, or a narrative description, to a permit as Class 1 modifications where the added wastes are: (1) Restricted wastes that have been treated to meet the applicable Part 268 treatment standard, or (2) residues from treating so called "soft hammer" wastes, and (3) certain wastewater treatment residues and incinerator ash. The rule also allows as a Class 1 modification, without prior approval, the addition of new wastes for treatment in tanks or containers under certain limited conditions. Finally the rule allows as a Class 1 modification, with prior Director approval, the addition of new treatment processes, as long as those processes are necessary to treat restricted wastes to meet treatment standards and the treatment processes are to take place in tanks or containers.

B. Changes at Interim Status Facilities

1. Increases in Design Capacity

Today's rule (§ 270.72(a)(2)) allows owners and operators to increase design capacity of processes at a facility when the Director approves the change as necessary to comply with Federal, State, or local requirements. This new provision expands the reasons for allowing capacity increases; the former § 270.72(b) allowed owners and operators to increase design capacity only if the Director approved the change because of a demonstrated lack of available capacity at other waste management facilities.

This change will allow interim status facilities to comply with new requirements, including those imposed by HSWA, and will, therefore, provide increased public and environmental protection. In the preamble to the proposal of this rule, the Agency set forth several examples to demonstrate this point. (*See* 52 FR 30570 at 30573). No comments were submitted in opposition to this amendment. For these reasons, the Agency is adopting the proposed § 270.72(a)(2)(i) to allow increases in design capacity necessary to comply with new requirements.

Several commenters, however, requested that the Agency clarify whether "increases in design capacity of processes" could include the addition of new units at a facility. Section 270.72(a)(2) does allow the Director to approve addition of new units at a facility to increase the capacity of a process already in operation at the facility. It should be noted, however, that addition of a unit of a type not already present at the facility would be considered a change in process rather than an increase in design capacity, and therefore would fall under § 270.72(a)(3). (*See* section III.B.2 of this preamble).

Another commenter argued that § 270.72(a)(2)(i), which allows the Director to approve an increase in design capacity because there is a lack of available capacity elsewhere, frustrates implementation of the minimum technology requirements of section 3004(o) by requiring a finding of lack of available capacity before increases in design capacity can be made. EPA believes that the new § 270.72(a)(2)(ii) addresses this commenter's concern. As explained above, EPA or a State Director may approve an increase in design capacity under this section if the change is necessary to comply with Federal, State, or local requirements, regardless of whether or not other capacity is available. The preamble to the proposal specifically references the facility changes necessary to comply with section 3004(o) as being the type of Federally mandated requirement that would qualify as an appropriate reason for EPA or a State to approve an interim status change.

2. Changes in or Addition of Processes

Under the former § 270.72(c), owners and operators could make changes in or add processes at a facility if the Director approved the change as necessary either to protect human health and the environment in an emergency or to

comply with Federal regulations or State or local laws. The corresponding provision in today's rule, § 270.72(a)(3), has been amended to clarify that "Federal regulations or State or local laws" encompasses all Federal, State, and local requirements. This includes regulations, orders, statutes, and permit-related requirements such as approved closure plans. EPA received no comments opposing this clarifying amendment.

3. Corrective Action

Section 3008(h) authorizes the Agency to order a facility owner or operator to conduct corrective action during interim status when the Agency determines that there is or has been a release of hazardous waste into the environment. Section 270.72(a)(5) promulgated today allows interim status facilities to make changes in accordance with corrective action orders issued by the Agency under section 3008(h) or other Federal authority (or orders issued by a Director under an equivalent State authority). In today's rule, the Agency has modified the language proposed in § 270.72(a)(5) to clarify that when the Agency or a State seeks corrective action through judicial proceedings and a court, rather than the Agency or State, issues an order requiring corrective action, changes made in accordance with such an order would also be permissible changes under § 270.72(a)(5).

In addition to the new § 270.72(a)(5), today's rule also promulgates § 270.72(b)(5), which removes the reconstruction limit for changes made in accordance with such corrective action orders.

Under the new § 270.72(a)(5), facility changes introduced in accordance with corrective action orders restricted to activities involving wastes associated with the facility. This limitation does not prevent treatment, storage, or disposal of wastes released from within the facility that migrated beyond the facility's boundaries. Rather the limitation prevents the owner or operator from making changes under this authority to manage wastes and materials that have no relationship to the facility. The limitation for unrelated materials is necessary to prevent the owner or operator seeking to manage such materials from evading the permit requirement for new facilities and change in interim status requirements for facility modifications.

Some commenters expressed concern that the new § 270.72(a)(5) limits changes permissible for purposes of corrective action to those made in accordance with a corrective action order. The commenters argued that the provision should be expanded to allow changes necessary for voluntary corrective action to be made as well and that the reconstruction limit should not apply to voluntary corrective action measures. The commenters noted that corrective action done early can decrease the cost of clean-up and provide increased protection of human health and the environment. The Agency, however, limited the changes permissible under new § 270.72(a)(5) to those made in compliance with a corrective action order because voluntary corrective action would not typically involve EPA or State oversight or public notice. By requiring that the changes made under paragraph (a)(5) be made in accordance with a corrective action order, the Agency has assured that those changes will be subject to Agency review and, additionally, to public comment. Therefore, the Agency has not made the modification to § 270.72(a)(5) that the commenter suggested.

The Agency, nevertheless, believes that the regulations already provide significant flexibility for voluntary corrective action at interim status facilities. Section 270.72(a) (2) and (3) allow the Director to approve increases in design capacity or the addition of new processes, if necessary to comply with Federal, State, or local requirements. This would include changes made as part of voluntary corrective action taken in anticipation of a section 3008(h) order or section 3004(u) permit conditions. These changes, however, would be subject to Director approval and would be limited by the reconstruction cap of § 270.72(b).[1]

Sections 270.72(a) (2) and (3) and 270.72(a)(5), therefore, impose somewhat different requirements on different types of corrective action. Where EPA or a State has required specific corrective action as part of a section 3008(h) or similar order, or a court has ordered correction action, approval of that action as a change in interim status is not necessary, and the reconstruction limit does not apply (§ 270.72 (a)(5) and (b)(5)). On the other hand, where the action is not explicitly required in an order, or it is taken merely in anticipation of an order, Director approval is required and the reconstruction limit potentially applies (§ 270.72(a) (2) and (3)).

4. Loss of Interim Status

In some cases, new land disposal units may be added to a facility as a change in interim status. For example, a surface impoundment handling nonhazardous waste at an interim status facility might be brought into the system if EPA subsequently listed the waste as hazardous. In this case, § 270.73(e) of today's rule (proposed as § 270.72(c) but moved in the final rule to § 270.73 for purposes of clarity) would require the facility to certify, 12 months after the effective date of the listing, that the unit was in compliance with all applicable ground-water monitoring and financial responsibility requirements. EPA added this requirement to ensure comparable treatment of land disposal units containing newly identified hazardous wastes at permitted, unpermitted, and interim status facilities.

5. Other Issues

One commenter argued that the Agency should have the authority to approve any change in interim status that would improve environmental quality, decrease costs, or improve safety or efficiency. Another commenter argued that the Agency should allow changes made to: (1) Protect human health and the environment, (2) avoid disrupting ongoing waste management, and (3) enable the permittee to respond to sudden changes in the types or quantities of wastes being managed at the facility. The agency believes that the criteria suggested by these commenters are too broad. In adopting its regulation for interim status facilities, the Agency chose an approach it believed would allow reasonable modification to existing facilities without nullifying the requirements for obtaining a RCRA permit. (See 45 FR 33290 at 33324, May 19, 1980). As part of its approach, the Agency allowed increases in design capacity and addition of or changes in existing processes at interim status facilities only for specified reasons, and made those changes subject to Agency approval and to the reconstruction limit. The Agency continues to follow this approach in its regulations at § 270.72. EPA believes that the criteria suggested by the commenter might result in expansions at interim status facilities that require full public participation and other protections of the permitting process.

[1] The Agency addressed this general issue in the preamble to the proposed Mobile Treatment Unit (MTU) regulation (52 FR 20914 to 20930, June 3, 1987). In that preamble, the Agency explained that MTU's may be allowed to operate at interim status facilities as a change necessary to comply with Federal, State, or local requirements. The Agency then went further to say that the use of an MTU for studies at an interim status facility to determine whether a specific treatment could meet BDAT in accordance with the land disposal restrictions, or to select a remedial measure in anticipation of Agency action under sections 3008(h) or 3004(u) would likely qualify as an acceptable change in interim status.

C. Reconstruction Limit

1. General

The former § 270.72(e) prohibited changes to an interim status facility that required a capital expenditure equalling or exceeding 50 percent of the cost of constructing a comparable new hazardous waste management facility. This "reconstruction limit" was designed to prevent facilities from circumventing permitting requirements by expanding significantly during interim status. This limitation was amended in EPA's new tank standards, issued on July 14, 1986 (51 FR 25422), which eliminated the reconstruction limit for changes made solely for the purposes of complying with the tank standards on § 265.193. It was further amended in a final rule issued on July 8, 1987 (52 FR 25760), which eliminated the reconstruction limit for changes made to treat or store, in tanks or containers, wastes subject to land disposal restrictions when the changes were made solely to comply with land disposal restrictions. The Agency believes, however, that there are additional changes that should be allowed at interim status facilities even when they amount to a reconstruction. The need for these changes is more compelling than the need to limit interim status facility expansion.

To allow those changes, today's rule eliminates the reconstruction limit for changes in interim status that EPA or the State Director determines to be necessary: (1) To comply with Federal, State, or local requirements, if the changes take place solely in existing units; in new tanks or containers; or in replacement surface impoundments that meet the minimum technology requirements of section 3004(o); or (2) to allow the owner or operator to continue to handle newly listed or identified hazardous wastes. It also amends the reconstruction limit to specify that it does not apply to corrective actions required by EPA or by States under authorized RCRA programs, or ordered by a court. Finally, it amends the reconstruction limit so that it does not apply during closure of a facility or of a unit within a facility that is done pursuant to an approved closure plan.

2. Federal, State, and Local Requirements

Section 270.72(b)(2) of today's rule lifts the reconstruction limit for changes to existing units, changes solely involving tanks or containers, and changes involving the addition of replacement surface impoundments meeting minimum technology requirements, if those changes are necessary to comply with Federal, State, or local requirements. As explained in the preamble to the August 14 proposal, this amendment will allow more expeditious compliance with new requirements, therefore improving protection of human health and the environment.

Several commenters argued that the scope of § 270.72(b)(2) was too narrow. For example, some commenters suggested that the reconstruction limit be lifted for any new or replacement landfill or surface impoundment, and for any lateral expansions to these units, as long as the units were in compliance with minimum technology requirements. Commenters also argued that limitations to the reconstruction cap will prevent facilities from making all changes necessary to comply with Federal, State, or local requirements. Commenters argued that some rules, such as the land disposal restrictions, mandate incineration as the treatment standard for some wastes and that the reconstruction limit stands in the way of incinerators being added to a facility to allow the facility to comply with these requirements. Another argued that a facility should be able to follow the requirements for interim status landfills and surface impoundments in RCRA section 3015(b) and not be blocked by the reconstruction limit.

EPA disagrees with these comments and has finalized the rule as proposed. As the Agency stated in the preamble to the proposal, major new landfills and incinerators (i.e., those that would exceed the 50% reconstruction limit) require the close Agency oversight and approval afforded by the permit process. In addition, the permit process provides an opportunity for public participation, including an opportunity for comment and a hearing. Public comments on other rulemakings—such as the recent amendments to the permit modification procedures—and the intent of Congress as illustrated by HSWA, which stressed, for example, concerns about land disposal, make it clear that major new land disposal units and incinerators are inappropriate at interim status facilities, without the protections provided by the permitting process.

3. Newly Listed or Identified Wastes

Section 270.72(b)(3) of today's rule lifts the reconstruction limit for changes that are necessary to allow owners or operators to continue handling newly listed or identified wastes that had been treated, stored, or disposed of at the facility prior to the effective date of the rule establishing the new listing or identification.

This provision has been slightly modified from the proposal. The proposal restricted acceptable changes to those taking place at facilities that had handled the newly listed or identified waste prior to the date of the **Federal Register** notice establishing the new listing or identification. Today's rule allows the changes if the facility had handled the waste before the effective date of the rule.

EPA made this change in response to commenters, who pointed out an inconsistency between the proposal's treatment of interim status facilities and the statute's treatment of unpermitted facilities. Under section 3005(e)(A)(ii) of RCRA, facilities handling newly listed or identified wastes may obtain interim status if they were in existence on the effective date of the regulation listing or identifying the waste. EPA does not believe there is any reason to treat interim status facilities and facilities outside the permitting universe differently in this case. Therefore, it has modified the proposed language, so that the trigger date for defining whether a facility is eligible is the effective date of the new listing or identification, not the date of the rule's publication. Note that EPA made a similar change with respect to management of newly listed and identified wastes at permitted facilities in its recent amendments to the permit modification procedures. (*See* 53 FR 37912, September 28, 1988).

One commenter argued that the reconstruction limit should be lifted for changes necessary to handle newly listed or identified wastes, whether or not previously handled at the facility, when the process necessary to handle the newly listed or identified waste was similar to processes already at the facility. The commenter argued that the restriction to wastes previously handled at the facility is unfounded, particularly if the treatment required for handling the new waste is similar to treatment already used at the facility.

EPA disagrees with this comment. The purpose of § 270.72(b)(3) in the August 14 proposal was to prevent disruptions in existing operations at interim status facilities, not to allow facilities to expand their activities significantly without meeting permitting requirements. In doing so, it put interim status facilities on an equal footing with unpermitted facilities. Therefore, EPA has not adopted the commenter's suggestion in today's rule.

The Agency, however, believes that in most cases the flexibility requested by the commenter is already provided in other parts of § 270.72. In particular, facility changes to handle newly

identified wastes, where the unit process is similar to processes already at the facility, are unlikely to exceed the reconstruction limit. If such a change does not exceed the reconstruction limit, it can be made as a change in interim status, as long as it was approved as necessary to comply with Federal, State, or local requirements. Furthermore, such a change that involves storage or treatment solely in tanks or containers might be allowed as a change in interim status, even if the change exceeded the reconstruction limit. (See § 270.72(b)(2)).

4. Changes During Closure

Under § 270.72(b)(4) of today's rule, changes made at an interim status facility during closure in accordance with an approved closure plan are not subject to the reconstruction limit. For example, if an approved closure plan calls for the use of a new tank unit at a facility to treat waste before final disposal, that unit could be brought on to the facility, with Director approval, as a change in interim status. Similarly, if an approved closure plan required on-site incineration, an incinerator may be brought on to the facility as a change in interim status. However, in both cases, the unit could be used to handle only the wastes associated with closure.

EPA stresses that the closure plan approval process provides for Agency review and an opportunity for public comment analogous to that provided by the permit process. For example, in approving a closure plan, EPA or an authorized State would ensure that any new units brought on to the facility under a change in interim status met all applicable Part 265 operating and closure standards. Additional conditions might be required where necessary to ensure that the overall closure activity meets the closure performance standard at § 265.111. In the case of an incinerator, this would mean compliance with the trial burn requirements, the operating standards, and other requirements found in Part 264, depending on the site-specific circumstances. In addition, the closure regulations require public notice and an opportunity for comment, just as do the permitting regulations.

5. Corrective Action

As explained in section III.B.3 of this preamble, § 270.72(b)(5) removes the reconstruction limit for changes necessary to comply with corrective action orders, provided that such changes will be limited to treatment, storage, or disposal of solid waste from releases that originate within the boundary of the facility. This amendment will ensure prompter implementation of corrective action orders, while the section 3008(h) procedures will ensure public participation equivalent to permitting. For more discussion, see section III.B.3 of the preamble.

6. Other Issues

One commenter stated that the reconstruction limit is unsound and unwarranted. The commenter pointed out that EPA controls when to call in Part B permit applications and that new units are subject to new technology requirements. Citing the Agency's justification for the reconstruction limit in the preamble to the proposed rule, the commenter argued that if, as the Agency alleged, the purpose of the reconstruction limit is to prevent facilities from expanding during interim status, thereby evading the permitting process, the Agency should explicitly identify the means by which facilities do this and only those methods should be limited by the reconstruction limit. The commenter noted that there is no statutory reference to the reconstruction limit.

The Agency disagrees with this comment. Congress' purpose in establishing "interim status" was to ensure that facilities already in the business of managing hazardous waste were not unduly disrupted by RCRA's new permitting requirements. Interim status provides a mechanism to allow these facilities to continue in operation pending permit review and issuance.

In developing regulations to implement this requirement, EPA recognized that interim status facilities would require some flexibility to maintain operations. Section 270.72 provides that flexibility. However, EPA placed a cap on changes in interim status in the "reconstruction limit," to ensure that interim status facilities could not avoid permitting requirements for major new expansions of activities. Thus, the Agency struck the balance between undue disruption of current facility operations (the goal of interim status in the first instance) and the direction of Congress to move facilities into the permitting universe. This provision is described more fully in the preamble to EPA's interim status regulations (45 FR 33290 at 33324, May 19, 1980).

The August 14 proposal and today's rule do not change the basic requirements of the reconstruction limit. Instead, the purpose of the proposal was to identify specific areas where the reconstruction limit was not necessary or approrpriate. The commenter suggested that, instead of establishing the reconstruction limit as an across-the-board requirement and identifying exceptions, EPA should merely identify those activities where the limit applies. The Agency disagrees. Given the wide range of changes that might take place at an interim status facility, it would be impossible to identify all those that were "permit-like" or that required permit-level public participation. Therefore, the Agency has not adopted this approach, and continues to believe that the reconstruction limit should be lifted only in specific, clearly identified circumstances such as those identified in today's rule.

Another commenter suggested that EPA remove the reconstruction limit for any improvements to a facility that would provide increased protection of human health and the environment. EPA has rejected this standard as overly broad and vague. While the Agency does not wish to delay such changes unduly, it believes that, read broadly, this standard could allow almost any change at a facility, including the construction of a major new landfill or an incinerator. These are the kinds of changes that should undergo permitting and full public participation, regardless of whether they arguably increased health and environmental protection.

Another commenter suggested that the reconstruction limit (and more broadly § 270.72) prohibited a wide range of necessary or beneficial changes not identified in today's regulation. The commenter specifically referred to a storage facility that it claimed was unable to curb and pave an unpaved surface on which palletized drums were stored because the cost of this activity would exceed the reconstruction limit. The commenter in this case, however, has misunderstood the reconstruction limit. This limit applies only to facility changes that are regulated under § 270.72. If a change (for example, a new roof over a container storage area or the paving of a storage area) is not identified under § 270.72(a), and does not otherwise require a RCRA permit, it does not need Director approval before it can be made.

In general, if a facility requests an expansion during interim status, the Agency calculates the cumulative cost of all expansions made under § 270.72 since the time the facility gained interim status to determine if the proposed change constitutes a reconstruction. (Note that changes made to the facility that are not regulated under § 270.72 are not included in the cumulative cost). Today's rule raises the question of whether changes for which the reconstruction limit has been lifted should be included in this calculation of

cumulative cost. The Agency believes that inclusion of such changes could effectively block any subsequent change to the facility under § 270.72. Such an effect would inappropriately limit facility changes in interim status. Therefore, when calculating the cumulative cost of changes to a facility to determine whether a proposed change would constitute a reconstruction, the Agency will exclude the cost of any changes listed under § 270.72(b).

D. Post-Closure Permitting

Today's rule clarifies that the Agency has the authority to deny a permit for the active life of a facility or unit while a decision with respect to the post-closure permit remains pending. This practice allows EPA to close interim status facilities promptly through the permit denial process if they are unable to meet permitting standards, rather than delay denial (and closure) until all post-closure permit conditions have been reviewed and approved. The Agency believes that it has always had the authority to separate these two permit decisions under the permitting regulations, although those regulations did not specifically outline such an approach. In the August 14 **Federal Register** notice, the Agency proposed modifications to its permitting regulations under 40 CFR Part 270 that would make clear this authority. Those amendments, promulgated today, make the following changes: A new § 270.29 is added to specify that the permitting authority may deny a permit under 40 CFR Part 124 either in its entirety or as to the operating portion only; amended § 270.1(c) clarifies that any such partial denial does not affect a facility's responsibility to obtain the post-closure permit; and, amended § 270.10(c) specifies that the permitting authority may deny the operating portion of a permit without awaiting an application that is complete as to post-closure responsibilities. Finally, to assure fairness in this process, today's rule amends §§ 124.1(a), 124.15 (a) and (b), and 124.19 to clarify that a decision under § 270.29 to deny the operating portion of a permit is subject generally to Part 124 procedures and, in particular, to the appeals procedures of § 124.19.

The amendments allow EPA to deal expeditiously with facilities or units clearly unable to meet standards for operation under Part 264. They clarify the Agency's authority, in such cases, to move more expeditiously to permit denial and initiation of the closure process. At the same time, the amendments make it clear that such permit denial does not relieve the facility of its post-closure care responsibilities under the Part 264 standards once the post-closure permit is issued. Prior to issuance of the post-closure permit, the facility or unit remains subject to Part 265 standards. (*See* § 265.1(b)).

If the Agency did not have the authority to bifurcate the permit decision and instead were limited to only one permit decision, then it would have to issue the permit for the post-closure care period at the same time that it denied the portion of the permit concerning operational life. Development of the post-closure information necessary for a complete application and for issuance of the post-closure portion of the permit can be very time-consuming. Thus, the Agency's permitting decision to close a facility could be greatly delayed due to the need to develop post-closure information, even after it became clear that the facility would not be permitted for continued operation.

For instance, under § 124.3(d), failure to submit sufficient information for permitting is a basis for permit denial. However, if the Agency could not deny a permit without simultaneously issuing the post-closure portion of the permit, the permit decision for the facility would be delayed, allowing the facility to continue operation while the Agency gathered information necessary to develop a post-closure permit. In fact, the permit denial might be delayed longer for facilities that have greater deficiencies in their applications, thus rewarding facilities that are in greater noncompliance.

The Agency pointed out in the preamble of the proposed rule that it cannot under these amendments bifurcate the *issuance* of an operating permit and a post-closure permit. No permit may be issued without conditions covering the post-closure period applicable to the facility. One commenter questioned whether EPA in fact adhered to that requirement. The commenter cited a permit that contained no post-closure permit but only incorporated a reference to the post-closure plan. In fact, the permit described by the commenter appears to be consistent with EPA policy, because it contains post-closure conditions (albeit by reference). At the time of "closure," a separate "post-closure permit" would not be issued; instead, the facility owner/operator would be required to follow the terms of the post-closure plan incorporated into the permit.

One commenter objected that a bifurcated permit issuance process would violate due process rights of owners and operators of interim status facilities. First, the commenter argued that, rather than deny a permit for the active life and issue a post-closure permit, the Agency should use its enforcement authority to force closure. The Agency agrees that enforcement may in many cases be the appropriate authority for forcing closure at interim status facilities unable to comply with the regulations. However, the Agency also has the responsibility and in fact is required to deny applications for an operating permit at such facilities, as well as at facilities that prove unwilling to or incapable of preparing a complete application.

Second, the commenter argued that the proposed amendment would provide the Agency with unfettered discretion to deny a permit application at any stage of the process and that possible abuse could occur if the Agency were to use proposed § 270.10(c) rather than the notice of deficiency/response procedures specified in § 124.3 as a means of addressing incomplete applications. The Agency does not agree. To deny a permit, the Agency must follow the applicable procedures of 40 CFR Part 124; today's rule does not change that. The new § 270.29 provides that "[t]he Director may, pursuant to the procedures in Part 124, deny the permit application either in its entirety or as to the active life of a facility or unit only." Permit denial under section 124 presupposes that the completeness review process of § 124.3 has been satisfied. In addition, § 124.6(b) requires that, if the Agency decides to deny a permit application, it must first issue a notice of intent to deny. This, of course, includes a notice of intent to deny a permit for the operating life of a facility and, this notice must follow the same procedures as any draft permit under that section, that is, it must be accompanied by a statement of basis and a fact sheet, based on the administrative record, publicly noticed, and made available for public comment. (*See* § 124.6(e)). In addition, to assure clarity, the Agency has amended §§ 124.1, 124.15 (a) and (b), and 124.19 in today's rule to indicate specifically that the decision to deny the operating life portion of a permit is subject to appeal under the procedures of § 124.19. Thus, today's amendments do not change the applicability of Part 124 procedures for permit denial, which the Agency believes provide owners and operators of interim status facilities full due process protection.

The commenter also pointed out that the Agency amended § 270.10(c) on December 1, 1987 (52 FR 45788) in a rule

that codified certain HSWA provisions. The Agency recognizes this fact and further amends that section in this rule.

One commenter pointed out that while the preamble language discussed bifurcation of permit decisions in terms of "facilities", the regulatory language in proposed §§ 270.1(c) and 270.10(c) referred to "units". The Agency agrees with the commenter that this discrepancy requires clarification. Generally, it is the Agency's practice to issue or deny permits for entire facilities, addressing all units in operation or closing at the site. However, the Agency has authority, under § 270.1(c)(4), to issue or deny a permit for one or more units at a facility without simultaneously issuing or denying a permit to all units at the facility. To make it clear that the Agency can either bifurcate its permit denial and post-closure permit decisions with respect to the entire facility or for selected units at the facility, the Agency has modified the language in today's revisions to §§ 270.1 and 270.10(c) to refer to "facility or unit."

E. Permit Modifications to Comply With the Land Disposal Restrictions and to Facilitate Treatment

On September 28, 1988 (53 FR 37912), EPA established a new three-tiered system of procedures for permittee-initiated permit modifications. In that rule, specific facility changes were classified as either Class 1, 2, or 3 modifications. On November 17, 1988 (53 FR 46474), EPA requested further comment in this rulemaking on whether it would be appropriate to allow, as Class 1 modifications, certain facility changes that are necessary to comply with the land disposal restrictions and to otherwise facilitate treatment of hazardous wastes. After reviewing comments on this notice, EPA is today amending the permit modification requirements to add the following types of modifications:

Class 1 modifications without prior approval

1. Addition of new waste codes (or a narrative description) for *disposal* of restricted wastes if:

—Treated to BDAT standards, or
—Treated in compliance with "soft-hammer" standards.
—In addition, the waste must be disposed of in landfills or surface impoundments meeting minimum technology requirements.

2. Addition of new waste codes (or a narrative description) for *disposal* of treated wastewater, waste-water treatment residues, and incinerator ash containing non-restricted waste codes, if:

—Disposed of in a landfill or surface impoundment meeting minimum technology requirements, and
—The receiving landfill or surface impoundment previously handled that type of waste

3. Addition of new waste codes (or a narrative description) for *treatment* if:

—Receiving unit is a tank or container, and
—No new tanks or containers and no new management or treatment processes are added, and
—The receiving unit previously handled that type of waste

Class 1 modification with prior approval

1. Addition of new tanks or containers or new treatment processes in tanks or containers (with or without addition of new waste codes), if:

—Used for treatment of restricted wastes to BDAT or "soft hammer" standards

Each of these new permit modifications are discussed in greater detail below.

1. Disposal of Restricted Wastes that Meet Treatment Standards. In the November 17 notice, the Agency requested comment on establishing a new Class 1 modification for the addition of new waste codes, or a narrative description of wastes, to a permit when the addition covers restricted wastes that meet the applicable treatment standards (i.e., the treatment standard promulgated in Subpart D of Part 268, which standard is based on performance of the Best Demonstrated Available Technology). This change would apply to treatment residues from restricted wastes (including wastes derived therefrom) treated to BDAT levels, or that meet the treatment standards as generated. In addition, the Agency requested comment on whether these modifications should be limited to situations where the receiving unit met the minimum technological requirements.

All of the commenters who responded to this request for further comment supported the general concept of establishing this new Class 1 modification. A few commenters expressed a preference for Agency approval prior to such a facility change. However, most commenters argued that prior Agency approval should not be required. Since the wastes would already meet BDAT treatment standards, the requirement for prior Agency approval would have little environmental benefit and would only delay the implementation of the changes. In addition, many commenters also argued that the minimum technological requirements should not be required for landfills or surface impoundments receiving these wastes because the wastes would meet BDAT standards, and so may legally be disposed in non-MTR landfills and, in limited circumstances, non-MTR impoundments.

EPA agrees with the commenters who urged that this modification be Class 1 without prior Agency approval. However, the Agency disagrees with the commenters who argued that minimum technological requirements should not apply to receiving landfills and surface impoundments. The rationale for establishing a Class 1 modification without prior Agency approval for these types of permit changes is based on the fact that the wastes will be treated in accordance with the applicable treatment standards and that they will be placed in receiving units that meet the most stringent unit design standards (i.e., minimum technology requirements). These prerequisites will assure that the permit modification will be relatively minor and, therefore, appropriate for Class 1. Under the Class 1 process, facilities implementing the change must notify the Agency within 7 days of implementation, and the Agency retains the right to reject a Class 1 modification for cause (e.g., not meeting the Class 1 modification preconditions).

Several commenters pointed out that the minimum technological standards are not imposed on landfills and surface impoundments that would otherwise be subject to those standards as long as they qualify for the exemption in section 3004(o) (2) and (3) (e.g., the unit has alternative design and operating practices or is a monofill). EPA agrees with these commenters that restricted wastes destined for a unit that qualifies for the section 3004(o) (2) or (3) exemption may also be added to the permit as a Class 1 change. This could include impoundments that meet certain of the section 3005(j) exceptions to retrofitting. (See 50 FR 28710, July 15, 1985, and 53 FR 31185–186, August 17, 1988). The Agency believes that this is equitable and protective since these two exemptions are allowed only in situations where environmental protection equivalent to the minimum technological requirements will be achieved.

In summary, today's rule allows the addition of new waste codes, or a narrative waste description, to a permit as a Class 1 modification where the addition involves a restricted waste that

meets the applicable treatment standards, provided that the waste is disposed in a landfill or surface impoundment unit that meets the minimum technology requirements set forth at section 3004(o) (including the exemptions in section 3004(o) (2) and (3)). The modification appears in items (H)(5)(c) (surface impoundments) and J(6)(C) (landfills) of Appendix I to § 270.42.

This amendment will provide permittees the ability to respond quickly to the requirements of the land disposal restrictions. This will facilitate implementation of the land disposal restrictions program by helping to ensure that there is an ultimate disposal outlet for properly treated hazardous wastes (and for wastes that already meet treatment standards). Without a means a disposal, treatment facilities will not accept restricted wastes for treatment, thus undermining the whole purpose of the land disposal restrictions effort. Today's rule will also expedite final disposition of restricted wastes and will encourage the use of units that meet the minimum technological standards. It should be noted that those permittees who have landfill or surface impoundment units that do not meet the minimum technological requirements may generally use the Class 2 procedures to add waste codes for restricted waste treated to (or that meet) BDAT standards.

2. Soft Hammer Waste Treatment Residues. In the November 17 notice, EPA solicited comment on whether the addition of waste codes, or a narrative description, for the receipt of residues from the treatment of "soft hammer" wastes should also be a Class 1 modification. Further, the Agency requested comment on whether such Class 1 modifications should be available only when a certification has been submitted pursuant to § 268.8. This certification would ensure that these wastes would have to be treated by the practically available technologies that yield the greatest environmental benefit (§ 268.8(a)(2)(ii)). Under the approach described in the November 17 notice, therefore, Class 1 modifications would not be available for adding waste codes, or a narrative description, for: (1) *Untreated* "soft hammer" wastes, or (2) any treated "soft hammer wastes" that will not be disposed in a minimum technology landfill or surface impoundment (e.g., if the waste is destined for a land treatment unit).

Most commenters argued that the addition of waste codes to a permit for the receipt of residuals from the treatment of "soft hammer" wastes should be defined as Class 1 without prior Agency approval. Furthermore, several commenters believed that this modification should include the receipt of untreated "soft hammer" wastes.

EPA agrees with the commenters in general regarding the need for greater flexibility for permittees to be able to accept treated "soft hammer" wastes and, therefore, is today promulgating such permit changes as a Class 1 modification. (*See* Appendix I to § 270.42, items H(5)(c) (surface impoundments) and J(6)(c) (landfills)). However, the Agency has determined that only the "soft hammer" treatment residues for which there is a § 268.8 certification should qualify for Class 1 modifications. EPA believes that this limitation is necessary since today's rule is designed in large part to further the legitimate treatment of restricted wastes and to advance the ultimate goal of the land disposal restrictions statutory provisions. Allowing disposal of untreated soft hammer wastes (i.e., soft hammer wastes for which a generator certifies that there is no practically available treatment) does not further these objectives. Furthermore, since no § 268.8 certification is to be filed for soft hammer wastes not destined for disposal in a landfill or impoundment, there is no ready benchmark to evaluate the extent of treatment of such wastes, making the Class 1 modification inappropriate. Other permit changes involving "soft hammer" wastes or residues can generally be allowable under the Class 2 procedures.

3. Other Treatment Residues. EPA, in response to comment, is also allowing as a Class 1 modification without prior approval the addition of new waste codes (or a new narrative description of particular wastes) by a disposal facility to receive residues from wastewater treatment or incineration, or to receive treated wastewater, provided that the disposal unit meets minimum technology requirements, and provided that the surface impoundment or landfill has previously handled this type of waste. For example, if the facility already receives wastewater treatment sludge from treating multi-waste code leachate, it could add waste codes (or a narrative description) to allow it to continue to receive this same type of waste. In addition, today's rule would allow disposal facilities to modify their permits to receive multi-waste code incinerator ash as a Class 1 modification, without prior approval, where the facility already is permitted to accept incinerator ash and the waste is placed in an MTR unit. These modifications are described in items H(5)(d) (surface impoundments) and J(6)(d) (landfills) of Appendix I.

EPA is adopting this provision in response to comment, and also is acting to assure that there are means of disposing of properly treated residues from wastewater treatment and from incineration. As the Agency indicated in the November 17 notice, there are many forms of wastewater treatment and incineration that approximate BDAT that should be facilitated. (*See* 53 FR 46477). Treatment will not occur, however, if there is no means of disposing of the residues from such treatment. The Agency also is assuring that only land disposal units with the most safeguards are eligible for receipt of these treatment residues by limiting eligibility for this Class 1 modification to disposal in minimum technology landfills and surface impoundments.

4. Addition of Wastes at Treatment Facilities. The Agency also solicited comment on whether greater flexibility should be provided for treatment facilities receiving hazardous wastewaters and wastewater treatment residues carrying multiple waste codes not yet subject to land disposal restrictions. EPA specifically cited the problems potentially faced by treatment facilities handling leachate derived from the disposal of waste in the second or third of the schedule. Although the facility's level of treatment might approximate eventual BDAT, if the leachate or leachate treatment residue carries too many waste codes, the treatment facility's permit could preclude immediate receipt. (It should be noted that although many wastewater treatment tank facilities do not require RCRA permits, some do. (*See generally*, 53 FR 34080–81, September 2, 1988). Permits also are required for tanks treating wastewater treatment residues that are non-wastewaters).

Commenters on this question generally recommended that EPA provide broad flexibility for facilities receiving such wastes. In reviewing these comments as well as the principle underlying the current permit modification rules, however, the Agency concluded that a broad approach, setting no limits on the types of wastes received or the treatment conducted would be inappropriate—particularly where a Class 1 modification without prior approval was contemplated. As a result, the Agency has decided on a narrower approach, focusing on the specific examples cited in the November 17 notice.

Today's rulemaking, consequently, establishes a Class 1 modification

without prior approval to allow tank and container treatment facilities to add waste codes (or a narrative description) provided that the treatment occurs in tanks or containers, the facility does not add any new treatment units or types of treatment processes (i.e., methods), the waste does not require any new management standards, and the facility previously handled that type of waste. (*See* F(4)(b) (containers) and G(5)(d) (tanks)).

The Agency notes that in response to comment, it has determined that this Class 1 modification should be available without prior approval. The Agency believes that the limitations placed on eligibility assure minimal changes in existing treatment facility operation, and that the further limitation to treatment in tanks and containers will result in this modification being available only in situations with minimum potential for adverse environmental impact. The Agency also notes that this amendment will in many cases encompass restricted wastes, and thus addresses changes that were covered by the former § 270.42(p), which was superseded on September 28, 1988. In addition, as already noted, the Agency is attempting to avoid regulatory impediments to proper treatment, and believes that this amendment furthers that objective. Moreover, to the extent restricted wastes are involved (and by May, 1990, most wastes will be restricted), this modification furthers the ultimate goals of the land disposal restrictions program as well by increasing availability of treatment and thus allowing the land disposal prohibitions to go into effect without the need of national or case-by-case variances based on lack of existing treatment capacity.

5. New Tanks and Containers to Perform Treatment. In the November 17 **Federal Register** notice, EPA requested comment on the establishment of a Class 1 modification with prior Agency approval for the addition of new waste codes (or a narrative description) where additional tanks and containers, or new treatment processes that take place in tanks and containers, are necessary to treat restricted wastes to meet treatment standards. (The amendment would also cover addition of new tanks or containers, or new treatment processes, without addition of new waste codes). This would include partial treatment that meets treatment standards for some of the hazardous constituents in a waste mixture. Treatment would include treatment according to BDAT standards, or for "soft hammer" wastes, treatment for which a certification will be filed pursuant to § 268.8. This modification would be similar to the previous minor modifications in § 270.42 (o) and (p) that were superseded by the permit modification rule published on September 28, 1988. Most commenters supported this modification and its classification, and the Agency is today promulgating this provision as proposed. (*See* Appendix I of § 270.42, items F(1)(c) and G(1)(e)).

It should be noted that this modification would require Class 1 procedures, *with* prior Director approval. The Agency previously determined, in promulgating the former § 270.42 (o) and (p), that flexibility in adding treatment processes, treatment capacity, and waste codes of restricted wastes, would encourage availability of treatment to meet the BDAT standards and thus would further the objectives of the land disposal restrictions program. (*See* 52 FR 25781, July 8, 1987). At the same time, the Agency still believes that if new tanks or containers, or new treatment processes in tanks or containers, are to be added by the facility, prior Director approval should be required before the modification goes into effect. (In this regard, EPA disagrees with the commenter who stated that the former § 270.42(p) did not require prior Director approval; it in fact did require such approval.)

Another commenter stated that this modification should also include treatment in devices "similar to" tanks and containers. The commenter specifically cited distillation units as an example of such units. The Agency disagrees with this comment. In the first place, most distillation units will probably fall within the definition of tank, and therefore this amendment is unnecessary. (*See* 52 FR 3762–63, February 5, 1987). More importantly, it would be very difficult, if not impossible, to define by regulation which units were "similar to" tanks and which were not. The Agency, therefore, is not adopting this suggestion.

6. Other Issues. In commenting on the November 17 notice, several commenters raised a number of issues directly related to the "derived from" rule as discussed in the August 17, 1988 First Thirds Land Disposal Restrictions rule (53 FR 31138). Today's rule only addresses procedural concerns arising from the Agency's long-standing interpretation of the "derived from" rule. The more substantive aspects regarding the application of the "derived from" provisions are not part of this rulemaking.

Today's Class 1 modifications also do not apply to the listed dioxin-containing hazardous wastes (F020, 021, 022, 023, 026, 027, and 028). Such an amendment raises complicated issues beyond the scope of the Agency's notice and not discussed in any detail in the public comments.

The Agency also adds one further note respecting waste codes. Federal RCRA regulations do not require that waste codes be listed in permits. Although such permits must contain some language authorizing receipt of particular hazardous wastes, that language might for example take the form of a narrative description (for example "residues from incineration" or "residues from treating leachate"). Thus, facilities wishing to modify their permits pursuant to today's amendments could do so by establishing a narrative description of allowable wastes instead of by adding particular waste codes.

IV. State Authority

A. Applicability of Rule in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (*See* 40 CFR, Part 271 for the standards and requirements for authorization). Following authorization, EPA retains enforcement authority under sections 3008, 7003, and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments (HSWA) of 1984, a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal Program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State that the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to implement those requirements and prohibitions in an authorized State, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related

provisions as State law to retain final authorization, HSWA applies in authorized States in the interim.

However, it should be noted that section 3009 of RCRA and § 271.1(i) provide that States can impose requirements that are more stringent than the Federal requirements. Federal program changes that are less stringent or reduce the scope of the Federal program do not have to be adopted by authorized States. Furthermore, any authorized State requirement that is more stringent than a newly enacted less-stringent Federal provision remains in effect as authorized State law. This is true even if the less stringent Federal requirements are imposed by HSWA. For less stringent Federal program changes (or changes that reduce the scope of the program), the combined effect of RCRA sections 3006 and 3009 will result in one of the two following situations. In the first case, if the new Federal requirements are promulgated pursuant to pre-HSWA authority, such requirements will not take effect in an authorized State unless and until the State chooses to adopt them as part of the State program. In contrast, less stringent Federal requirements that are imposed by HSWA authority become part of the Federal program that is in effect in all States, including authorized States; however, as discussed above, any more stringent State requirement remains in effect as authorized State law. Therefore, as a practical matter, the regulated community may not be able to benefit from the less stringent Federal HSWA provisions until the State chooses to amend its more stringent authorized RCRA regulations or enabling authority.

B. Effect on State Authorizations

Today's rule is considered to be less stringent than, or to reduce the scope of, existing Federal requirements. Therefore, authorized States are not required to modify their programs to adopt requirements equivalent to these provisions.

Today's rule is not a rule that imposes a requirement or prohibition pursuant to HSWA. However, portions of today's rule may be necessary in appropriate situations to effectively implement HSWA. For example, use of a Class 1 modification to add waste codes and/or narrative descriptions of treatment residues to RCRA permits may be necessary in appropriate situations to effectively implement the treatment requirements and prohibitions of the HSWA land disposal restrictions program. Other examples would involve a change in interim status needed to comply with an EPA-issued section 3008(h) corrective action order or to comply with the minimum technology requirements of HSWA section 3004(o). Hence, the portions of today's rule necessary to implement HSWA in appropriate situations will be immediately effective and administered by EPA in all States pursuant to RCRA section 3006(g). The Agency notes that a permit modification that specifies waste codes and/or narrative descriptions for a permit that previously did not specify waste codes and/or provided a less specific description may create a more stringent permit. Furthermore, during EPA's administration of today's rule, depending on State law, a State may not need to take any action to recognize the effectiveness of a Class 1 modification.

V. Effective Date

Today's rule is effective immediately. Section 3010(b) of RCRA provides that regulations respecting permits for the treatment, storage, or disposal of hazardous waste shall take effect six months after the date of promulgation. However, section 3010(b)(1) of RCRA allows EPA to shorten the time to the effective date if the Agency finds that the regulated community does not need six months to come into compliance with the new regulation.

Today's rule establishes requirements that are less stringent than requirements currently in place. Since the rule relaxes regulations with which the regulated community is required to comply, the Agency finds that the regulated community does not need six months to come into compliance. In addition, the Agency believes that it is important for these amendments to become effective as soon as possible, because of the need for flexibility on the part of interim status facilities to comply with new requirements coming into effect, such as the land disposal restrictions and corrective action. These reasons also provide good cause for making today's rule immediately effective under section 553(d) of the Administrative Procedure Act.

VI. Regulatory Analysis

A. Regulatory Impact Analysis

Under Executive Order 12291, EPA must determine whether a regulation is "major" and thus whether it must prepare and consider a Regulatory Impact Analysis in connection with the rule. Today's rule is not major because it will not result in an annual effect on the economy of $100 million or more, nor will it result in an increase in costs or prices to industry. There will be no adverse impact on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, the Agency has not prepared a Regulatory Impact Analysis for today's rule. This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12291.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, at the time an Agency publishes a proposed or final rule, it must prepare a Regulatory Flexibility Analysis that describes the impact of the rule on small entities, unless the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities. Today's rule provides more flexibility for treatment, storage, or disposal facilities to respond to new requirements and does not affect the compliance burdens of the regulated community. Therefore, pursuant to 5 U.S.C 601b, I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

List of Subjects

40 CFR Part 124

Administrative practice and procedure, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 270

Administrative practice and procedure, Hazardous waste, Reporting and recordkeeping requirements, Permit application requirements, Permit modification procedures, Waste treatment and disposal.

Date: February 26, 1989.

William K. Reilly,

Administrator.

Therefore, Subchapter I of Title 40 is amended as follows:

PART 124—PROCEDURES FOR DECISIONMAKING

1. The authority citation for Part 124 continues to read as follows:

Authority: Resource, Conservation, and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.;* and Clean Air Act, 42 U.S.C. 1857 *et seq.*

2. In § 124.1, paragraph (a) is amended by adding a sentence to the end to read as follows:

§ 124.1 Purpose and scope.

(a) * * * The procedures of this part also apply to denial of a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29.

* * * * *

3. In § 124.15, the first sentences in paragraphs (a) and (b) introductory text, are revised to read as follows:

§ 124.15 Issuance and effective date of permit.

(a) After the close of the public comment period under § 124.10 on a draft permit, the Regional Administrator shall issue a final permit decision (or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29).

* * * * *

(b) A final permit decision (or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29) shall become effective 30 days after the service of notice of the decision unless:

* * * * *

4. In § 124.19, the first sentence of paragraph (a) introductory text, is revised to read as follows:

§ 124.19 Appeal of RCRA, UIC, and PSD permits.

(a) Within 30 days after a RCRA, UIC, or PSD final permit decision (or a decision under § 270.29 to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under § 124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. * * *

* * * * *

PART 270—EPA-ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

1. The authority citation for Part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

2. In § 270.1, paragraph (c) introductory text, is amended by adding a sentence to the end to read as follows:

§ 270.1 Purpose and scope of these regulations.

* * * * *

(c) * * * The denial of a permit for the active life of a hazardous waste management facility or unit does not affect the requirement to obtain a post-closure permit under this section.* * *

3. In § 270.10, paragraph (c) is amended by adding a sentence to the end to read as follows:

§ 270.10 General application requirements.

* * * * *

(c) * * * The Director may deny a permit for the active life of a hazardous waste management facility or unit before receiving a complete application for a permit.

* * * * *

4. In Part 270, a new § 270.29 is added to Subpart B to read as follows:

§ 270.29 Permit denial.

The Director may, pursuant to the procedures in Part 124, deny the permit application either in its entirety or as to the active life of a hazardous waste management facility or unit only.

5. Section 270.42, Appendix I is amended by revising items F(1)(a), F(1)(b), F(3), G(1)(a), G(1)(b), (G)(5)(a), and G(5)(b) and adding items F(1)(c), F(4)(a), F(4)(b), G(1)(e), G(5)(c), G(5)(d), H(5)(c), H(5)(d), J(6)(c), and J(6)(d) as follows:

§ 270.42 Permit modification at the request of the permittee.

* * * * *

Appendix I to § 270.42—Classification of Permit Modifications

Modification	Class
* * * * *	
F. *Containers*	
1. Modification or addition of container units:	
a. Resulting in greater than 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) below	3
b. Resulting in up to 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) below	2
c. Or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii), with prior approval of the Director. This modification may also involve addition of new waste codes or narrative descriptions of wastes. It is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	[1] 1
* * * * *	
3. Storage of different wastes in containers, except as provided in (F)(4) below	
* * * * *	
4. Storage of treatment of different wastes in containers:	
a. That require addition of units or change in treatment process or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards, or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
b. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
* * * * *	
G. *Tanks*	
1. * * *	
a. Modification or addition of tank units resulting in greater than 25% increase in the facility's tank capacity, except as provided in G(1)(c), G(1)(d), and G(1)(e) below	3
b. Modification or addition of tank units resulting in up to 25% increase in the facility's tank capacity, except as provided in G(1)(d) and G(1)(e) below	2
* * * * *	
e. Modification or addition of tank units or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii), with prior approval of the Director. This modification may also involve addition of new waste codes. It is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	[1] 1
* * * * *	
5. * * *	
a. That require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process from that authorized in the permit, except as provided in (G)(5)(c) below	3
b. That do not require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process than authorized in the permit, except as provided in (G)(5)(d)	2

Modification	Class
c. That require addition of units or change in treatment processes or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii). The modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	[1] 1
d. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
* * * * *	
H. * * *	
5. * * *	
c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 269.8(a)(2)(ii), and provided that the unit meets the minimum technological requirements stated in § 268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a unit that meets the minimum technological requirements stated in §268.5(h)(2), and provided further that the surface impoundment has previously received wastes of the same type (for example, incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
* * * * *	
J. * * *	
6. * * *	
* * * * *	
c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii), and provided that the landfill unit meets the minimum technological requirements stated in § 268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a landfill unit that meets the minimum technological requirements stated in §268.5(h)(2), and provided further that the landfill has previously received wastes of the same type (for example, incinerator ash). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
* * * * *	

[1] Class 1 modifications requiring prior Agency approval.

6. Section 270.72 is revised to read as follows:

§ 270.72 Changes during interim status.

(a) Except as provided in paragraph (b), the owner or operator of an interim status facility may make the following changes at the facility:

(1) Treatment, storage, or disposal of new hazardous wastes not previously identified in Part A of the permit application (and, in the case of newly listed or identified wastes, addition of the units being used to treat, store, or dispose of the hazardous wastes on the effective date of the listing or identification) if the owner or operator submits a revised Part A permit application prior to such treatment, storage, or disposal;

(2) Increases in the design capacity of processes used at the facility if the owner or operator submits a revised Part A permit application prior to such a change (along with a justification explaining the need for the change) and the Director approves the changes because:

(i) There is a lack of available treatment, storage, or disposal capacity at other hazardous waste management facilities, or

(ii) The change is necessary to comply with a Federal, State, or local requirement.

(3) Changes in the processes for the treatment, storage, or disposal of hazardous waste or addition of processes if the owner or operator submits a revised Part A permit application prior to such change (along with a justification explaining the need for the change) and the Director approves the change because:

(i) The change is necessary to prevent a threat to human health and the environment because of an emergency situation, or

(ii) The change is necessary to comply with a Federal, State, or local requirement.

(4) Changes in the ownership or operational control of a facility if the new owner or operator submits a revised Part A permit application no later than 90 days prior to the scheduled change. When a transfer of operational control of a facility occurs, the old owner or operator shall comply with the requirements of 40 CFR Part 265, Subpart H (Financial Requirements), until the new owner or operator has demonstrated to the Director that he is complying with the requirements of that subpart. The new owner or operator must demonstrate compliance with Subpart H requirements within six months of the date of the change in ownership or operational control of the facility. Upon demonstration to the Director by the new owner or operator of compliance with Subpart H, the Director shall notify the old owner or operator in writing that he no longer needs to comply with Subpart H as of the date of demonstration. All other interim status duties are transferred effective immediately upon the date of the change in ownership or operational control of the facility.

(5) Changes made in accordance with an interim status corrective action order issued by EPA under section 3008(h) or other Federal authority, by an authorized State under comparable State authority, or by a court in a judicial action brought by EPA or by an authorized State. Changes under this paragraph are limited to the treatment, storage, or disposal of solid waste from releases that originate within the boundary of the facility.

(b) Except as specifically allowed under this paragraph, changes listed under paragraph (a) of this section may not be made if they amount to reconstruction of the hazardous waste management facility. Reconstruction occurs when the capital investment in the changes to the facility exceeds 50 percent of the capital cost of a comparable entirely new hazardous waste management facility. If all other requirements are met, the following changes may be made even if they amount to a reconstruction:

(1) Changes made solely for the purposes of complying with the requirements of 40 CFR 265.193 for tanks and ancillary equipment.

(2) If necessary to comply with Federal, State, or local requirements, changes to an existing unit, changes solely involving tanks or containers, or addition of replacement surface inpoundments that satisfy the standards of section 3004(o).

(3) Changes that are necessary to allow owners or operators to continue

handling newly listed or identified hazardous wastes that have been treated, stored, or disposed of at the facility prior to the effective date of the rule establishing the new listing or identification.

(4) Changes during closure of a facility or of a unit within a facility made in accordance with an approved closure plan.

(5) Changes necessary to comply with an interim status corrective action order issued by EPA under section 3008(h) or other Federal authority, by an authorized State under comparable State authority, or by a court in a judicial proceeding brought by EPA or an authorized State, provided that such changes are limited to the treatment, storage, or disposal of solid waste from releases that originate within the boundary of the facility.

(6) Changes to treat or store, in tanks or containers, hazardous wastes subject to land disposal restrictions imposed by Part 268 or RCRA section 3004, provided that such changes are made solely for the purpose of complying with Part 268 or RCRA section 3004.

7. In § 270.73, paragraphs (e) and (f) are redesignated as paragraphs (f) and (g) and a new paragraph (e) is added to read as follows:

§ 270.73 Termination of interim status.

* * * * *

(e) For owners or operators of any land disposal unit that is granted authority to operate under § 270.72(a)(1), (2) or (3), on the date 12 months after the effective date of such requirement, unless the owner or operator certifies that such unit is in compliance with all applicable ground-water monitoring and financial responsibility requirements.

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federal register

Tuesday
March 7, 1989

Part IV

Environmental Protection Agency

40 CFR Part 61

National Emission Standards for Hazardous Air Pollutants; Regulation of Radionuclides; Proposed Rule and Notice of Public Hearing

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[FRL 3504-8]

National Emission Standards for Hazardous Air Pollutants; Regulation of Radionuclides

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule and notice of public hearing.

SUMMARY: On December 8, 1987, the DC Circuit Court granted EPA's motion for a voluntary remand of all radionuclide National Emission Standards for Hazardous Air Pollutants (NESHAPs) and decisions not to regulate certain categories of radionuclide emissions that had been challenged in petitions for review (*EDF v. EPA*). The Court ordered EPA to propose its regulatory decisions for all radionuclide source categories within 180 days and to finalize them within 360 days. On March 17, 1988, the Court modified the order to require EPA to propose regulatory decisions by February 28, 1989 and take final action by August 31, 1989.

This notice presents the Administrator's reexamination of regulatory decisions and issues associated with the use of section 112 of the Clean Air Act to control the emission of radionuclides from the following source categories: DOE Facilities, Licensees of the Nuclear Regulatory Commission and Non-DOE Federal Facilities, Uranium Fuel Cycle Facilities, Elemental Phosphorus Plants, Coal-Fired Boilers, High-level Nuclear Waste Disposal Facilities, Phosphogypsum Stacks, Underground and Surface Uranium Mines, and Licensed and Inactive Uranium Mill Tailings Piles. It proposes four policy alternatives that could be used in setting NESHAPs following the DC Circuit's decision in *NRDC* v. *EPA*, 824 F.2d 1146 (1987). The decisions that would result from application of each of the policy approaches to the radionuclide source categories are described and the resulting standards are proposed. Also included is a discussion of the issues raised by all the parties to the litigation that has surrounded these regulatory decisions.

Public hearings will be held to provide interested persons an opportunity for oral presentation of data, views, or arguments concerning these proposed actions.

DATES: *Comments.* Comments must be received on or before May 15, 1989.

Public Hearing. Public hearings will be held in Washington, DC on April 10 and 11, 1989 and in Las Vegas, Nevada on April 13 and 14, 1989.

Request to Speak at Hearings. Persons wishing to present oral testimony should notify EPA by April 3, 1989.

ADDRESSES: Comments should be submitted (in duplicate if possible) to: Central Docket Section (A-130), Environmental Protection Agency, Attn: Docket No. A-79-11, Washington, DC 20460.

The rulemaking record is contained in Docket No. A-79-11. This docket is located in Room 4, South Conference Center, Central Docket Section, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket may be inspected between 8 a.m. and 3 p.m. on weekdays. A reasonable fee may be charged for copying.

Single copies of the Draft Background Information Document and Draft Economic Assessment (which, combined, form the draft Environmental Impact Statement (EIS)) have been placed in the docket. Other documents available for review include: A Guide for Determining Compliance with the Clean Air Act Standards for Radionuclide Emissions from NRC-Licensed and Non-DOE Federal Facilities (January 1989); NRC Regulatory Guide 3.59, Methods for Estimating Radioactive and Toxic Airborne Source Terms for Uranium Mill Operations (March 1987); Procedures Approved for Demonstrating Compliance with 40 CFR Part 61 Subpart J (January 1989); Screening Techniques for Determining Compliance with Environmental Standards (March 1986); and User's Guide for the COMPLY Code (January 1989). Copies of these documents may be obtained by writing to: Director, Criteria and Standards Division (ANR-460), Office of Radiation Programs, Environmental Protection Agency, Washington DC 20460.

Requests to participate in the public hearings should be made in writing to the Director, Criteria and Standards Division. All requests for participation should include an outline of the topic to be addressed in the opening statement(s), the amount of time requested for the statement(s), and the name of the participants. Statements can be made at the hearings without prior notice, but may be subject to time constraints, at the discretion of the hearing officer. Statements should not repeat information already presented in written comments, but should address additional information or issues.

Locations for the hearings are:

In Washington—

Sheraton Inn, 8727 Colesville Rd., Silver Spring, MD 20910.

In Las Vegas—

Thomas M. Mack Center, 4505 South Maryland Parkway, Las Vegas, Nevada 89154.

FOR FURTHER INFORMATION CONTACT: James M. Hardin, Environmental Standards Branch, Criteria and Standards Division (ANR-460), Office of Radiation Programs, Environmental Protection Agency, Washington, DC 20460, (202) 475-9610.

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I. Definitions

A. Terms

Activity. The amount of a radioactive material. It is a measure of the

transformation rate of radioactive nuclei at a given time. The customary unit of activity, the curie, is 3.7×10^{10} nuclear transformations per second.

Agreement state. Any state with which the Nuclear Regulatory Commission or the Atomic Energy Commission has entered into an effective agreement under subsection 274(b) of the Atomic Energy Act of 1954, as amended 68 Stat. 919.

Annualized cost. The equivalent uniform annual net disbursement.

By-product material. Any radioactive material (except source material and special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material and wastes from the processing of ores primarily to recover their source material content.

Effective Dose Equivalent (EDE). A risk-weighted average of the organ dose equivalents. The effective dose equivalent has the same risk (for the model used to derive the weighting factors) as a uniform dose equivalent to all organs and tissues. For the purposes of this standard, "effective dose equivalent" means the result of the calculation used to determine the dose eqivalent to the whole body, by taking into account the specific organs receiving radiation and the radiation effective dose eqivalent to the body as a whole. The method used to calculate the dose is described in detail in the International Commission on Radiological Protection's Publication No. 26.

Half-life. The time in which half the atoms of a particular radioactive substance transform, or decay, to another nuclear form.

Incidence. This term is used to denote the number of fatal cancers in a population. Other health effects (non-fatal cancers, genetic, and developmental) are noted separately.

Maximum individual risk. The additional cancer risk of a person due to exposure for a 70-year lifetime at a point of maximum concentration of a emitted pollutant.

Pathway. A method or way that radionuclides might contaminate the environment or reach people, e.g. air, food.

Radionuclide. A type of atom which spontaneously undergoes radioactive decay.

Source term. The amount of emisssions from a source, either estimated, measured or reported, that is used in the risk assessment.

Transuranic. An element with an atomic number greater than the atomic number of uranium.

Uranium fuel cycle. The operations of milling of uranium ore, chemical conversion of uranium, isotopic enrichment of uranium, fabrication of uranium fuel, generation of electricity by a light-water-cooled nculear power plant using uranium fuel, and reprocessing of spent uranium fuel, to the extent that these directly support the production of electrical power for public use utilizing nuclear energy. This definition does not include mining operations, operations at waste disposal sites, transportation of any radioactive material in support of these operations and the reuse of recovered non-uranium special nuclear and by-product materials from the cycle.

B. Acronyms

AEA—Atomic Energy Act, 42 U.S.C. 2011 *et seq.*
ALARA—As low as reasonably achievable
AMC—American Mining Congress
ANPR—Advanced Notice of Proposed Rulemaking
BACT—Best available control technology
CAA—The Clean Air Act, 42 U.S.C. 7401 *et seq.*
CAP-88—Clean Air Act Assessment Package—1988
CFR—Code of Federal Regulations
BID—The Draft Background Information Document prepared in support of this rulemaking (Volume 1 of the draft EIS)
EIA—The Draft Economic Impact Assessment prepared in support of this rulemaking (Volume 2 of the draft EIS)
EIS—Environmental Impact Statement
DOE—United States Department of Energy
EDF—Environmental Defense Fund
EPA—United States Environmental Protection Agency
fCi—femtocurie, 1×10^{15} curie
HLW—High-Level Radioactive Waste
ICRP—International Commission on Radiological Protection
MSHA—Mining Safety and Health Administration
mrem—millirem, 1×10^{3} rem
NAAQS—National Ambient Air Quality Standards
NESHAP—National Emission Standard for Hazardous Air Pollutants
NCRP—National Council on Radiation Protection and Measurements
NRC—United States Nuclear Regulatory Commission
pCi—picocurie, 1×10^{-12} curie
UFC—Uranium Fuel Cycle
UMTRCA—Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. 7901, *et seq.*

II. Overview of Proposed Actions

Under section 112 of the Clean Air Act (CAA), EPA is required to establish emission standards for hazardous air pollutants at a level which provides an ample margin of safety to protect public health. In *Natural Resources Defense Council, Inc. v. EPA,* 824 F.2d 1146 (1987) (hereafter referred to as *Vinyl Chloride*), the Court set out a two-step decision process for EPA to follow in setting NESHAPs under section 112. The two steps are: (1) Determine a "safe" or "acceptable" health risk level and (2) set the standard at the level—which may be lower but not higher than the "safe" or "acceptable" level—that protects public health with an ample margin of safety. The Administrator may instead use only one step to set standards, but if he does this, he may not consider cost or technology.

As discussed in detail in Section VI of this notice, the Agency is, as it did in the proposed Benzene NESHAP, 53 FR 28496, proposing four alternative policy approaches for making these two decisions under section 112. Commentors should understand that the final decision on the NESHAP approach could be one of the four described in this notice or a variation. The final policy approach and the relative weight it gives to the various risk measures and uncertainties may become the framework for future NESHAPs decisions. Consequently, the Agency is interested in comments on general implications of the various policy approaches in addition to comments on the specific applications to the twelve radionuclide source categories.

The framework adopted for NESHAPs does not apply to other Agency programs. The Court's interpretation of the process required for establishing NESHAPs did not extend to regulatory decisions under any other section of the CAA or other statute administered by EPA: therefore, the Agency does not envision applying the process described below to regulatory judgments under other Acts. Regulatory decisions under other Acts will continue to be made using decisional approaches pursuant to those distinct statutory mandates.

The various policy approaches being proposed differ in how the question of acceptable risk is addressed and in how uncertainty in risk measures is considered. The Agency is using both the four proposed approaches and the applications of the approaches to the radionuclide source categories as a means to further frame the public debate on these questions. The Agency believes that the broad ramifications of any

particular approach for establishing acceptable risk levels for all NESHAPs should be subject to informed public debate.

A. Safe or Acceptable Risk Policy Approaches

Each of the four approaches treats the acceptable risk decision differently. The major characteristics of the four proposed approaches to acceptable risk and ample margin of safety decisions are described below.

1. Approach A. Case-by-Case Approach

This is the only approach in which all the health information, risk measures and potential biases, underlying assumptions, and quality of the information (i.e., uncertainties) are considered together in the acceptable risk decision. The preferred level for the maximum individual lifetime risk in this approach is 10^{-4} or less; however, different results for specific source categories may be reached based on consideration of all the available information.

2. Approach B. Incidence-Based Approach

This approach only considers EPA's best estimate of the total incidence of fatal cancer in the acceptable risk decision. The other health information, including individual risk and the uncertainties, are not considered until the ample margin step. The incidence level being proposed as acceptable is no more than 1 case of fatal cancer per year per source category.

3. Approach C. 1×10^{-4} or Less Maximum Individual Risk Approach

For this approach, the only parameter considered in determining acceptable risk is EPA's best estimate of the maximum individual lifetime risk of fatal cancer. The other health information including incidence, and the uncertainties, are considered in the ample margin step. In this approach, a maximum individual lifetime risk of no greater than 1×10^{-4} is acceptable.

4. Approach D. 1×10^{-6} or Less Maximum Individual Risk Approach

This approach is similar to Approach C, however, acceptable risk is defined as a maximum individual lifetime risk of no greater than 1×10^{-6}.

B. Ample Margin of Safety Decision

This decision is made separately after the safe determination has been made. The Administrator considers all the health risk measures as well as the technological feasibility, costs, estimation uncertainties, economic impacts of control technologies and any other relevant information. An issue that arises in this decision is whether to require all technologically feasible controls which are affordable no matter how small the risk reduction.

III. Historical Background of Radiation NESHAPs

On December 27, 1979, EPA listed radionuclides as a hazardous air pollutant under section 112 of the CAA [44 FR 76738 (December 27, 1979)]. EPA determined that radionuclides are a known cause of cancer and genetic damage and that radionuclides cause or contribute to air pollution that may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, constituting a hazardous air pollutant as defined by section 112(a)(1). EPA then determined that radionuclides presented a risk warranting regulation under section 112, and listed the pollutant under that section. Having listed radionuclides as a hazardous air pollutant, EPA was then required by section 112(b)(1)(B) to establish National Emissions Standards for Hazardous Air Pollutants (NESHAPs) at the "level which [in the judgment of the Administrator] provides an ample margin of safety to protect the public health from such hazardous air pollutant," or find that they are not hazardous and delist them.

On April 6, 1983, EPA proposed standards regulating radionuclide emissions from four source categories: (1) Elemental phosphorus plants, (2) DOE facilities, (3) NRC licensed facilities and non-DOE federal facilities (NRC-licensees), and (4) underground uranium mines. The Agency simultaneously proposed its decision not to regulate several other categories: (1) Coal-fired boilers, (2) the phosphate industry, (3) other extraction industries, (4) uranium fuel cycle facilities, (5) uranium mill tailings, (6) high level radioactive waste facilities, and (7) low energy accelerators [48 FR 15076 (April 6, 1983)]. In February 1984, the Sierra Club filed suit in the U.S. District Court for the Northern District of California to compel EPA to take final action on the proposed standards. *Sierra Club v. Ruckelshaus,* No. 84-0656. EPA was subsequently ordered by the Court to promulgate final standards or make a finding that radionuclides are not hazardous air pollutants and delist them.

In October 1984, EPA withdrew the proposed emission standards for elemental phosphorus plants, DOE facilities, and NRC licensees, finding that the control practices already in effect for those categories protected the public from exposure to radionuclides with an ample margin of safety. EPA, therefore, concluded that no additional regulation would be necessary [49 FR 43906 (October 31, 1984)].

In the notice, EPA also withdrew the proposed standard for underground uranium mines but stated its intention to promulgate a different standard for that category and simultaneously published an Advance Notice of Proposed Rulemaking (ANPR) for radon-222 emissions from underground uranium mines to solicit additional information on control methods. EPA also published an ANPR for radon-222 emissions from licensed uranium mills. EPA affirmed its decision not to regulate the other categories: coal-fired boilers, the phosphate industry, other extraction industries, uranium fuel cycle facilities, and high level radioactive waste. The Agency decided not to regulate phosphogypsum stacks under section 112 at that time, but instead to further study the category to determine whether the need for a standard existed.

On December 11, 1984, the U.S. District Court for the Northern District of California found EPA in contempt of its order to promulgate final standards and again directed that EPA issue final radionuclide emission standards for the original four categories or make a finding that radionuclides are not hazardous air pollutants. EPA complied with the court order by promulgating standards for radionuclides emissions from elemental phosphorus plants, DOE facilities, and NRC-licensees [50 FR 7280 (February 6, 1985)] and a work practice standard for radon-222 emissions from underground uranium mines [50 FR 15385 (April 17, 1985)]. On September 24, 1986, EPA promulgated a final rule regulating radon-222 emissions from licensed uranium mill processing sites by establishing work practices for new tailings [51 FR 34056 (September 24, 1986)].

The Environmental Defense Fund (EDF), the Natural Resources Defense Council (NRDC), and the Sierra Club filed petitions for review of the October 1984 withdrawals and final decisions not to regulate, the February 1985 standards for the three source categories and the April 1985 standard for underground uranium mines. The April 1985 standard for underground uranium mines was also challenged by the American Mining Congress (AMC). In November 1986, AMC and EDF filed petitions challenging the standard for licensed uranium mill processing sites.

On July 28, 1987, the U.S. Court of Appeals for the DC Circuit remanded to the Agency an emissions standard for vinyl chloride which had also been promulgated under section 112 of the CAA. The Court in *Vinyl Chloride* concluded that the Agency improperly considered cost and technological feasibility without first making a determination based exclusively on risk to health.

In light of that decision, EPA concluded that the standards for elemental phosphorus plants, DOE facilities, NRC-licensees, and underground uranium mines should be reconsidered and on November 16, 1987, moved the Court for a voluntary remand of those NESHAPs. EPA also agreed to reexamine all issues raised by the parties to the litigation. On December 8, 1987, the Court granted EPA's motion for voluntary remand and established a time schedule for EPA to propose regulatory decisions for all radionuclide source categories within 180 days and finalize them within 360 days. On March 17, 1988, the Court granted a subsequent EPA motion and modified the order to require proposed regulatory decisions by February 28, 1989 and final action by August 31, 1989.

On April 1, 1988, EPA also requested a remand for its standard for licensed uranium mill tailings. On August 3, 1988 the Court granted EPA'a motion and put the uranium mill tailings NESHAP on the same schedule as the other radionuclide NESHAPs.

On remand, EPA intends to take a "fresh look" at the risks and issues involved in regulating or not regulating radionuclide emissions under section 112 of the CAA. This means that the Agency is not bound by previous statements, positions or decisions. The Agency will or will not regulate sources based on whether or not their emissions protect public health with an ample margin of safety as determined during this rulemaking.

IV. Characterization of the Risks of Radiation

A. Sources of Radiation

Every day each person is exposed to radiation from a variety of natural and manmade sources. Natural sources of radiation include cosmic rays, radon, and other terrestrial sources. Manmade radiation includes medical and dental X-rays, fallout from above ground nuclear weapons testing and indsutrial sources.

The earth's atmosphere acts as a shield to cosmic rays, absorbing much of the radiation. People receive a higher dose of cosmic rays at higher altitudes because there is less atmosphere to shield them from cosmic rays. For example, people living in the mountains receive a higher dose than people living at sea level, and people are exposed to even higher levels when flying in an airplane. Terrestrial radiation comes from the small amount of radionuclides that are naturally present in all matter: soil, air, food, clothes, and even our bodies.

Radon is a radionuclide that is produced as a radioactive decay product of the radium which is naturally found in soil. Radon is always present in the ambient air where it poses some health risk. In addition, radon often gets trapped in homes, leading to even higher health risks. EPA has issued recommendations to homeowners for reducing these risks.

This rulemaking deals with sources of radionuclide emissions, including radon, from industrial sources. Although the amount of radiation dose that most people receive as a result of these emissions is lower than their natural background dose, the resulting risk can still be signficant. A source does not present an acceptable risk simply by being less than natural background. It is important to note that total background radiation from all sources, including naturally occurring radon, results in a calculated maximum lifetime risk of fatal cancer of approximately 1×10^{-2}. In most cases, little can be done to reduce most of this radiation exposure which people receive from natural background.

Industrial sources of radionuclide emissions in the air include a wide variety of facilities, ranging from nuclear power facilities to hospitals to uranium mill tailing piles. Industry uses hundreds of distinct radionuclides in solid, liquid, and gaseous forms, emitting different types of radiation (alpha, beta, gamma) at various energy levels.

Industrial sources of radionuclide emissions fall into two major categories. The industries that use radioactive materials have emissions as a result of an inability to completely contain the materials they use. For example, hospitals use radionuclides as part of their radiology departments. Since many of the radionuclides they use are gases, liquids capable of evaporation, or solids capable of sublimation, some radionuclides inevitably are released into the environment. The other type of source is that which releases radionuclides (usually radon) as an unintended consequence of other activity, such as mining or milling. An example of this is phosphogypsum stacks. These piles emit radon because radium (from which radon is produced by radioactive decay) is found naturally in the same soils that are the source of phosphate rock.

B. Health Effects of Radiation

The level and type of hazard posed by radionuclides vary, depending on such characteristics as the radionuclide's radioactive half-life, the type of radiation it emits, the energy level of the emission(s), and its ability to concentrate in the body. Different radionuclides will irradiate different parts of the body causing different types of cancers.

There are three major types of long-term health impacts from exposure to radiation: Cancer, hereditary effects, and developmental effects on fetuses such as mental retardation. Since there is such a strong basis for quantifying the risk from fatal cancers, EPA's consideration of fatal cancers is the driving force in this rulemaking. However, it is important to note that other health effects have been considered as well in the rulemaking. The other effects are not specifically addressed in this discussion because none of them pose a more severe risk to health. Therefore, judging the risk of total fatal cancers acceptable is judging the other effects acceptable. In addition, risk distribution of health effects from radiation from most of the sources considered for regulation show that fatal cancers occur much more frequently than non-fatal cancers and cancers generally occur more often than genetic or developmental effects. For sources that emit radon, no genetic or developmental effects and very few non-fatal cancers are expected.

Numerous studies have demonstrated that radiation is a carcinogen. It is assumed that there is no completely risk-free level of exposure of radiation for cancer. The risks from radiation have been observed in studies of workers and of the survivors of Hiroshima and Nagasaki. This information has been verified with studies of animals in the laboratory. However, the effects of doses at low levels of exposure can only be predicted by extrapolating from the observed effects at higher doses since cancers caused by radiation cannot be distinguished from ones with other causes. Some pollutants cause diseases that are unique to the pollutant, for example, asbestos and asbestosis. Radiation, however, causes the same types of cancers that are caused by other factors, such as leukemia and lung and liver cancer. Since these cancers are not unique to radiation effects, it is impossible to differentiate cancers caused by radiation from other cancers.

The second type of effect is the induction of hereditary effects in discendants of exposed persons, which vary in degree and may be fatal. It is assumed that there is no completely risk-free level of exposure for hereditary effects. Although hereditary effects have been observed in experimental animals at high doses, they have not been confirmed at low doses in studies of humans.

Based on extensive scientific evidence, it is prudent to assume that at low levels of exposure, the risk of incurring either cancer or hereditary effects is linearly proportional to the dose received in the revelant tissue. However, the severity of either effect is not related to the amount of dose received. That is, once a cancer or an hereditary effect has been induced, its severity is independent of the dose.

Regarding cancer, there continues to be divided opinion on how to interpolate between the absence of radiation effect at zero dose and the observed effects of radiation (mostly at high doses) in order to estimate the most probable effects at doses that represent small increases above natural background radiation. Most scientists believe that available data best support use of a linear model for estimating such effects. Others, however, believe that other models, which usually predict somewhat lower risk, provide better estimates. These differences of opinion have not been resolved to data by studies of the effects of radiation in humans, the most important of which are those of the survivors of the Hiroshima and Nagasaki atomic bombs. It is important to note that no one receives a zero dose of radiation. All doses received by people as a result of emissions from industrial sources are in addition to the natural background dose.

Studies are now underway to reassess radiation dose calculations for these survivors and to provide improved estimates of risk. These studies may reduce the uncertainty associated with extrapolation from high doses to low doses. These studies may also result in an increase of the estimated risk per unit dose. But they will not address the question of whether a threshold exists. EPA is monitoring the progress of this work and will initiate reviews of the risks of exposure to low levels of radiation upon its completion.

It could be argued that the approach taken understates the risk to an exposed individual. Two important and unquantifiable factors can lead to an underestimation of risk. The first is the possibility of greater susceptibility of some members of the population to radiation. The other factor that EPA cannot quantify is the synergistic effects of radiation with other pollutants. Radiation is only one of a number of carcinogens in the environment. While EPA's relative risk model takes into account the effect of chemicals that are widely distributed in the environment, there are hundreds of chemicals that are concentrated in local areas, and the effects of these chemicals are not and can not be taken into account.

C. Risk Assessment

EPA estimates numerical risk in several ways in this rulemaking. One is the maximum risk to which any individual would be exposed for his or her entire lifetimes, 70 years on the average. Another is to estimate the number of fatal cancers that will be caused by the annual radionuclide emissions from the studied facility. Another is to estimate how many persons within a certain distance of a source of pollutant emissions are at what level of individual risk. A risk distribution estimates how many persons within a certain distance of a source of pollutant emissions are at what level of individual risk. Typically, the distribution is given for 10-fold increments of individual risk. Such a distribution provides the decisionmaker with information on both the individual risk level for those exposed and the number of persons exposed at each level. For NESHAP and other decisions, the Agency has examined risk distributions both as measures of risk and to compare the effects of various strategies for risk reductions across a source category.

In attempting to make these estimates, EPA has tried at all times to give "best estimates" of the radionuclide concentrations in the environment and individual and population risks. Wherever possible, measured or reported data of emissions, meteorology and population were used. Where estimates were used, EPA has tried to use the most likely numbers in its assessments. When model facilities were used, they were designed to be representative of actual facilities. EPA's risk assessments are based on a current "snapshot" of each industrial source category as it now stands. EPA has not estimated the maximum conceivable risks that may result from the facilities analyzed at some point in the future. Future risk may be higher or lower depending on whether people move closer to, or further away from, the facilities studied and whether the emissions from those facilities increase or decrease. This is not to say that there is little or no uncertainly in the final results. As in all such assessments, the analysis have considerable uncertainly. EPA's analysis are not designed to consistently over- or underestimate risks.

The level of uncertainty is greater in the estimate of the maximum individual risk than in the estimate of population risk. Many possible errors in analysis cancel out in assessments of populations. For example, the results from pollutant dispersion models may be in error. For example, local meteorological conditions may cause more radionuclides to go in one direction than another. This effect may cause an over- or underestimate of the maximum individual risk, depending on where the most exposed individual is located. However, this source of error tends to be less important in population estimates, since the analysis integrates individual doses to a large number of people. If one person gets a larger risk due to local dispersion effects, it means that another person is getting less. Consequently, when the individual risks are summed, local conditions will not cause a serious error in the value for total population risk.

In estimating the radiation exposure to the meet exposed individual, EPA assumes that the person receiving the maximum individual risk lives for a lifetime, an average of 70 years, at the same site. EPA has assumed, *a priori*, that the person exposed to the maximum individual risk lives at the point of maximum exposure his whole life. EPA then makes its best estimate of the risks to the individual of living his entire lifetime under a set of certain conditions.

EPA makes this assumption as a matter of policy and does not believe that it undercuts the accuracy of risk assessments. It is not meant to be a "best guess" of how people live. EPA has made this assumption for several reasons. First, EPA is attempting to estimate the maximum individual risk and it is completely possible that someone could live in the same place for that person's entire life. Use of different assumptions could lead, in some cases, to understanding the maximum risk.

Second, a considerable fractions or risk can occur in less than 70 years. The effect of radiation and risk are not independent of age. Children appear to be a more susceptible to the effects of radiation than adults. In addition, due to their youth, they generally have a greater chance of developing the cancer the radiation would cause (and they are less likely to die of something else before they die of cancer). Due to these two factors, younger people are at a greater risk from the same dose than

older people. (See Table 1). If EPA were to reduce the number of years of assumed exposure to less than a lifetime, it would be unclear what number of years to use or where to place those years. For example, should EPA assume that the person lives in the same place from birth to age 19 or from age 35 to 50? Generally, in the first case the risk is 6 times greater than in the second case. Finally, the difference that would be caused by assuming a shorter period of exposure is not very significant. For an assumed constant rate of exposure, people receive over 60 percent of their total lifetime risk during their first nineteen years. To change the period of exposure from 70 years to the first 19 years of life would change the final result by less than a factor of 2.

TABLE 1.—AGE DEPENDENCE OF RISK DUE TO WHOLE BODY RADIATION

[Assumed Percentage of Total Lifetime Risk As A Function Of Ages At Which Radiation Exposure Occurs]

Period of exposure (ages)	Percentage of lifetime risk	Cumulative percentage of lifetime risk [1]
0 to 9	30	30
10 to 19	30	60
20 to 34	20	80
35 to 50	10	90
50+	10	100

[1] Exposure is at a constant rate for a lifetime.

D. Computer Models

1. Clean Air Act Assessment Package—1988 (CAP-88)

In this rulemaking, EPA uses the Clean Air Act Assessment Package—1988 (CAP-88) in risk analysis and to estimate the dose and risk resulting from radionuclide emissions to air. CAP-88 is a set of computer programs, data bases and associated programs that model the transport of radionuclides from the emission point through the environment to exposed human populations and estimates the resulting dose and health impact. For more information on the source of data used in CAP-88, see the BID.

a. Environmental transport of radionuclides. The computer program which models environmental transport in CAP-88 is AIRDOS-EPA. This program uses a modified Gaussian plume equation to estimate both horizontal and vertical dispersion of radionuclides released from up to six sources. The sources may be either elevated stacks, such as a smokestack, or reasonably uniform area sources, such as a pile of uranium mill tailings. Plume rises can be calculated assuming either a momentum-driven or buoyancy-driven plume. Assessments are done for a circular area within a radius of 80 kilometers (50 miles) around the facility.

AIRDOS-EPA computes radionuclide concentrations in air, rates of deposition on ground surfaces, concentrations in food and intake rates to people from inhalation of air and ingestion of food produced in the assessment area. Estimates of the radionuclide concentrations in produce, milk and meat consumed by humans are made by coupling the output of the atmospheric transport models with the U.S. Nuclear Regulatory Commission Regulatory Guide 1.109 terrestrial food chain models. The computer program PREPAR is used to prepare the input data for use by AIRDOS-EPA. This is done to insure proper formatting of the large arrays required to do environmental transport calculations. These arrays include the agricultural productivity data, population distributions and meteorological data. PREPAR also passes on information on the fraction of food which is assumed to be home-grown, the fraction taken from production within the 80-km assessment area, and the fraction of uncontaminated food imported from outside the assessment area.

Population distributions are generated with the utility program SECPOP, which uses a data base of 1980 Census data. Since census enumeration districts vary widely in their size, the census data base is not very precise at estimating population groups close to the facility, and the arrays have to be modified with supplemental site specific data.

Meteorological data required to estimate the dispersion of radionuclides in air is either supplied from on-site weather stations or generated from stability arrays (STAR files) which are available from the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. These data are generated from weather data reported from airports across the nation and include the frequencies of wind direction, wind speed and stability category. Where on-site data are not available, and a reporting station is not close by, data are selected from the nearest reporting station judged to have similar weather conditions. The annual average rainfall rate is estimated for each facility from historical climatic data.

b. Estimation of dose and risk. The computer program RADRISK is used to estimate dose and risk conversion factors. Factors are provided for the pathways of ingestion and inhalation intake, ground level air immersion and ground surface irradiation. Factors are further broken down by particle size, solubility class and digestion transfer factors. These factors are generated once and stored in a data base for future use. The data base used for the 1988 rulemaking is RADRISK.V8401RBM. For more information concerning this data base, see the BID.

Estimation of dose and risk is made by the program DARTAB, which combines the inhalation and ingestion intake rates, and the air and ground surface concentrations output from AIRDOS-EPA with the dose and risk conversion factors from the RADRISK data base. DARTAB lists the dose and risk to the maximum individual, the average individual and the collective population. Doses and risks are further tabulated as a function of radionuclide, pathway, location and organ.

DARTAB also tabulates the number of people in each risk category, as well as the number of health effects from each risk category. Risk categories represent the lifetime risk and are computed by powers of ten from one in ten (1×10^{-1}) to one in a million (1×10^{-6}).

c. Limitations of the CAP-88 methodology. There are some limitations in the mathematical dispersion models that are available in CAP-88. The CAP-88 codes have been verified, and improvements will be made on a continuing basis as new techniques become available.

While up to six stack or area sources can be modeled, all the sources are modeled as if co-located at the same point; that is, stacks cannot be located in different areas of a facility. No correction for the diffusion introduced by building wakes or tip downwash can be made. Also, area sources are treated as uniform and co-located. Variation in radionuclide concentrations due to complex terrain cannot be modeled; all assessments assume a flat plain.

Errors arising from these assumptions will have a negligible effect for assessments where the distance to exposed individuals is large compared to the stack height, area or facility size.

d. Verification of the CAP-88 methodology. The Gaussian plume model used in CAP-88 to estimate dispersion of radionuclides in air is one of the most commonly used models. It produces results that agree with experimental data as well as other models, is fairly easy to work with, and is consistent with the random nature of turbulence.

The Office of Radiation Programs has made comparisons between the predictions of annual-average ground-level concentration to actual

environmental measurements and found very good agreement. In the recent paper "Comparison of AIRDOS-EPA Prediction of Ground-Level Airborne Radionuclide Concentrations to Measured Values", environmental monitoring data at five Department of Energy (DOE) sites were compared to AIRDOS-EPA predictions. EPA concluded that, as often as not, AIRDOS-EPA predictions are within a factor of 2 of actual concentrations.

2. COMPLY

This section deals with the compliance procedures that the Agency has developed to implement the NESHAPs for NRC-licensees. Most of the estimated 6,000 facilities subject to the rule possess very small quantities of radioactive materials, and under normal conditions they will not exceed the standard.

In cooperation with the National Council on Radiation Protection and Measurements (NCRP), a group chartered by Congress to develop basic concepts about radiation measurement and protection, EPA has developed a system for implementing the CAA that is easy to use and that reduces the burden of demonstrating compliance for small facilities. The NCRP assisted the Agency by developing a simplified screening model allowing the regulated community to calculate dose based on: emissions to the atmosphere, distance to the receptor, building dimensions, and other readily available information. The NCRP model employs a Gaussian plume air dispersion model which was modified to take into consideration building wake effects. It calculates dose through four exposure pathways: Inhalation, ingestion, immersion, and radionuclides deposits on the ground. It was developed by the NCRP to provide a simple method for calculating radiation dose from releases of radioactivity to the atmosphere.

The NCRP model is intentionally designed to overestimate the dose both to maintain simplicity for hand calculation, and because it was intended for screening purposes only. The model is presented in NCRP Commentary No. 3, "Screening Techniques for Determining Compliance with Environmental Standards." To augment these procedures, the EPA has developed a method allowing the regulated community to estimate a source term for the models in lieu of measured release rates. Simple compliance procedures for the regulated community have been devised based on these considerations.

The process consists of providing the regulated community with a series of ways to make increasingly more accurate estimates, depending on their potential to exceed the standard. First, a facility can be found in compliance if the quantity of radioactive material possessed during the year is less than that listed in a table of annual possession quantities (Appendix E, Table 1). The table of annual possession quantity has been derived using EPA's emission factors in collaboration with the NCRP screening model. The table assumes that the nearest resident is 10 meters from the point of release while food is produced at 100 meters.

A facility will also be in compliance if the average annual radionuclide emission concentration is less than that listed in a table of air concentration levels (Appendix E, Table 2). This table is based on the effective dose equivalent calculated by the NCRP screening model assuming that the resident and the source of food production are located at the point of release. If the facility is not demonstrated to be in compliance by using these tables, it can establish compliance by estimating a dose using the NCRP screening model with a radiological source term derived using EPA approved emission factors. These procedures are described in "Guide for Determining Compliance with the Clean Air Act Standards for Radionuclide Emissions from NRC-Licensed and Non-DOE Federal Facilities."

A user-friendly computer program called COMPLY has been developed to reduce the burden on the regulated community. The Agency has also prepared a "User's Guide for the COMPLY Code" to assist the regulated community in using the code, and in handling more complex situations such as multiple release points.

The compliance model, which is an extension of the NCRP screening model, is the last stage of the COMPLY computer code. The compliance model was developed by EPA to decrease overestimation of the dose estimates by allowing input of site-specific information by user. The differences between the compliance model and the screening models developed by NCRP are as follows:

1. The compliance model allows the use of more complete meteorological data—the frequency with which the wind blows in a given direction and the average wind speed in that direction (a wind rose).

2. It accounts for momentum or buoyant plume rise.

3. It allows for a more precise determination of the locations for the sources of food production.

4. It uses more realistic pathway parameters from AIRDOS-EPA as opposed to the conservative pathway parameters selected by NCRP for screening purposes.

These differences make the compliance model more realistic than the NCRP model, which was designed to be simple enough to be implemented using a hand calculator. Comparisons of the dose calculated using the compliance model to that calculated using the AIRDOS-EPA code at the same air concentration, show that the two codes produce essentially the same results for inhalation and immersion. The compliance model predicts dose rates that are somewhat greater than AIRDOS-EPA values for ingestion and radioactivity deposited on the ground.

More radionuclides are contained in the COMPLY computer code than are in NCRP Commentary No. 3 and the tables to calculate dose for Subpart I. The Agency intends to expand the list of nuclides for the hand calculational procedures and is interested in soliciting comments on which nuclides should be added.

E. Effective Dose Equivalent

Since 1985, when EPA proposed dose standards regulating NRC-licensees and DOE facilities, a different methodology for calculating dose has come into widespread use, the effective dose equivalent (EDE). In 1987, EPA, in recommending to the President new standards for all workers exposed to radiation, accepted this methodology for the regulation of doses from radiation. This method, which was originally developed by ICRP, will be used in all the dose standards proposed by EPA in this notice. In the past, EPA dose standards were specified in terms of limits for specific organ doses and the "whole body dose," a methodology which is no longer consistent with current practices of radiation protection.

The EDE is simple, is more closely related to risk and is recommended by the leading national and international advisory bodies. By changing to this new methodology, EPA will be converting to the common international method for calculating dose. This will make it easier for the regulated community to understand and meet our standards.

The EDE is the weighted sum of the doses to the individual organs of the body. The dose to each organ is weighted according to the risk that dose represents. These organ doses are then added together and that total is the effective dose equivalent. In this manner the risk from different sources of radiation can be controlled by a single

standard. The weighting factors for the individual organs are listed in Table 2:

TABLE 2.—WEIGHTING FACTORS FOR INDIVIDUAL ORGANS

Organ	Factor
Lung	.12
Breast	.15
Thyroid	.03
Gonads	.25
Bone surface	.03
Red bone marrow	.12
Remainder	.30

EPA risk models differ from those underlying the ICRP recommendations. The risks calculated by EPA are not strictly proportional to the EDE derived using ICRP quality factors and organ weighting factors. While the risk methodology underlying the ICRP EDE differs from that used by EPA, the widespread acceptance of the EDE approach, and the small likelihood that a regulation based on this concept would allow an unacceptable risk make it a reasonable basis for regulation under the CAA.

F. Science Advisory Board Review

Beginning in 1984, EPA's Science Advisory Board (SAB) has conducted reviews of the risk assessment methods used in this rulemaking. EPA has worked closely with the SAB with respect to their comments and findings and believes it has been responsive to them.

In 1984, the SAB recommended that available scientific information be integrated into an assessment document that would lead from identification of emission sources through calculation of radiation dose and health risk and the associated degrees of uncertainty; a full explanation of procedures to be provided. This has been done in the Environmental Impact Statement accompanying this rulemaking.

In 1988, the SAB reviewed the dose-risk conversion factors for low-LET radiation and for radon and the source terms and environmental pathway models used by EPA in the risk assessments which are considered in this rulemaking. Given below are specific SAB comments and the Agency's responses:

SAB comment: EPA should use the effective dose equivalent concept for regulations protecting people from exposure to radiation.

EPA response: This is done in the proposed rules.

SAB comment: EPA should use simple screening methods in implementation procedures such that only the largest users of radionuclides are required to report annually to EPA.

EPA response: A simple screening procedure is proposed.

SAB comment: SAB has given specific advice on risk factors for low-LET and for radon.

EPA response: The SAB approaches to these risk factors have been used in the risk assessments supporting this rulemaking.

SAB comment: EPA should improve presentation of risk by clearly stating assessment objectives, presenting the number of people exposed and health impacts in terms of individual risk ranges, defining input/output parameters clearly, and comparing risks with commonly encountered risks.

EPA response: Assessment objectives are carefully defined in the EIS in terms of the individuals and populations at risk. The number of people at risk and incidence is presented by range of risk. Summaries of inputs and outputs of the computer code models have been placed in the docket. Radiation risks are compared with other risks and other radiation control recommendations.

SAB comment: EPA should rigorously derive quantified uncertainty estimates for each risk assessment.

EPA response: This is a large task. For the short term, prior to the final rule, we will perform parameter sensitivity analysis of the most important parameters using simplifying assumptions. For the long term, an Agency task group has been formed to plan and conduct more complete studies of the uncertainty question. This longer term effort will take a number of years to complete.

EPA acknowledges the uncertainty in risk estimates, considers them when making risk management decisions and recognizes that a quantitative expression of uncertainty would be an improvement. However, it does not believe that the quantitative expression of uncertainties, which are themselves uncertain to a degree, would change the decisions made in this rulemaking. For a more complete discussion of uncertainty, see chapter 7, Volume 1 of the EIS.

SAB comment: Make environmental transport models state-of-the-art.

EPA response: The task group identified above will oversee the updating of risk assessment models for radionuclides. However, the SAB's recommendations to improve environmental transport models involve modifications of second order pathways, such as adding ingestion of contaminated soils by cattle to the existing ingestion pathways of cattle, correcting for the short range effect of the presence of a building on the air dispersion model predictions of radionuclide concentrations, and using seasonal parameters to describe agricultural practices instead of yearly averages.

While EPA acknowledges the desirability of making such improvements, we believe that the results of implementing these recommendations would make only minor changes in the estimated risks supporting this rulemaking.

V. Decision to List Under Section 112

Section 122(a) of the CAA required EPA to make a determination of whether or not "emissions of radioactive pollutants * * * will cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health." Once an affirmative determination is made, that section requires EPA to either list the substance under section 108(a)(1), governing National Ambient Air Quality Standards (NAAQS), 111(b)(1)(A), governing New Source Performance Standards, or 112(b)(1)(A), governing NESHAPs. EPA analyzed numerous studies which indicated that exposure to radionuclides can cause three major types of health effects: Cancer, genetic damage, and developmental effects. After considering these health effects, EPA made the determination that radionuclides cause or contribute to air pollution which "may reasonably be anticipated to endanger public health." Because EPA intended to regulate carcinogens under section 112, it listed radionuclides under section 112(b)(1)(A) [44 FR 76738 (Dec. 27, 1979)]. That decision was the first step in the regulatory process, and was challenged in the current litigation. As a result, EPA has reevaluated the decision and determined that the original listing under section 112 was correct. This discussion explains that decision to the public and provides an additional opportunity for comment on this issue.

The first part of the listing decision, the "hazardousness" of radionuclides, is unchallenged. The evidence that radionuclides can cause cancer has, if anything, increased since 1979, see Volume 1 of the BID. The evidence now points to the conclusion that radiation is even more dangerous than was believed at that time. While some people have expressed the view that, even though radiation can cause cancer, the amount of radionuclides that are released from a given source or industry is insignificant and to not present a risk. EPA believes that the results of the risk assessments demonstrate the risk to public health that results from radionuclide emissions

from industrial sources. These risk assessments support the listing decision.

Section 112(b)(1)(A) applies not merely to any "air pollutant" as do sections 108 and 111, but to a "hazardous air pollutant" that is defined as a pollutant that "causes or contributes to air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible or incapacitating reversible illness." Once a pollutant is determined to be a hazardous air pollutant, the only remaining step is for the Administrator to determine whether emissions of the pollutant present a risk warranting regulation under section 112—that is, whether it is a hazardous air pollutant "for which he intends to establish an emission standard" under that section. EPA has determined that radionuclides not only pose a risk of carcinogenicity and mutagenicity when emitted into the air (see, National Academy of Sciences, Commission on Biological Effects of Ionizing Radiation, Reports Number 3 and 4), but also are emitted in sufficient quantities as to create a risk warranting regulation under section 112. Therefore, EPA reaffirms its prior conclusion that radionuclides should be listed for regulation under section 112.

VI. EPA NESHAPs Policy

A. Legal Framework Under Vinyl Chloride

1. Introduction

Under the Congressional mandate of Section 112 of the Clean Air Act, EPA must promulgate NESHAPs that provide "an ample margin of safety" "to protect the public health." The recent *Vinyl Chloride* decision defines this language as having two stages of analysis. First, EPA must make an initial determination of what is safe, based exclusively on risk to health. Second, the level may be adjusted downward in order to provide a greater degree of safety. The second step provides the "ample margin" of safety.

2. "Safe" or "Acceptable" Level

The court in *Vinyl Chloride* explicitly declined to determine what risk level is safe or acceptable (the court used these terms interchangeably) or to set out the method for determining this level. The court recognized that scientific uncertainty concerning the effects of a particular carcinogenic pollutant is a matter for the Administrator's discretion under section 112. "EPA, not the court, has the technical expertise to decide what inferences may be drawn from the characteristics of * * * substances and to formulate policy with respect to what risks are acceptable." *Id.*, at 1163, *citing*, Environmental Defense Fund v. EPA, 598 F. 2d, 83–84 (DC Cir. 1978). But the Administrator may not consider other factors, such as cost or technological feasibility in making the "safe" determination.

The court did, however, provide some guidance on making the "safe" determination. The court stated that the Administrator must base the "safe" decision on "an expert judgment" concerning "the level of emissions that will result in an 'acceptable' risk to health." *Vinyl Chloride*, at 1164–65. To exercise this judgment, "the Administrator must determine what influences should be drawn from available scientific data and decide what risks are acceptable in the world in which we live." *Id.* at 1165. The court emphasized that "safe" does not require elimination of all risk. "There are many activities that we engage in every day—such as driving a care or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider those activities 'unsafe.' " *Id., citing, Industrial Union Dep't., AFL–CIO v. American Petroleum Inst.*, 448 U.S. 607,642 (1980) (OSHA Benzene Case)

3. Ample Margin of Safety

Because the determination in the first stage of analysis of what is "safe" is marked by scientific uncertainty, and safe does not mean risk free, the Administrator may set the level below that which is determined to be safe in order to achieve an "ample margin of safety." Once "safety" is assured with regard only to risk to health, the Administrator may consider cost and technological feasibility in lowering the level. "Because consideration of these factors at this stage is clearly intended to protect the public health, it is fully consistent with the Administrator's mandate under section 112." *Vinyl Chloride*, at 1165.

4. Uniqueness of Decision

The effect of *Vinyl Chloride* is to require a unique decisionmaking process for public health protection decisions, unlike any other regulatory decision faced by the Agency. This is the result of the court's prescription of two separate steps for decisionmaking, the first, in which only health factors can be considered in setting an acceptable risk level, and the second, in which additional factors including cost, technological feasibility, and other relevant factors may be considered in providing an ample margin of safety. This scheme is unlike any other in the Clean Air Act or any of the other statutes administered by EPA because the acceptable risk that EPA adopts in the first step cannot be exceeded by the standard EPA adopts in the second step.

In contrast, other EPA statutes have very different structures and legal requirements for decisionmaking on public health standards. For example, while the Safe Drinking Water Act provides for two separate decisions, the first is a health-based goal toward which to work, but not necessarily meet; the second is an enforceable standard that takes cost and feasibility into account. Under both the toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the balancing of health concerns and benefits of continued chemical use and control costs are explicitly provided for within a single decision. RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) both require statutory decisionmaking very different from the bifurcated process mandated by the Court for section 112.

Thus, the *Vinyl Chloride* decision requires EPA to consider whether a risk is acceptable without at the same time considering benefits of the activity causing risk, feasiblity of control, or other factors. This problem is particularly acute in the case of carcinogens, for which the Agency has stated that it is unable to identify a threshold no-effect level.

The very examples cited by the Court bring home the unusual nature of the Court's "acceptable risk" decision step. The court (quoting the Supreme Court's decision in the OSHA Benzene Case) cited "driving a car or even breathing city air" as activities that "few people would consider * * * 'unsafe.' " But driving a car entails risks that most people would consider high; the annual incidence approximates 50,000 fatal accidents, and the average individual risk (not the maximum, but the actuarial average risk) approximates a 1 in 100 chance of automobile-related death over a 70-year lifetime. Yet the Court was correct to say that our society accepts (or tolerates) the risk from driving cars. As a society, we continue to try to reduce the level of risk, but we accept it due to the value of the benefits in increased mobility that the automobile affords. The same is true of "breathing city air." Individuals live in cities to be close to the workplace, for the recreational and cultural advantages associated with cities, and for a variety of reasons extrinsic to the risk itself.

Commentors have often suggested that EPA consider a cost-benefit

analysis in assessing risk acceptability. The court has rejected this approach. How, then, is EPA to make those judgments? Later in this section, EPA sets out for public comment four approaches that deal with this issue. The approaches cover a range of possible risk levels, and they give prominence to different measures of risk, e.g., individual versus population risk.

B. Survey of Societal Risk

The question of what constitutes "safe" must be answered with reference to the "risks that are acceptable in the world in which we live." *Vinyl Chloride*, 824 F.2d at 1165.

In approaching the question of what level of risk is "acceptable" or "safe", EPA surveyed a range of health risks that our society faces. The objective of this survey was to develop information to place the radionuclide risk estimates in perspective. Thus, the risks examined included those encountered in everyday life, such as driving a car and breathing city air, which were cited in the *Vinyl Chloride* decision, as well as a range of regulatory judgments or risks. The EPA surveyed both the individual risk and the incidence in the population exposed to risk associated with the activities. Considering incidence comports with the purpose of section 112 to protect "public health" when incidence is viewed as a measure of health of the population as a whole.

The risks examined ranged from individual risks of 1 to 10 (10^{-1}) to less than 1 in 10,000,000 (10^{-7}). Everyday risks include risks from natural background radiation as well as risks from home accidents. Natural background radiation (excluding radon) at sea level creates individual lifetime cancer risks in the range of 3 in 1,000 (3×10^{-3}) and an estimated 10,000 cancer cases per year. Naturally occurring radon in homes poses an additional source of radiation risk, and these risks can be as high as 1 in 100 to 1 in 10 (10^{-2} to 10^{-1}) and cause an estimated 5,000 to 20,000 cancer cases per year. In the U.S., accidents, natural disasters, and rare diseases pose individual risks of death from 1 in 10,000 (10^{-4}) (e.g., tripping and falling which cause approximately 470 deaths per year) to 1 in 10,000,000 (10^{-7}) (e.g., rabies which causes an average of 1.5 deaths per year).

Judgments on risks have also spanned a broad range of risk levels. The NCRP, following recommendations of the International Commission on Radiological Protection, has recommended that maximum individual exposures from non-medical manmade radiation be limited to an amount corresponding to risks of 3 in 1,000 (3×10^{-3}). See Table 3 for a comparison of radiological risks and recommendations. It is important to note that the recommendations of national and international bodies shown in table 3 are coupled with recommendations that radiation doses should be "as low as reasonably achievable" (ALARA). The implementation of ALARA requires a site-specific consideration of the cost effectiveness of controls that could be added to reduce radiation doses. Therefore, these national and internationally recommended dose levels are acceptable only when the ALARA principle has also been satisfied.

The Food and Drug Administration (FDA) establishes tolerances for poisonous or deleterious substances, such as polychlorinated biphenyls (PCBs), at a level found necessary to protect the public health, taking into account the extent to which the substance is unavoidable in the food supply and the other ways the consumer may be affected by the same substance. For example, FDA has established a tolerance level for PCBs in fish at an individual risk of 7×10^{-5}, which could result in 34 cancer cases each year among heavy fish consumers alone (44 FR 38333, June 29, 1979).

The EPA regulates pesticide uses under FIFRA based on whether the pesticide creates unreasonable adverse effects, a statutory term defined as requiring the balancing of risks and benefits. The EPA has authorized some uses of the pesticide chlorobenzilate that would create individual risk of 1×10^{-6} to 7×10^{-6} and could result in 2 to 9 additional cancer cases per year (EPA banned other uses of this pesticide).

Regulatory judgments have also been made to require lower risks. For example, under the provisions of the Food, Drug, and Cosmetic Act, which povides that "no residue" from carcinogenic additives to animal feed may remain in any edible portion of the animal, FDA has established a policy of not allowing the use of additives that create a risk higher than 1 in 1,000,000 1×10^{-6}. A complete description of the risks EPA considered is presented in a document in the docket entitled "Survey of Risks."

No fixed risk level could be identified as acceptable in all cases and under all regulatory programs for two main reasons. First, as discussed above, in most cases the calculation or risks depends on different data, assumptions, and uncertainties. For example, the risk associated with motor vehicle and other common accidents can be calculated directly from accident records and therefore reflects actual risk, whereas environmental risks are based on estimating procedures and assumptions and therefore are more uncertain.

TABLE 3.—RADIOLOGICAL RISKS COMPARED

	Annual effective dose equivalent (mrem)	Lifetime risk
REGULATORY RISK		
Federal guidance [3] (1960) (individual, long-term)	500	1.5×10^{-2}
ICRP advisory [1,3] (1987) (all sources)	100	3×10^{-3}
NCRP advisory [2,3] (1985) (all sources)	100	3×10^{-3}
British advisory [3] (1987) (all sources)	50	1.5×10^{-3}
NCRP advisory [2,3] (1984) (air sources)	25	7×10^{-4}
NRC goal for nuclear power plants [3] (current)	5	1.5×10^{-4}
EPA drinking water standards (1976)	4	1.2×10^{-4}
BACKGROUND RISK		
Natural background (total)	300	1×10^{-2}
Natural background (total non-radon)	100	3×10^{-3}
Yearly round trip flight N.Y. to L.A. (70 years)	7	2×10^{-4}
Remaining fallout from atomic tests	4	1.2×10^{-4}

[1] International Commission on Radiological Protection.
[2] National Council on Radiation Protection and Measurement.
[3] Risks stated are the maximum allowed. These regulatory decisions presume that all exposures will be kept "as low as reasonably achievable".

Thus, actuarial and environmental risk estimates cannot be directly compared so as to draw precise judgments as to whether one risk is larger, or less acceptable, than another. Second, the acceptability of risk is a relative concept and involves consideration of different factors. Considerations in these judgments may include: The certainty and severity of the risk; the reversibility of the health effect; the knowledge or familiarity of the risk; whether the risk is voluntarily imposed or whether the individual receives a direct benefit for

accepting the risk voluntarily; the advantages of the activity; and the risk and advantages for any alternatives. Thus, different *judgments* on acceptability can be made for similar numerical estimates of risks.

In addition, the uses of individual risk and incidence as comparative factors face limitations since the relative size of the risks associated with an activity determine how the activity is defined. For example, incidence associated with a single leaking pipe at a plant within a particular industry could be quite small, but the cumulative risks associated with all plants within the industry could be significant. This limitation can be ameliorated by careful selection of the appropriate categories of sources.

In summary, EPA surveyed and considered this risk information to provide perspective on society's consideration and acceptance of risk. In its consideration, EPA is not judging whether each of the risks presented here is acceptable or unacceptable. They are presented, instead, to provide a context for evaluating the relative public health implications of a range of activities and the risk present in activities being considered for regulation under section 112.

C. General NESHAP Policy Considerations

The purpose of this section is to discuss and solicit comment on the appropriate criteria for determining an "acceptable risk" and an "ample margin of safety." In its determination, EPA will consider measures of health risk, and limitations and uncertainties of the risk estimation methods and basic data. A discussion of these factors follows, as well as a discussion of the four approaches to making the acceptable risk decision. Comments are solicited on all aspects of the discussion and the four approaches. The framework adopted in this proceeding has already been proposed in the Benzene NESHAP and may also become the policies for decisions on future NESHAPs but will not apply to other Agency programs or other sections of the Clean Air Act.

The main purpose of the discussion presented here is to provide a basis for comment on the major policy issues raised by the Court's opinion, in particular, on the requirement that in regulating air toxics under section 112 the Agency must decide what risk is acceptable in "the world in which we live." In the months since the Court's decision, issues about acceptability of risk from air toxics have been the subject of discussion both within the Agency and in public debate. The four alternative policy approaches outlined address the acceptable risk decision in different ways. The basic questions to be answered in each approach are: What measure or measures of risk should be given weight in the acceptable risk decision? Are there specific levels of individual or population risk that are acceptable? How should EPA balance individual, population risk and risk distribution? Should the same levels be set and the same measures applied for all NESHAPs? How should uncertainty in risk estimation be considered?

The approaches described include one in which all risk information and measures available as well as estimation limitations and uncertainties are considered in determining acceptable risk on a case-by-case basis. Other approaches simply apply one quantitative risk parameter, either risk to the maximally exposed individual or aggregate risk of increased fatal cancer in the population (population risk). The approaches also vary in the level of risk that would be acceptable. The details of the results of applying each of the approaches to radionuclide source categories are described later in this preamble.

Three of the approaches use either maximum individual risk or population risk as the sole criterion for acceptable risk. Some take the view that added cancer risk to the individual is the most, or only important measure. Two of the approaches use this as the only criterion for acceptable risk. The third approach uses incidence as the only criterion for acceptable risk. Arguments in favor of the individual risk measure are that no individual should be at high risk, that considering the number of people at risk leads to acceptance of higher individual risk when few people are exposed, and that it is inequitable for acceptable risk to an individual to depend upon the number of people similarly exposed. Arguments favoring use of added incidence are that it is an appropriate measure of total public health impact and this total risk to the population is a good indicator of acceptable risk.

On the other hand, fatal cancer is only one of a number of possible health effects and thus may not accurately measure the total health impact nor total population risk.

Uncertainty of risk estimates is also dealt with differently by the alternative approaches. Under Approach A, the case-by-case approach, all risk factors including estimation uncertainties are considered in the acceptable risk determination. Approaches B, C and D use a single risk measure as the criterion for the acceptable risk decision and thus would leave consideration of other risk measures and specific judgments concerning much of the overall uncertainty until the second step, the ample margin of safety decision. How to weigh these uncertainties is a problem under any approach because while the Agency often has quantitative estimates of uncertainty to use for specific elements of the risk assessment, it can often only make a qualitative judgment about whether the overall uncertainty in the methods and assumptions has resulted in a over- or underestimated risk. Comments are solicited on the consideration of uncertainty in acceptable risk decisions.

Each alternative deals similarly with the ample margin of safety decision. In each, all the health information as well as cost, technical feasibility, estimation uncertainties and other relevant factors would be considered. Comment is requested on five issues in particular. First, is the ample margin of safety step more suitable than the acceptable risk step to take into account (usually qualitatively) the direction and extent of estimation uncertainties? Second, should all technically feasible and affordable controls be required without regard to whether any significant risk reduction is associated with the control? Third, should the Agency adopt a policy of using the ample margin step to force the development of new technology to reduce risk? Fourth, how should EPA balance the various risk, technical, and economic considerations in ample margin of safety decisions? Fifth, what criteria should EPA use to define the "availability" and "feasibility" of technological controls?

The remainder of this section describes several risk measures, how they are derived, general questions regarding control technology, and the four alternative regulatory approaches. The approaches are considered from the perspective of application to the radionuclide source categories covered in today's notice and to the NESHAP program.

D. Risk Measures Considered in NESHAP Policy Approaches

In decisions on cancer risks from stationary sources of hazardous air pollutants, the Agency has estimated three measures of health risk. These are termed "maximum individual risk," "risk distribution," and "incidence". Each of these combines an estimate of the dose/response for a pollutant with estimates of exposure to the pollutant. The response estimated is the pollutant-related increase in the probability that an individual will contract fatal cancer in his or her lifetime. The exposure

estimated is the average daily exposure assuming exposure for 70 years.

1. Maximum Individual Risk

Individual risk is expressed as an estimated probability, e.g., 1 in 100 (10^{-2}), 1 in 1,000 (10^{-3}), 1 in 10,000 (10^{-4}). Thus a 1×10^{-3} individual risk is an added "chance" of 1 in 1,000 of contracting fatal cancer sometime in the individual's lifetime.

In this discussion, the maximum individual lifetime risk is the additional cancer risk of a person due to exposure for 70-year lifetime at a point of maximum concentration of an emitted pollutant. The maximum individual risk is sometimes called the maximum exposed individual risk. This estimate is based on the fact that the concentration of an emission, and the consequent risk, diminishes with distance from its source. For NESHAP decisions, the practice has been to estimate this figure for the largest annual average pollutant concentration to which any member of the public may be subject according to census data on residence locations. It has also been estimated in some other Agency decisions as the maximum at the source perimeter.

The maximum individual lifetime risk is different from average individual risk which is sometimes estimated for sources like public drinking water systems or food in which the concentration of a pollutant and other factors are assumed to be equal at all distribution locations. This distinction is particularly relevant when considering the maximum risk one might find acceptable from different sources. In using the maximum individual risk in acceptable risk decisions for hazardous air pollutants, its limitations should be considered. Used alone, the measure does not tell how many people may be so affected; it relates only to the risk to the most exposed individual(s).

2. Risk Distribution

A risk distribution estimates how many persons within a certain distance (e.g. 80 km) of a source of pollutant emissions are at what level of individual risk. Typically, the distribution is given for 10-fold increments of individual risk. Such a distribution provides the decisionmaker with information on both the individual risk level for those exposed and the number of persons exposed at each level. For NESHAP and other decisions, the Agency has examined risk distributions both as measures of risk and to compare the effects of various strategies for risk reductions across a source category.

In making an acceptable risk decision, one relevant consideration is how many people are exposed at each risk level, e.g. a (10^{-2}) risk might be acceptable if only one person were at that level, but not if 1,000 people were subject to it. Similarly, the number of persons exposed at various individual risk levels could be an important element in deciding on acceptable risk. The risk distribution could be used in similar ways to consider whether an ample margin of safety exists.

3. Incidence

Incidence is an estimate of population, rather than individual, risk. It is derived by multiplying individual risk by the estimate of the number of persons at that level of risk and summing the results over all risk levels. This number, which provides a lifetime population risk figure, is then divided by 70 (years) to give an annual fatal cancer incidence estimate. The incidence parameter can be used as an estimate of impact on the entire exposed population within a given area by totalling the incidence associated with each increment of individual risk. Incidence can also be portrayed along with individual risk and population numbers in a risk distribution. Typically, the Agency weighs incidence estimates in conjunction with maximum individual risk or average individual risk estimates. Estimated incidence generally is a particularly informative parameter when looking at aggregate risk from a category of like sources. One feature to take into account whenever it is used is its dependence on the size of the source category.

E. Uncertainties in Risk Measures.

Each of the three risk parameters defined above has three elements. These are the estimated response per unit of pollutant concentration (e.g. pCi/1 in air), the estimated exposure concentration, and the estimation of the number and location of the population residing in the area of the sources (usually taken from census data).

Uncertainties exist in estimating each of these elements for a variety of reasons including the fact that the relevant data and our understanding of the biological events involved are not complete. Where data gaps exist, qualitative and quantitative assumptions are made based on our present understanding of the biological mechanisms of cancer causation, estimates of air dispersion, engineering estimates, and other factors. Selection of certain assumptions to be used is a policy decision. The Agency has published guidelines covering many of these for both cancer risk assessment and exposure assessment. ["Final Guidelines for Carcinogen Risk Assessment," 51 FR 33992 (September 24, 1986) and "Final Guidelines for Estimating Exposures," 51 FR 33042 (September 24, 1986)].

The following is a discussion of methods used to calculate the three parameters, together with a few examples of the uncertainties.

Risk assessment, under EPA guidelines, takes into account the nature and amount of evidence that the agent will cause the effect of concern in humans as well as the uncertainties of interpretation of data and its quantification. When the toxicity data from human studies are available, as in the case of radionuclides (which is a known carcinogen), there is less uncertainty about the hazard of dose/response than when the data is solely from animal studies. Nevertheless, important uncertainties enter into the analysis even when human data is available. Examples include the fact that human epidemiological studies are often retrospective and measure effects of exposure that occurred many years in the past. The level of exposure to the agent at that time usually must be estimated and cannot be verified. Also, in certain categories of human studies, the studies are often of workers exposed to the pollutant. Worker populations are not representative of the general population with respect to age or sex. Workers are also generally the healthier segment of the population. These factors can lead to over- or underestimation of risk.

When data from animal studies are used, uncertainties about exposure can be experimentally controlled, but other uncertainties arise. Many of these concern the extrapolation from data collected in animal tests to estimate effects on humans. The extrapolation has to try to account for many factors, such as the equivalent dose for humans and laboratory animals given the size differences and the potential differences in metabolism and excretion of a chemical pollutant.

In addition, uncertainties arise in extrapolating the observed dose/response relationship from either workplace or animal test exposures to the usually lower dose levels of the general population.

In estimating exposure, the dispersion of a pollutant from a source is usually quantified by a predictive mathematical model using a known or model source emission rate, temperature and velocity characteristics, and weather patterns at nearby stability array (STAR) stations, typically the nearest recording weather station. The model predicts the

concentration of the dispersed pollutant at various distances from the source. Standard assumptions are that the population around the source resides there for a 70-year lifetime and is continuously exposed to the modeled concentrations. The amount of emissions can be derived from sampling and analysis of emissions at the source or from engineering estimates, with more or less uncertainty associated with each method according to the type of emission. There are varying degrees of accuracy and precision in sampling, analysis, or estimates of emissions. Therefore the uncertainties involved in the method of estimating individual exposure and the number of individuals exposed are numerous. Thus, it is evident that uncertainty is difficult to quantify. Questions relevant to two-step decisionmaking under the *Vinyl Chloride* opinion are: At which step or steps should uncertainty be accounted for? How should uncertainty be considered if it cannot be quantified?

F. Technology Availability and Plant Closure Considerations

In the proposed benzene NESHAP, as well as in this NESHAP for radionuclides, EPA has considered only factors relating to risks to public health in deriving alternative "acceptable" levels of risk. However, in evaluating whether to further reduce the risk to provide for an ample margin of safety, EPA has also considered the extent to which plants would be forced to: (a) Install control technologies which are not cost effective or fully demonstrated and/or (b) curtail or stop production. These considerations are reflected in today's proposal to the extent that they apply to affected radionuclide sources.

With regard to the availability of technology to control air pollutants, EPA has in this case considered a technology available if it has been installed on a commercial scale in the United States and adequate data have been collected on plant and control equipment characteristics and performance. However, at various times in the past, EPA has considered emission standards which force plants to install technologies which do not meet these current "availability" criteria or cause facilities to curtail production or shut down. For example, EPA has in the past considered a technology "available" if it has been commercially demonstrated in other countries, even if no units have been installed in the United States. Also, EPA has considered bench- or pilot-scale demonstrations in order to judge reasonableness of expenditures for commercial demonstration of a given technology. Others have argued that EPA should not be concerned about the extent to which technologies are "available" since the standards should be solely based on public health considerations. Proponents of this latter view argue that the health-based standards will themselves provide adequate incentive for currently high risk industries to develop new control technologies. Still others argue that the compliance schedules in section 112 will cause sources to close rather than undertake the risk of installing costly technology that is unproven.

The EPA solicits public comment on the relative merits of alternative criteria for determining the availability of technology and on the question of appropriate alternative methods for encouraging development of alternative technologies, processes, product substitutes, and/or lifestyle changes.

G. Description of Alternative Policy Approaches

Each of the four approaches described here for comment treat the "acceptable risk" decision differently. The first approach considers all risk factors in the "acceptable" decision and then considers all risk factors plus cost and feasibility of emission controls in the "ample margin of safety" decision. The other three approaches differ from the first in that they use a single parameter, maximum individual lifetime risk or incidence, as the sole deciding factor for acceptable risk, while considering other factors in the "ample margin" decision.

The case-by-case and single parameter approaches differ in the degree to which they possess each of two desirable features. One feature is the ability of the Agency to consider the weight of evidence, or confidence, in the hazard data from which risk numbers are derived and the confidence in the emission and exposure estimates. The second feature is the degree to which decisions are clear and understandable, and thus can be perceived by the public as consistent.

The case-by-case approach is designed to bring all of the evidence to bear in association with risk numbers at both decision steps. The Agency has adopted the policy of risk assessment contained in the 1983 study by the National Academy of Sciences entitled "Risk Assessment in the Federal Government Managing the Process" (National Academy Press). This study covers the various elements of cancer risk assessment and the assumptions and uncertainties it involves.

One of the policies emphasized in the report and adopted by EPA is to give the risk manager a risk characterization which contains the information needed for a decision on how much confidence to place on numbers. For example, numbers for risk estimates for two different pollutants might look the same, but be based on data sets of quite different quality. A very large set of data from human and animal studies could be the foundation for a high degree of certainty in deriving a quantitative dose/response relationship. On the other hand, a quantitative dose/response estimate based on less evidence could be more uncertain. Moreover, emission estimates and exposure modeling may be based on site-specific information, assumptions, or combinations of the two. Depending on the data and assumptions, there can be large differences in the confidence of the exposure estimates. EPA has used a variety of data in this rulemaking and has confidence in the data used for the purposes of this rulemaking. However, a risk manager would be justified in using two kinds of estimates differently in decisionmaking, in spite of the fact that the numbers might be very similar.

An advantage of the case-by-case approach is that it uses the full range of evidence behind the risk numbers in determining acceptable risk and in deciding on an ample margin of safety. A disadvantage of this approach is that it relies on case-by-case interpretation and judgment of data, which can make the basis for the decision more difficult for the public to understand. In addition, decisions may appear inconsistent when different numerical risks are judged to be acceptable in different cases.

The single measure approaches takes risk numbers at face value for the acceptable risk decision, with a fuller consideration of the weight of all evidence at the margin of safety step. The advantages of these approaches are their clarity and ease of administration, which are good bases for adoption of such an approach. Their disadvantage is that they do not consider all of the risk factors, risk characterization, and uncertainties in the initial step.

Approach A. Case-by-Case Approach

Under this approach, the Administrator makes decisions on what is an acceptable risk on a case-by-case basis. The Administrator considers individual risk, risk distribution and incidence, their estimation limitations and uncertainties in judging which levels of emissions present acceptable risks to public health for each of the sources considered. This approach recognizes that the risk to public health is a combination of these factors, and, therefore, the level of acceptable risk to

the public health varies among the different sources.

In applying Approach A, the approach is to examine the risk distribution and to consider maximum individual risks around 10^{1-4} or less to be the preferred range. The 10^{1-4} level was selected for reasons analogous to its use in Approach C (see discussion of Approach C for further explanation). Under all Approach A decisions, however, the Agency will closely examine the aggravating and mitigating factors associated with the risk estimates. Included in this examination is recognition that there are considerable uncertainties in the risk characterization, emission, estimates, and exposure assumptions; these uncertainties may very widely among assessment. Acceptability of higher risks includes consideration of the number of people at that risk and the total incidence. Greater weight is given to the incidence associated with individual risks greater than 10^{1-5}, this is because risks lower than this are generally considered small. In addition, both the dose/response and exposure estimates increase in uncertainty at these lower levels, which generally represent large extrapolations from high to low doses and dispersion of the pollutant at greater distance from the source, respectively. Risks greater than the 10^{1-4} or less preferred range may be judged acceptable in this approach when all factors are considered. Examples of circumstances that EPA believes appropriate to consider include: (1) The uncertainties of the analysis; (2) the degree of over or under estimation in the risk characterization; (3) the weight of evidence of the health effects and non-quantified health effects, (4) modeled versus measured exposures, and; (5) the estimated population predicted at lifetime risk of around 1 in 10,000 or greater.

It should be recognized that zero risk is unattainable. This approach provides a mechanism to reasonably consider various health risks or other health related factors that are appropriate to each source category.

EPA has also considered the health risk due to the level of natural background radiation. In the case of radionuclides, the background levels cause higher individual and population risks than any of the source categories being considered for regulation in this rulemaking.

The highest level of emissions that is considered in the acceptable risk step is the baseline level of emissions. Alternatives other than baseline emissions are developed to give the Administrator reasonable alternatives with specific quantitative benefits to choose from. In reality, the concepts of acceptable risk and ample margin of safety exist on a continuum and are not easily quantified.

Decisions on acceptable risk are premised on the highest associated risk that was judged acceptable after weighing the many different considerations appropriate for that source category. Clearly all the alternatives for that source category that present smaller risks are also acceptable. Any alternative that is higher than the chosen alternative for that case allows risks that are unacceptable. However, that does not mean that any risk that is even slightly higher than the chosen alternative is inherently unacceptable. In order to develop standards, discrete alternatives are selected and discrete lines are drawn.

Approach B. Incidence-Based Approach

In this approach, incidence is the only parameter used to decide acceptability of risk. At the "ample margin of safety" step, all of the risk parameters as well as estimation uncertainties, cost, and feasibility are considered. The annual incidence proposed as acceptable is no more than 1 death/yr per source category. The EPA is proposing an incidence number of 1 per category because it is felt that one was small compared to the total number of cancer deaths each year and in relation to incidence associated with risks from numerous everyday activities. Comment is requested on the appropriateness of this selection.

Approach B relies on incidence. An advantage of an incidence-based approach is that while incidence and maximum individual lifetime risk are uncertain figures, in general, incidence figures are likely to be more accurate than maximum individual lifetime risk figures. A maximum individual lifetime risk estimate is much more sensitive to errors in modeling assumptions in the exposure estimate. When those uncertainties are spread throughout the exposed population in an incidence estimate, they tend to average out and thus to yield results that are less uncertain.

One feature to note is that since no other criterion besides incidence plays a role in the acceptable risk decision, high maximum individual risk levels would be acceptable so long as the exposed population is sufficiently small that the incidence level is met.

Approach C. $1x10^{1-4}$ or less Maximum Individual Risk Approach

This approach would use maximum individual risk as the sole criterion for deciding acceptable risk. At the ample margin of safety step, the risk distribution and incidence would be added to the factors considered as well as uncertainty, cost and feasibility.

The acceptable risk level for maximum individual risk under this approach is $1x10^{1-4}$ or less. This approach focuses on the estimation of the maximum concentration to which anyone could be exposed, which is used to calculate the maximum individual risk. Approach C's acceptable risk is defined as $1x10^{1-4}$ maximum individual risk. This level is analogous to the top of the target individual risk range used in some other EPA programs. A risk of 10^{1-4} falls roughly in the middle of the range of risks considered in the survey of societal risks, discussed earlier in this section. An advantage of using the single parameter of individual risk is that it is simple and clear cut. The level chosen is low enough to assure that the risk to the public health is acceptable. One disadvantage of Option C is that without the additional perspective of the risk distribution and incidence estimates and all other risk information, many decisions would ride exclusively on the uncertain prediction of the concentration and location of the area of maximum exposure. The accuracy of emission factors, meteorological data, and census data for specific source locations are among the more uncertain estimates, but would be the most critical elements under this decision. However, at the ample margin of safety step, the other risk measure could be examined to bring the needed perspective to the overall decision.

Approach D. $1x10^{1-6}$ or Less Maximum Individual Risk Approach

This approach is identical to Approach C except that it uses a more stringent criterion for individual risk. The acceptable risk is defined as $1x10^{1-6}$ maximum individual risk. This level is proposed on the theory that risks below this level have been generally regarded as small additions to an individual lifetime risk or cancer considering the risks faced by background radiation. Additionally, the 10^{1-6} level falls near the lower end of the risk range in the survey of risks, discussed earlier in this section.

Based on current information, EPA is unable to accurately quantify the effects resulting from the implementation of Approach D. We are interested in

receiving comments concerning the effects of such action.

H. Format of Standards

The format of the standards proposed for the various source categories vary because of the differing technical features of the sources. For example, area sources emitting radon are best monitored by flux measurements. Thus, flux standards are most appropriate. Similarly, mixtures of radionuclides are best related to public health through the use of the concept of dose. We have proposed dose standards to limit emissions in those cases where it is appropriate. Where a single radionuclide is emitted or a single radionuclide emission limit would serve to limit all others, we have proposed an emission limit for that radionuclide. Where no form of emission limit is possible, we resort to work practice standards.

VII. Discussion of Source Categories

The regulatory decisions proposed today are based on the risk assessments and other factors available in the current rulemaking record. This proposal may provide EPA with additional risk analyses or other information relevant to these decisions. Consequently, based on such information the Administrator may choose to reach a different regulatory decision in the final rule for some or all the source categories addressed in the rulemaking.

A. Department of Energy Facilities

1. Introduction

The DOE administers many facilities, including government-owned, contractor-operated facilities across the country. Some facilities conduct nuclear energy and weapons research and development, some enrich uranium and produce plutonium for nuclear weapons and reactors, and some process, store and dispose of radioactive wastes. These facilities contain significant amounts of radioactive material and emit radionuclides into the air. Other facilities contain large stockpiles of byproduct material which emit large quantities of radon. A discussion of DOE facilities in this category appears as a separate section later in this Preamble. EPA is considering the two categories separately in this rulemaking because of the imprecision of converting radon measurements into dose standards. In addition, the two categories employ different control methods.

Some of the DOE facilities emitting radionuclides are on large sites covering hundreds of square miles in remote locations. Some of the smaller sites resemble typical industrial facilities and are located in suburban areas.

In total, DOE has almost 100 sites that emit radionuclides. These facilities emit a wide variety of radionuclides in various physical and chemical states. Emissions from various DOE facilities represent many types of radionuclides and both internal and external dose pathways (although specific facilities may emit only one or two radionuclides affecting only one pathway).

DOE facilities are presently covered by a radionuclide NESHAP which limits emissions such that no individual receives a whole body dose of 25 mrem/y or receives a dose of 75 mrem/y to any organ. DOE also controls releases from these facilities under DOE orders which limit calculated doses to the general public to be less than 100 mrem/y from all sources and pathways. By incorporating the ALARA concept into its Orders, DOE has kept the dose to the public well below 100 mrem/y. The NESHAP also mandates that DOE send annual reports of emissions to EPA. The information gathered from these reports contributed to EPA's risk assessment of DOE facilities.

2. Estimates of Exposure and Risk

EPA's risk assessment of DOE facilities is a site-by-site assessment. Emissions are based on DOE's 1986 report of emissions, meteorological data is taken from nearby weather stations, and population distributions within 80 km are based on U.S. census tract data. EPA has a high degree of confidence in the results of this risk assessment.

According to EPA's analysis, all DOE facilities are in compliance with the current NESHAP. The risk to the most exposed individual is approximately 1.2×10^{-4}. DOE facilities are estimated to cause 0.17 fatal cancers per year to the exposed populations within 80 km of all DOE facilities. Most of the exposed population has a lifetime fatal cancer risk of less than 1×10^{-6}.

Table 4 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2 and 3.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI, to the DOE source category are described below.

Approach A: Case-by-Case Approach—Decision on Acceptable Risk. As stated earlier the maximum individual risk to any individual is 1.2×10^{-4},, which is virtually the same as the level generally preferred under the case-by-case approach. Only a few people are at risks greater than 1×10^{-4}, and the vast majority of people within 80 km of DOE facilities receive risks of less than 1×10^{-6}. The estimated annual incidence is 0.17 fatal cancers per year. Most DOE facilities have much smaller emissions than that causing the highest individual risk and do not contribute significantly to the total risk from the entire category. In addition, DOE has reduced the emissions from its facilities over the last few years and is continuing to do so.

EPA examined several alternatives before determining the acceptable level. Those alternatives and the risks they present are illustrated in Table 4. After examining these different options, the Administrator proposes to determine that 10 mrem/y ede, which represents the baseline, is acceptable under the case-by-case approach.

TABLE 4.— ALTERNATIVES FOR ACCEPTABLE RISK FROM DOE FACILITIES

	Alternative 1 (baseline)	Alternative 2	Alternative 3
Maximum individual risk (lifetime)	1.2×10^{-4}	3.6×10^{-5}	2.4×10^{-5}
Incidence within 80 km (death/y)	0.17	0.13	0.094
Risk individual:			
E-2 to E-1	0	0	0
E-3 to E-2	0	0	0
E-4 to E-3	([1])	0	0

TABLE 4.— ALTERNATIVES FOR ACCEPTABLE RISK FROM DOE FACILITIES—Continued

	Alternative 1 (baseline)	Alternative 2	Alternative 3
E-5 to E-4	600,000	540,000	250,000
E-6 to E-5	1M	140,000	410,000
Less E-6	65M	66M	66M
Risk incidence:			
E-2 to E-1	0	0	0
E-3 to E-2	0	0	0
E-4 to E-3	([1])	0	0
E-5 to E-4	0.12	0.11	0.042
E-6 to E-5	0.035	0.0067	0.040
Less E-6	0.011	0.014	0.012

Other Health Impacts: Total cancers no more than twice fatal cancers.
[1] EPA believes there are people at this risk at two facilities. However, we cannot quantify the number because site visits have not been made.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from DOE facilities. To reduce the complexity of studying the costs and benefits of all different control options, EPA has concentrated on the facilities with the largest emissions. The costs and benefits of controlling emissions to various levels can be seen in Table 5.

Based on the costs of achieving alternative 2 and the very small reductions of incidence and the small decreases in risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. Therefore, EPA believes that limiting emissions to their current level, represented by a level of 10 mrem/y ede, will protect public health with an ample margin of safety. No further reduction below the safe level is required. However, EPA believes that the risks are high enough, and have the potential to go significantly higher, that the protection of public health requires that a NESHAP be promulgated to insure that the current levels of emissions which are safe with an ample margin of safety are not increased. Therefore, EPA is proposing a NESHAP manadating that radionuclide emissions from DOE facilities shall not cause any individual to receive a dose of greater than 10 mrem/y ede.

TABLE 5.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR DOE FACILITIES

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	$1.2x10^{-4}$	0.17					
1-A	$1.2x10^{-4}$	0.17					
2	$3.6x10^{-5}$	0.13	0.04	0.04	$7.4M	$0.7M	$0.7M
3	$2.4x10^{-5}$	0.094	0.036	0.076	111M	16M	17M

Regulatory Status: Currently we have a NESHAP limiting air emissions to 25 mrem/y whole body and 75 mrem/y any organ (equivalent to a MIR of $7X10^{-4}$).

Comments:

Alternative 1: Baseline, no rule—Self regulated by DOE. They use ALARA procedures and their own overall whole body limit of 100 mrem/y. The current NESHAP would be vacated.

Based on a low-LET risk factor of 400 fatal cancers per million person-rad, ranging from 120 to 1200 fatal cancers per million person-rad, the Alternative 1 risk may range from $3.6x10^{-5}$ to $3.6x10^{-4}$.

Alternative 1-A: Baseline rule, emission limit of 10 mrem/y ede (equivalent to a MIR of $3x10^{-4}$)—highest emissions are from Reactive Metals, Los Alamos and Hanford sites.

Alternative 2: Emission limit of 3 mrem/y ede (equivalent to a MIR of $1x10^{-4}$)—the following controls are needed: RMI—HEPA filters on 3 stacks; Los Alamos—beam stops and delay lines; Hanford—N-reactor remains closed; Oak Ridge-HEPA filters, particulate scrubbers, and tritiated water capture.

Alternative 3: Emission limit of 1 mrem/y ede (equivalent to a MIR of $3x10^{-5}$)—the following additional controls are needed: Savannah River—HEPA filters for particulate control; FMPC-HEPA filters and scrubbers to control uranium emissions.

Alternative 4: Table does not contain alternative to bring the MIR to $1x10^{-6}$ because it is not yet possible to predict results accurately. Many additional controls would be needed. DOE roughly estimates cost to exceed $250 million.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. EPA has determined that emissions from DOE facilities cause less than one fatal cancer per year. Therefore, under this approach, current emissions are acceptable.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from DOE facilities. To reduce the complexity of studying the costs and benefits of all different control options, EPA has concentrated on the facilities with the largest emissions. The costs and benefits of controlling emissions to various levels can be seen in Table 5.

Based on the costs of achieving alternative 2 and the very small reductions of incidence and the small decreases in risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. Therefore, EPA believes that limiting emissions to their current level, represented by a level of 10 mrem/y ede, will protect public health with an ample margin of safety. No further reduction below the safe level is required. However, EPA believes that the risks are high enough, and have the potential to go significantly higher, that the protection of public health requires that a NESHAP be promulgated to insure that the current levels of emissions are not increased. Therefore, EPA is proposing a NESHAP mandating that radionuclide emissions from DOE facilities shall not cause any individual to receive a does of greater than 10 mrem/y EDE.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. The use of dose-based standards makes it simple to determine the correct standard under this approach. When the dose is evenly distributed to all organs, an effective dose equivalent of 3 mrem/y for 70 years equals a risk of 1×10^{-4}. Therefore, under this approach, an

acceptable level of emissions is the amount that shall not cause any member of the public to receive an effective dose equivalent of more than 3 mrem/y.

Decision on Ample Margin of Safety. After comparing the benefits and costs of reducing risks below the safe level, EPA has determined that no further reductions below the level of 3 mrem/y EDE are needed. Therefore, EPA is proposing a NESHAP of 3 mrem/y which protects public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. The use of dose based standards makes it simple to determine the correct standard under this approach. When the dose is evenly distributed to all organs, an effective dose equivalent of 0.03 mrem/y for 70 years equals a risk of 1×10^{-6}. Therefore, under this approach an acceptable level of emissions is the amount that shall not cause any member of the public to receive an effective dose equivalent of more than 0.03 mrem/y.

Decision on Ample Margin of Safety. After comparing the benefits and cost of reducing risks below the safe level, EPA has determined that no further reductions below the level of 0.03 mrem/y EDE are needed to protect public health with an ample margin of safety. Therefore, EPA is proposing a NESHAP of 0.03 mrem/y protects public health with an ample margin of safety.

4. Implementation

a. Introduction. ORP's experience in implementing the existing radionuclide NESHAP covering DOE facilities has shown that implementation of the current standard has several problems. EPA is proposing a new system for implementing the proposed NESHAP designed to overcome some of the limitations in the present standard. This system will be used regardless of the specific level of standard that is chosen.

b. Yearly reports. The implementation system for the NESHAP is designed to provide EPA with yearly reports on the levels of emissions from regulated facilities and resulting doses. Presently, DOE facilities monitor their emissions and make annual reports to EPA. These reports should continue under the new NESHAP. Although the report is based on a calendar year the dose standard applies to any year, i.e. any period of 12 consecutive months. Since these reports provide EPA with the information it needs, DOE facilities are exempted from the requirements of 61.10.

c. Definition of a facility. A problem in implementing the current standard is the ambiguity associated with the present definition of a facility. All the buildings, structures and operations within one contiguous site shall be considered a single facility. For example, the entire DOE facility at Oak Ridge, Tennessee must meet the current standard of 25 mrem/y, instead of each individual building getting its own 25 mrem/y standard.

d. Distinction between construction and modification. Since EPA takes the position that a facility is all the buildings within a given plant site, there can be confusion over whether the construction of a new building constitutes an existing facility, is new construction, or is a modification of an existing facility. It is proposed that the new NESHAP will specify that the construction of a new building is new construction at the facility and not a modification of the facility. This distinction is important because all new construction needs to be checked to see whether or not it needs prior approval but modifications which do not cause a net increase in the rate of emissions from the facility do not need prior approval.

e. Prior approval of new construction or modification. EPA will not change the basic definition of modification that exists at 40 CFR 61.15. A change that causes any increase in the rate of emissions is a modification, no matter how small that increase is. To reduce unnecessary paperwork, it is appropriate to avoid applications in cases of small changes.

EPA proposes a system under which DOE facilities will use AIRDOS to determine the dose to the most exposed individual due to the modification or new construction. If the estimated maximum individual dose added by the new construction or modification is less than 1% of the standard, then the modification or new construction does not need prior approval.

In making the determination of dose, for this purpose DOE must use the emission factors and source term determination from "BID: Procedures Approved for Demonstrating Compliance with the Dose Limits Established by 40 CFR Part 61, subpart I." (BID: Compliance).

B. Nuclear Regulatory Commission Licensed and Non-DOE Federal Facilities

1. Introduction

NRC-licensed, Agreement state-licensed, and non-DOE federal facilities include over 6,000 different facilities. These facilities include research and test reactors, hospitals, clinics, the radiopharmaceutical industry, low level nuclear waste facilities, and other research and industrial facilities. These facilities are located in all fifty states. EPA estimates that virtually every American lives within 80 km of an NRC licensee.

The facilities in this category emit a large number of radionuclides. These radionuclides affect individuals by inhalation, ingestion, ground deposition and immersion pathways. Individual facilities may emit only one or two radionuclides affecting only one or two pathways.

Emissions from this source category are presently covered by a radionuclide NESHAP which mandates that emissions do not cause any individual to receive a whole body dose of more than 25 mrem/y or receive a dose of 75 mrem/y to any organ. Two categories of NRC-licensees have been exempted from coverage by the existing NESHAP: High-level nuclear waste (HLW) facilities and uranium fuel cycle (UFC) facilities. There are two types of HLW facilities, management and disposal facilities. The disposal of HLW, which occurs at a few unique facilities, is considered as a separate source category. The management, processing and storage of HLW that occurs at a NRC-licensee is included in the estimate of emissions of the licensee used in the analysis that underlies today's proposal for this category. Most of the NRC-licensees that manage, process or store HLW do so because it is related to their other operations. For radionuclide NESHAPs, EPA has determined that it is impractical to separately analyze and regulate two different emissions from the same facility. UFC facilities, which are distinctly different facilities, are being analyzed as a separate source category.

2. Estimates of Exposure and Risk.

EPA's risk assessment of this category combined an analysis of the nine sub-categories that make up this category. Due to the wide scope of this category, EPA's risk assessment of this source category is based on large emitters and model facilities with model populations. The assessment included both analysis of those facilities believed to be the largest emitters and model facilities within each sub-category. The estimates of maximum individual risk are based on the site-by-site assessment of the largest known emitters.

The analysis of the largest sources was based on information compiled from previously existing data bases and information received from some of the sources themselves. The model facilities were developed after reviewing data from surveys conducted by the NRC and

the Conference of Radiation Control Program Directors. The use of model facilities increases the uncertainty of the risk assessment. Especially uncertain are estimates of the population within given risk ranges. EPA requests that commentors provide any additional information concerning emissions from this source category that might change EPA's estimate of maximum individual risk or population incidence.

The estimates of population risks are based on extrapolations from model facilities using census tract data. Frequency distributions do not take into account overlapping sources.

The results of this analysis are a maximum individual risk of 1.6×10^{-4}. EPA estimates that this category results in 0.13 fatal cancers per year. EPA's analysis shows that less than 0.5% of the U.S. population receives a lifetime fatal cancer risk greater than 1×10^{-6}. Some of the larger NRC-licensees do release small amounts of iodine-125 and iodine-131; these radionuclides can cause thyroid cancer.

Table 6 presents example scenarious to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2 and 3.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI to the NRC-licensees source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. The maximum individual risk to any individual is approximately 1.6×10^{-4} which is higher than the level preferred under the case-by-case approach. The estimated annual incidence is 0.13 fatal cancers per year; virtually all of that risk is borne by people whose risk is less than 1×10^{-5}, and over 80% of the risk is borne by individuals whose risk is less than 10^{-6}. Most NRC-licensees have much smaller emissions and do not contribute significantly to the total risk.

EPA examined several alternatives before determining the acceptable level. Those alternatives and the risks they present are illustrated in Table 6. After examining these different options, the Administrator proposes to determine that 10 mrem/y ede, which represents the baseline, is acceptable under the case-by-case approach. A maximum individual risk higher than the preferred level is acceptable in this case because only a few individuals incur this level of risk and because the risk distribution is such that incidence is only 0.13 per year.

TABLE 6.—ALTERNATIVES FOR ACCEPTABLE RISK FROM NRC LICENSEES

	Alternative 1 (baseline)	Alternative 2	Alternative 3
Maximum individual risk (lifetime)	1.6×10^{-4}	1.0×10^{-4}	3.0×10^{-5}
Incidence within 80 km (death/y)	0.13	0.13	0.12
Risk individual:			
E-2 to E-1	0	0	0
E-3 to E-2	0	0	0
E-4 to E-3	(1)	(1)	0
E-5 to E-4	2,600	2,600	800
E-6 to E-5	720,000	720,000	400,000
Less E-6	240M	240M	240M
Risk incidence:			
E-2 to E-1	0	0	0
E-3 to E-2	0	0	0
E-4 to E-3	(1)	(1)	0
E-5 to E-4	0.00054	0.00054	0.00025
E-6 to E-5	0.024	0.024	0.011
Less E-6	0.11	0.11	0.11

Other Health Impacts: Total cancers may be as much as 9 times higher than the number of fatal cancers because risks from some of the largest facilities in this source category are caused predominately by iodine which causes thyroid cancer.

[1] We believe there are some individuals at this risk level but all 6,000 facilities in this category have not been characterized.

Decision on Ample Margin of Safety. EPA has examined the control technology necessasry to lower emissions from NRC-licensees. To reduce the complexity of studying the costs and benefits of all different control options, EPA has concentrated on the facilities with the largest emissions. The costs and benefits of controlling emissions can be seen in Table 7.

Based on the costs of achieving alternative 2 and the very small reductions of incidence and the small decreases in risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. Therefore, EPA believes that limiting emissions to their current level, represented by a level of 10 mrem/y ede, will protect public health with an ample margin of safety. No further reduction below the safe level is required. However, EPA believes that the risks are high enough, and have the potential to go higher, that the protection of public health requires that a NESHAP be promulgated to insure that the current levels of emissions which are safe with an ample margin of safety are not increased. Therefore, EPA is proposing a NESHAP mandating that radionuclide emissions from NRC-licensees shall not cause any individual to receive a dose of greater than 10 mrem/y ede.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. EPA has determined that emissions from NRC-licensees cause less than one fatal cancer per year. Therefore, under this approach, current emissions are acceptable.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from NRC-licensees. To reduce the complexity of studying the costs and benefits of all different control options, EPA has concentrated on the facilities with the largest emissions. The costs and benefits of controlling emissions to various levels can be seen in Table 7.

TABLE 7.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR NRC FACILITIES

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	1.6×10^{-4}	0.13	.....	.....	.....	.....	.....
1-A	1.6×10^{-4}	0.13	.....	.....	.....	.....	.....
2	1.0×10^{-4}	0.13	<0.01	<0.01	$5M	$2.4M	$2.4M
3	3.0×10^{-5}	0.12	0.1	0.1	$20M	$9.6M	$12M
4	1.0×10^{-5}	0.07	0.05	0.06	$35M	$23M	$35M

Regulatory Status: Currently we have a NESHAP limiting air emissions to 25 mrem/y whole body and 75 mrem/y any organ (equivalent to a MIR of 7×10^{-4}).

Comments: For this category, non-fatal cancer risk is appreciably higher than the fatal cancer risk because most of the risk is due to I-131 and I-125 exposure (thyroid).

Alternative 1: Baseline, no rule—Some facilities may cause higher risks. All 6000 facilities have not been characterized. The current NESHAP would be vacated. Based on a low-LET risk factor of 400 fatal cancers per million person-rad, ranging from 120 to 1200 fatal cancers per million person-rad, the Alternative 1 risk may range from 4.8×10^{-5} to 4.8×10^{-4}.

Alternative 1-A: Baseline rule, 10 mrem/y ede (equivalent to a MIR of 3×10^{-4})—As a practical matter, this alternative is the same as the current NESHAP.

Alternative 2: Emission limit of 3 mrem/y ede (equivalent to a MIR of 1×10^{-4})—cost estimates are very uncertain. Several hundred facilities would install controls or measure emissions to demonstrate compliance.

Alternative 3: Emission limit of 1 mrem/y ede (equivalent to a MIR of 3×10^{-5})—cost estimates are very uncertain; estimates are not site specific.

Alternative 4: Emission limit of 0.3 mrem/y ede (equivalent to a MIR of 1×10^{-5})—compliance procedures have been developed to reduce the burdens to the regulated community. At this level many facilities will have difficulty demonstrating compliance.

Alternative 5: Table does not contain alternative to bring the MIR to 1×10^{-6} because it is not possible to predict the impact. Many additional controls would be needed. Implementation would be burdensome as most facilities would now have to demonstrate compliance with an emission limit in rigorous fashion.

Based on the costs of achieving alternative 2 and the very small reductions of incidence and the small decreases in risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. Therefore, EPA believes that limiting emissions to their current level, represented by a level of 10 mrem/y EDE, will protect public health with an ample margin of safety. No further reduction below the safe level is required. However, EPA believes that the risks are high enough, and have the potential to go higher, that the protection of public health requires that a NESHAP be promulgated to insure that the current levels of emissions are not increased. Therefore, EPA is proposing a NESHAP mandating that radionuclide emissions from NRC-licensees shall not cause any individual to receive a dose of greater than 10 mrem/y EDE.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. The use of dose-based standards makes it simple to determine the correct standard under this approach. When the dose is evenly distributed to all organs, an effective dose equivalent of 3 mrem/y for 70 years equals a risk of 1×10^{-4}. Therefore, under this approach, an acceptable level of emissions is the amount that shall not cause any member of the public to receive an effective does equivalent of more than 3 mrem/y.

Decision on Ample Margin of Safety. After comparing the benefits and costs of reducing risks below the safe level, EPA has determined that no further reductions below the level of 3 mrem/y EDE are needed. Therefore, EPA will propose a NESHAP of 3 mrem/y which protects public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. When the dose is evenly distributed to all organs, an effective dose equivalent of 0.03 mrem/yr for 70 years equals a risk of 1×10^{-6}. Therefore, under this approach, an acceptable level of emissions is the amount that shall not cause any member of the public to receive an effective dose equivalent of more than 0.03 mrem/y.

Decision on Ample Margin of Safety. After comparing the benefits and costs of reducing risks below the safe level, EPA has determined that no further reductions below the level of 0.03 mrem/y EDE are needed to protect public health with an ample margin of safety. Therefore, EPA will propose a NESHAP of 0.03 mrem/y which protects public health with an ample margin of safety.

4. Implementation

a. Introduction. The system for implementing this NESHAP is described in "A Guide for Determining Compliance with Clean Air Act Standards for Radionuclide Emissions From NRC-Licensed and Non-DOE Federal Facilities." The Agency has also developed the COMPLY Computer Code (described earlier), for IBM and IBM-compatible computers, to assist the regulated community in determining compliance with the standard.

b. Yearly reports. The implementation system for the NESHAP is designed to provide EPA with yearly reports on the levels of emissions and the dose caused by those emissions from regulated facilities. There are over 6,000 NRC-licensees, many of whom have very small amounts of radionuclides. EPA considers that the emissions from most sources in this category are so low that reporting should not be necessary. EPA has developed a system to determine whether or not reporting is required by estimating the dose caused by a facility's emissions. As long as the dose to the maximum individual is 10% of the standard or less, then the facility does not have to report. EPA currently estimates that if the cutoff is 1 mrem/yr, then less than 300 facilities would have to report to EPA.

The Agency has developed a system for dose determination that is based on screening models originally developed by the NCRP. This system is a series of screening tests each more complicated and more realistic than the next. Using this system, each affected facility will, annually, have to check to see whether or not it needs to report to EPA. Even in it does not have to report, it must keep records of the results for 5 years to demonstrate that it has checked to see whether or not it needs to report. Although the report is based on a calendar year the dose standard applies to any year, i.e. any period of 12 consecutive months.

In order to simplify calculation of the source term, the Agency will allow the use of generic emission factors. The derivation of these emission factors is explained in BID: Compliance. These factors are applied to the quantity of radionuclides used annually at the facility. Radionuclides in sealed containers are excluded. The results of these calculations are used as the input of emissions for the screening model mentioned above.

Since these reports will provide EPA with the information it needs, NRC-licensees are exempted from the requirements of 61.10.

c. Prior approval for modification or new construction. EPA proposes that the system discussed for DOE facilities also be used for this source category except that the sources will not use AIRDOS to

calculate the doses. Instead they will use the screening models and measured emissions or emission factors described above.

C. Uranium Fuel Cycle Facilities

1. Introduction

Uranium Fuel Cycle (UFC) facilities are the facilities used in the conversion of uranium ore to electric power. They include uranium mills and tailings (non-radon emissions), hexafloride conversion plants, fuel fabrication plants and commercial nuclear power plants. These facilities are licensed by the NRC. (Uranium fuel enrichment facilities are not included in this category because they are covered as DOE facilities.) These facilities are large sophisticated operations with the potential for large releases of radionuclides.

These facilities are not covered by a NESHAP. However, all releases from these facilities (air, water and direct gamma radiation) are covered under the Uranium Fuel Cycle Standard, 40 CFR 190. This standard was promulgated by EPA under the authority of the AEA and is enforced by NRC. Under the standard, the combined releases of all UFC facilities must not cause any individual to receive a dose of more than 25 mrem/y to the whole body or to any organ except the thyroid (which can receive 75 mrem/y). This standard has been implemented and enforced by the NRC. In the past, the Administrator has decided not to regulate this category under section 112, because he determined that the AEA standard protected public health with an ample margin of safety. EPA's decision not to regulate this category is one of the issues in the current litigation. After reconsidering this issue, EPA has decided to analyze UFC facilities using the same four regulatory options used for other categories.

2. Estimates of Exposure and Risk

EPA's risk assessment for this category is the combination of the results of the assessments of the different types of facilities included in this category. The source term for emissions from uranium mill tailing piles is estimated from a model mill using NRC methodology. The estimate does not include radon releases which are covered by a separate NESHAP. Meteorological and population data are based on typical mill sites. The assessment of the two uranium hexafluoride conversion plants is based on reported emissions and census population distributions using nearby meteorological data.

The assessment for fuel fabrication plants is based on reported emissions and census population distributions from large facilities. The emission estimate for nuclear power plants is based on actual releases from operating plants. Population data is taken from NRC reference populations for coastal, river and lake sites. Assessments consider effects of multiple reactors at a site, but not the overlap of multiple sites. Virtually the entire U.S. population lives within 80 km of at least one UFC facility.

The results of the analysis show that the most exposed individual receives a dose associated with an increased risk of fatal cancer of 2.2×10^{-4}. There is less than 0.1 fatal cancer per year in the population, and virtually all the population risk is received by people with a lifetime risk of less than 1×10^{-6}.

Table 8 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2 and 3.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI, to the UFC facilities source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum individual risk to any individual is approximately 2.2×10^{-4} which is higher than the level preferred under the case-by-case approach. The estimated annual incidence is 0.1 fatal cancers per year, and almost all of that risk is borne by people whose risk is less than 1×10^{-6}.

EPA examined several alternatives before determining the acceptable level. Those alternatives and the risks they present are illustrated in Table 8. After examining these different options, the Administrator proposes to determine that Alternative 1 (baseline emissions) is acceptable under the case-by-case approach. A maximum individual risk higher than the preferred level is acceptable in this case because the risk distribution is such that incidence is only 0.1 per year.

TABLE 8.—ALTERNATIVES FOR ACCEPTABLE RISK FROM URANIUM FUEL CYCLE FACILITIES

	Alternative 1 (baseline)	Alternative 2	Alternative 3
Maximum individual risk (lifetime)	2.2×10^{-4}	1.4×10^{-4}	3.0×10^{-5}
Incidence within 80 km (death/y)	0.10	0.10	0.10
Risk individual			
E-2 to E-1	0	0	0
E-3 to E-2	0	0	0
E-4 to E-3	95	[1]	0
E-5 to E-4	13,000	13,000	4,000
E-6 to E-5	190,000	190,000	190,000
Less E-6	240M	240M	240M
Risk incidence			
E-2 to E-1	0	0	0
E-3 to E-2	0	0	0
E-4 to E-3	0.00024	[1]	0
E-5 to E-4	0.0024	0.0024	0.001
E-6 to E-5	0.0093	0.0093	0.0093
Less E-6	0.091	0.091	0.091

Other Health Impacts: Total cancers no more than twice fatal cancers.

[1] At least one person may be at this risk level, total number of people unknown because site visit has not been made.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from UFC facilities. To reduce the complexity of studying the costs and benefits of all different control options, EPA has concentrated on the facilities with the largest emissions. The costs and benefits of controlling emissions can be seen in Table 9.

Based on the costs of achieving alternative 2 and the fact that it would reduce the incidence of fatal cancer by less than one case every 100 years, and considerating the small decreases in individual risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. Therefore, EPA believes that limiting emissions to their current level, represented by a level of 10 mrem/y ede, will protest public health with an ample margin of safety. No further reduction below the safe level is required. However, EPA believes that the risks are high enough, and have the potential to go significantly higher, that the protection of public health requires that a NESHAP be promulgated to insure that the current levels of emissions which are safe with an ample margin of safety are not increased. Therefore, EPA is proposing a NESHAP mandating that radionuclide emissions from UFC facilities shall not cause any individual to receive a dose of greater than 10 mrem/y ede.

Approach B: Incidence Based Approach. Decision on Acceptable Risk.

EPA has determined that emissions from UFC facilities cause less than one fatal cancer per year. Therefore, under this approach, current emissions are acceptable.

TABLE 9.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR URANIUM FUEL CYCLE FACILITIES

Alternative	MIR	Incidence	Incremental Incidence Reduction	Total Incidence Reduction	Incremental Capital Cost	Incremental Annualized Cost	Total Annualized Cost
1	2.2×10^{-4}	0.10	.....	.....	.....	.....	.....
1-A	2.2×10^{-4}	0.10	.....	.....	.....	.....	.....
2	1.4×10^{-4}	0.10	<0.01	<0.01	$5M	$5.4M	$5.4M
3	3.0×10^{-5}	0.10	<0.01	<0.01	$75M	$31M	$36M

Regulatory Status: Current AEA standard limits total emissions to 25 mrem/y whole body; 25 mrem/y any organ. Previously, we deferred to this AEA standard and did not propose a NESHAP for this source category.

Comments:

Alternative 1: Baseline, no rule—AEA rule limits risk to a maximum value of 7×10^{-4}.

Based on a low-LET risk factor of 400 fatal cancers per million person-rad, ranging from 120 to 1200 fatal cancers per million person-rad, the Alternative 1 risk may range from 6.6×10^{-5} to 6.6×10^{-4}.

Alternative 1-A: Baseline rule—10 mrem/y ede. The dose from one uranium mill is of this magnitude. CAA rule allows citizen suits not allowed under the AEA.

Alternative 2: Emission limit of 5 mrem/y ede (equivalent to a MIR of 1.4×10^{-4})—Particulate controls added to uranium mills. 5 mrem/y is the NRC design goal for nuclear power reactors.

Alternative 3: Emission limit of 1 mrem/y ede (equivalent to a MIR of 3×10^{-5})—Most of the incidence is due to power reactors and only a few are affected by this alternative, so there is little reduction in incidence. Additional controls are required for uranium mills and uranium conversion plants.

Alternative 4: Table does not contain alternative to bring the MIR to 1×10^{-6} because of the difficulty in estimating impacts. About half of the operating nuclear plants would add additional controls. Most supporting facilities would add additional controls. Cost would be large.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from UFC facilities. To reduce the complexity of studying the costs and benefits of all different control options, EPA has concentrated on the facilities with the largest emissions. The costs and benefits of controlling emissions to various levels can be seen in Table 9.

Based on the costs of achieving alternative 2 and the small associated decreases in individual risk, and the fact that virtually no reduction in incidence would result, EPA has determined that it is not necessary to further reduce risks below their current level. Therefore, EPA believes that limiting emissions to their current levels, represented by a level of 10 mrem/y ede, will protect public health with an ample margin of safety. No further reduction below the safe level is required. However, EPA believes that the risks are high enough, and have the potential to go significantly higher, that the protection of public health requires regulation under section 112 to insure that the current levels of emissions which are safe with an ample margin of safety are not increased. Therefore, EPA is proposing a NESHAP mandating that radionuclide emissions from UFC facilities shall not cause any individual to receive a dose of greater than 10 mrem/y ede.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. When the dose is equally distributed to all organs, an effective dose equivalent of 3 mrem/y for 70 years equals a risk of 1×10^{-4}. Therefore, under this approach, an acceptable level of emissions is the amount that shall not cause any member of the public to receive an effective dose equivalent of more than 3 mrem/y.

Decision on Ample Margin of Safety. After comparing the benefits and costs of reducing risks below the safe level, EPA has determined that no further reductions below the level of 3 mrem/y EDE are needed. Therefore, EPA is proposing a NESHAP of 3 mrem/y which protects public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. When the dose is equally distributed to all organs, an effective dose equivalent of 0.03 mrem/y for 70 years equals a risk of 1×10^{-6}. Therefore, under this approach, an acceptable level of emissions is the amount that shall not cause any member of the public to receive an effective dose equivalent of more than 0.03 mrem/y.

Decision on Ample Margin of Safety. After comparing the benefits and cost of reducing risks below the safe level, EPA has determined that no further reductions below the level of 0.03 mrem/y EDE are necessary to protect public health with an ample margin of safety. Therefore, EPA is proposing a NESHAP of 0.03 mrem/y which protects public health with an ample margin of safety.

4. Implementation

For each approach proposed today, EPA has independently decided that the same level of regulation is appropriate for both UFC facilities and NRC-licensees. Therefore, EPA proposes to remove the exemption for UFC facilities in the NRC-licensee NESHAP and regulate them exactly the same as other licensees, including reporting and recordkeeping requirements.

D. Elemental Phosphorus Plants

1. Introduction

Elemental phosphorus plants extract pure phosphorus from ore for use in the chemical industry. These facilities emit radionuclides into the air because phosphate ore is high in uranium and its decay products. These decay products, especially polonium-210 and lead-210, become volatilized during the extraction process and are released into the atmosphere. There are eight (5 operational, 3 standby) elemental phosphorus plants located in four different states. However, most of the emissions come from two plants in Idaho.

Due to the types of radionuclides emitted by these plants, virtually all the dose is received by the lung through the inhalation pathway causing an increased risk of lung cancer. This risk can be controlled through the use of a standard which directly limits emissions of polonium-210 (control measures which limit polonium-210 also limit emissions of lead-210). There is no need to write dose standards.

Elemental phosphorus plants are currently regulated by a NESHAP that limits their emissions to no more than 21 curies of polonium-210 annually.

2. Estimates of Exposure and Risk

EPA's risk assessment of elemental phosphorus plants is a site-by-site assessment of operating and standby plants, based on monitored data and throughput. Meteorological data was taken from nearby stations. Maximum

individual risks were assessed at actual residences or at a location 1500 m in the predominant wind direction. The location of nearby populations was taken from census tract data.

According to the assessment, EPA estimates that the most exposed individual receives a lifetime fatal cancer risk of 5.6×10^{-4}. There is an increased incidence of 0.072 fatal cancer per year in the nearby (within 80 km) population. Over 75 percent of the exposed population receives risks of less than 1×10^{-6}.

Table 10 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2, 3 and 4.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI to the elemental phosphorus plants source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum individual risk to any individual is approximately 5.6×10^{-4} which is higher than the level generally preferred under the case-by-case approach. The estimated annual incidence is less than 0.072 fatal cancers per year.

EPA examined several alternatives before determining the acceptable level. Those alternatives and the risks they present are illustrated in Table 10. After examining these different options, the Administrator proposes to determine that alternative 1 (10 Ci/y of polonium-210) is acceptable under the case-by-case approach. A maximum individual risk higher than the preferred level is acceptable in this case because the risk distribution is such that incidence is only 0.072 per year.

TABLE 10.—ALTERNATIVES FOR ACCEPTABLE RISK FROM ELEMENTAL PHOSPHORUS PLANTS

	alternative 1 (baseline)	alt. 2	alt. 3	alt. 4
Maximum individual risk (lifetime)	5.6×10^{-4}	2.4×10^{-4}	2.4×10^{-4}	1.1×10^{-5}
Incidence within 80 km (death/y)	0.072	0.024	0.011	0.0022
Risk individual				
E-2 to E-1	0	0	0	0
E-3 to E-2	0	0	0	0
E-4 to E-3	6,000	800	[1]800	0
E-5 to E-4	100,000	15,000	8,000	600
E-6 to E-5	310,000	330,000	190,000	12,000
Less E-6	1.4M	1.5M	1.6M	1.8M
Risk incidence				
E-2 to E-1	0	0	0	0
E-3 to E-2	0	0	0	0
E-4 to E-3	0.012	0.0019	0.0019	0
E-5 to E-4	0.038	0.0037	0.0021	0.00009
E-6 to E-5	0.016	0.012	0.0053	0.00030
Less E-6	0.0056	0.0065	0.0021	0.0018

Other Health Impacts: Non-fatal cancers no more than 5% of deaths.
[1] Alternative 3 has no additional impact on the plant causing the highest risk.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from elemental phosphorus plants. The costs and benefits of controlling emissions can be seen in Table 11. Based on the costs of achieving alternative 2 and the very small reductions of incidence and the small decrease in maximum individual risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. Therefore, EPA believes that current emissions, represented by a level of 10 Ci/y polonium-210, will protect public health with an ample margin of safety. No further reduction below the safe level is required. However, EPA believes that the risks are high enough, and have the potential to go significantly higher, that the protection of public health requires regulation under section 112 to insure that the current levels of emissions which are safe with an ample margin of safety are not increased. Therefore, EPA is proposing a standard of 10 Ci/y of polonium-210, which will protect public health with an ample margin of safety.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier, the emissions from elemental phosphorus plants cause less than one fatal cancer per year. Therefore, under this approach, current emissions are acceptable.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from elemental phosphorus plants.

TABLE 11.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR ELEMENTAL PHOSPHORUS PLANTS

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	5.6×10^{-4}	0.072					
1-A	5.6×10^{-4}	0.072					
2	2.4×10^{-4}	0.024	0.048	0.048	$9M	$2M	$2M
3	2.4×10^{-4}	0.011	0.013	0.061	7M	3M	5M
4	1.1×10^{-5}	0.0022	0.009	0.070	19M	12M	17M

Regulatory Status: Current NESHAP of 21 curies per year of Po-210.

Comments:

Alternative 1: Baseline, no rule—Existing NESHAP would be withdrawn.

Based on a low-LET risk factor of 400 fatal cancers per million person-rad, ranging from 120 to 1200 fatal cancers per million person-rad, the Alternative 1 risk may range from 1.7×10^{-4} to 1.7×10^{-3}.

Alternative 1-A: Baseline rule, emission limit of 10 Ci/y Po-210—highest current emission rate is 10 curies/y Po-210.

Alternative 2: High energy scrubbers on the two largest plants.

Alternative 3: High energy scrubbers on all plants.

Alternative 4: Fabric filters on two largest plants, high energy scrubbers on all other plants.

Alternative 5: Table does not contain alternative to bring the MIR to 1×10^{-6} because of the difficulties in accurately estimating the impacts. Probably 3 plants including the 2 largest ones processing western phosphate rock high in uranium would close. Two smaller plants processing low uranium eastern phosphate rock could continue after additional controls are installed at an annualized cost of about $8 million.

The costs and benefits of controlling emissions can be seen in Table 11. Based on the costs of achieving alternative 2 and the very small reduction of incidence and the small decrease in risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. Therefore, EPA believes that limiting emissions to their current level, represented by a level of 10 Ci/y polonium-210, will protect public health with an ample margin of safety. No further reduction below the safe level is required.

However, as in Approach A, EPA believes that the risks are high enough, and have the potential to go significantly higher, that the protection of public health requires that a NESHAP be promulgated to insure that the current levels of emissions are not increased. Therefore, EPA is proposing a standard of 10 Ci/y of polonium-210 which will protect public health with an ample margin of safety.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. An emissions limit of 0.6 Ci/y of polonium-210 for 70 years corresponds to a risk of 1×10^{-4}. Therefore, under this approach, an acceptable level of emissions is 0.6 Ci/y.

Decisions on Ample Margins of Safety. After comparing the benefits and costs of reducing risks below the safe level, EPA has determined that no further reductions below the level of 0.6 Ci/y are needed. Therefore, EPA is proposing a NESHAP of 0.6 Ci/y of polonium-210 which protects public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach Decision on Acceptable Risk. An emissions limit of 0.006 Ci/y of polonium-210 for 70 years corresponds to a risk of 1×10^{-6}. Therefore, under this approach, an acceptable level of emissions is 0.006 Ci/y.

Decision on Ample Margin of Safety. After comparing the benefits and cost of reducing risks below the safe level, EPA has determined that no further reductions below the level of 0.006 Ci/y are needed to protect public health with an ample margin of safety. Therefore, EPA is proposing a NESHAP of 0.006 Ci/y of polonium-210 which protects public health with an ample margin of safety.

4. Implementation

The current NESHAP for elemental phosphorus plants required each plant to either conduct an initial test on its emissions or get a waiver from testing. After this original report no further testing was required, unless plant operations were changed significantly. EPA plans to continue this system, without the waiver provisions. Tests conducted under the current NESHAP are still valid if conditions have not changed.

Plants will be required to monitor their operations continuously and keep records of the results of their monitoring onsite for five years. Plant owners will have to certify on a semiannual basis that no changes in operations that would require new testing have occurred. Although the report is based on a calendar year the emission limit applies to any year, i.e. any period of 12 consecutive months.

Since the reports from provide EPA with the information it needs, elemental phosphorous plants are exempted from the requirements of 61.10.

E. Coal-Fired Utility and Industrial Boilers

1. Introduction

This category covers electrical utility and industrial boilers which emit the radionuclides naturally present in coal. Coal contains only minute amounts of radionuclides. This category is being considered because large boilers burn large quantities of coal and are so widely dispersed throughout the nation that the radionuclide emissions are estimated to cause 0.8 fatal cancer a year among the U.S. population.

Emissions from coal-fired boilers are presently regulated under National Ambient Air Quality Standards for particulate matter. In addition, the larger new coal-fired boilers have to meet New Source Performance Standards (NSPS). Coal-fired boilers are regulated for the other pollutants they emit including SO_2, particulates, and other hazardous air pollutants such as arsenic and benzene.

2. Estimates of Exposure and Risk

EPA's risk assessment of coal-fired boilers is based on extrapolations of real emissions with model populations. Estimates of emissions are from the reference facilities with the largest emissions. These emissions were analyzed on four sites: Urban, suburban, rural and remote. Further information was received from a recent study of emissions from coal-fired boilers done by the Office of Air Quality, Planning and Standards. EPA assumed that the entire U.S. population lives within 80 km of at least one coal fired boiler.

EPA estimates that the maximum individual risk is 3×10^{-5} and that there are 0.8 fatal cancers a year caused by radionuclide emissions from coal fired boilers. Virtually all the fatal cancer risk is borne by individuals whose lifetime fatal cancer risk is less than 1×10^{-4}.

Table 12 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternative 2.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI, to the coal-fired boilers source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum individual risk to any individual is approximately 3×10^{-4} which achieves a lower level of risk than the upper bound that is described in the case-by-case approach. The estimated annual incidence is estimated at 0.8 fatal cancer per year.

EPA examined several alternatives before determining the acceptable level; those alternatives and the risks they

present are illustrated in Table 12. After examining these different options, the Administrator has determined that baseline emissions are acceptable under the case-by-case approach.

TABLE 12.—ALTERNATIVES FOR ACCEPTABLE RISK FROM COAL FIRED BOILERS—NUMBERS UNCERTAIN

	Alternative 1 (baseline)	Alternative 2
Maximum individual risk (lifetime)	2.5×10^{-5}	1.0×10^{-6}
Incidence within 80 km (death/y)	0.8	0.4
Risk individual		
E-2 to E-1	0	0
E-3 to E-2	0	0
E-4 to E-3	0	0
E-5 to E-4	(1)	0
E-6 to E-5	130,000	0
Less E-6	240M	240M
Risk incidence		
E-2 to E-1	0	0
E-3 to E-2	0	0
E-4 to E-3	0	0
E-5 to E-4	(1)	0
E-6 to E-5	0.001	0
Less E-6	0.8	0.4

Other Health Impacts: Total cancers no more than twice fatal cancers.

[1] At least one person may be at this risk level, total number of people unknown because site visit has not been made.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from coal-fired boilers. The costs and benefits of controlling emissions can be seen in Table 13. Based on the huge costs of achieving alternative 2 and the small reduction of incidence and the small decreases in risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. The fact that no individual receives a high risk is a significant factor in this decision.

Therefore, EPA has determined that limiting radionuclide emissions from coal-fired boilers to current levels will protect public health with an ample margin of safety. No further reduction below the safe level is required. Due to the small level of radionuclides in coal and the fact that all new facilities will have to meet NSPS, a NESHAP does not need to be promulgated for coal fired boilers. EPA proposes not to regulate this source category.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier, the emissions from coal-fired boilers cause 0.8 fatal cancer per year, which is less than the 1 fatal cancer per year. Therefore, by this approach, current emissions are acceptable.

Decision on Ample Margin of Safety. EPA has examined the control technology necessary to lower emissions from coal-fired boilers. The cost and benefits of controlling emissions can be seen in Table 13. Based on the huge costs of achieving alternative 2 and the small reduction of incidence and the small decreases in risk that would result, EPA has determined that it is not necessary to further reduce risks below their current level. The fact that no individual receives a high risk is a significant factor in this decision.

Therefore, EPA has determined that limiting radionuclide emissions from coal-fired boilers to current levels will protct public health with an ample margin of safety. No further reduction below the safe level is required. Due to the small level of radionuclides in coal and the fact that all new facilities will have to meet NSPS, a NESHAP does not need to be promulgated for coal fired boilers. EPA proposes not to regulate this source category.

TABLE 13.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR COAL-FIRED BOILERS

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1(util)	2.5×10^{-5}	0.4					
1(inds)	7×10^{-6}	.4					
2(util)	1×10^{-7}	.2	0.2	0.2	$13B	$4.4B	$4.4B
2(inds)	1×10^{-6}	.2	.2	.2		1.7B	1.7B

Regulatory Status: Particulate emission controls also control radionuclides. Particulates are controlled by NSPS, PSD, and SIP. Previously, we did not propose a rule on the grounds that risks are small on a facility basis and other pollutants from these boilers cause far more risk. Controlling these other pollutant risks also controls radionuclide risks.

Comments:

Alternative 1: Baseline, no rule—utility boilers: current emissions as controlled by NSPS, PSD, and SIP; industrial boilers: current emissions as controlled by SIP. Based on a low-LET risk factor of 400 fatal cancers per million person-rad, randing from 120 to 1200 fatal cancers per million person-rad, the Alternative 1 risk may range from 7.5×10^{-6} to 7.5×10^{-5}.

Alternative 2: Emission limit of 0.03 mrem/y ede. Utility boilers: retrofit of all sources to meet NSPS (particulate standard). Assumes ESPs are used to retrofit to an emission limit of 13 ng/joule (NEPS revised). Industrial boilers: retrofit all units >2MM Btu/h with ESPs.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. Under this approach, an acceptable risk is one which causes a maximum individual risk of 1×10^{-4} or less. EPA estimates that the maximum individual risk from coal-fired boilers is 3×10^{-5}, which exposes the public to a lower degree of risk than that allowed under this approach. Therefore, this level constitutes an acceptable risk to health.

Decision on Ample Margin of Safety. EPA believes that limiting radionuclide emissions to current levels from coal-fired boilers protects public health with an ample margin of safety. In addition, there is good reason to believe that emissions would decrease in the future. Therefore, EPA finds under this approach that the risks from radionuclide emissions from coal-fired boilers do not require regulation under section 112 of the CAA.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. Under this approach, an acceptable risk is one that causes a maximum individual risk of 1×10^{-6} or lower, which corresponds to a NESHAP standard level of 0.03 mrem/y ede. Current emissions from both industrial boilers and utility boilers are above the acceptable range of 1×10^{-6}. Therefore, retrofitting of many sources so that they meet the NSPS for particulates will be necessary to reduce the risk below 1×10^{-6}.

Decision on Ample Margin of Safety. EPA has determined that a NESHAP standard of 0.03 mrem/y EDE provides an ample margin of safety. As stated above, under this approach, retrofitting of all coal-fired boilers would be necessary to reduce the current emissions to below a level of 0.03 mrem/y EDE. Therefore, EPA proposes that all coal-fired boilers be retrofitted to met NSPS for particulates.

4. Implementation

The standard proposed for this category applies the NSPS 40 CFR 60.41a and 60.41b for particulates to all coal fired boilers whose output is greater than 2 million BTU's an hour. This NESHAP will be implemented in the same way as the NSPS is currently implemented.

F. High-Level Nuclear Waste Disposal Facilities

1. Introduction

Management and storage operations for high-level nuclear waste, spent fuel and transuranic waste are addressed in the categories for DOE facilities and NRC-licensed and non-DOE Federal facilities described above. This category addresses facilities constructed and dedicated to long term disposal of such materials pursuant to regulations to be promulgated at 40 CFR 191 Supbart B. Site characterization studies for the first such repository are being conducted by DOE and currently center on Yucca Mountain Nevada. In addition, DOE is constructing a test Waste Isolation Pilot Plant (WIPP) which may be dedicated as a disposal facility.

2. Estimates of Exposure and Risk

EPA's risk assessment of HLW disposal facilities is based upon DOE engineering estimates for conceptual designs for the WIPP In New Mexico, an MRS facility and a permanent repository at Yucca Mountain. They were analyzed by EPA and are believed to be reasonable. Although the decision on Yucca Mountain's acceptability has not yet been made, for purposes of improving the accuracy of the analysis, using a real site, EPA has analyzed the Yucca Mountain site. Population data was taken from U.S. census data at these sites.

EPA estimates that the maximum individual risk is 3×10^{-7} and that there would be 0.0001 fatal cancers a year caused by radionuclide emissions from HLW disposal facilities to less than 1 million people within 80 km of these facilities. All the fatal cancer risk is borne by individuals whose total fatal cancer risk is less than 1×10^{-6}.

The reason why the emissions and risks are so low is the nature of the disposal operations. Sealed sources will be brought to the site and buried below ground. Normal operations preclude any significant air emissions.

Table 14 presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI, to the HLW disposal facilities source category are described below.

Approach A: Case-by-Case Approach. Decision on Safe With an Ample Margin of Safety. As stated above, the individual risks from HLW disposal facilities are very small, less than 1×10^{-6}. In addition, there would be 0.0001 fatal cancers a year from radionuclide emissions from disposal of HLW, see Table 14. The emissions are so low that it was not necessary to evalaute any alternatives. The Administrator determines that the estimate of emissions from disposal of HLW represents a level that will protect public health with an ample margin of safety. EPA believes that since the emissions are so low, and there is no reason to expect that emissions to air would significantly increase, no NESHAP is needed.

TABLE 14.—ALTERNATIVES FOR ACCEPTABLE RISK FROM HIGH LEVEL NUCLEAR WASTE DISPOSAL FACILITIES

	Alternative 1 (baseline)
Maximum individual risk (lifetime)	2.8×10^{-7}
Incidence within 80 km (death/y)	0.00011
Risk individual:	
E-2 to E-1	0
E-3 to E-2	0
E-4 to E-3	0
E-5 to E-4	0
E-6 to E-5	0
Less E-6	780,000
Risk incidence:	
E-2 to E-1	0
E-3 to E-2	0
E-4 to E-3	0
E-5 to E-4	0
E-6 to E-5	0
Less E-6	0.0001

Other Health Impacts: Total cancers no more than twice fatal cancers.

No currently operating facilities. Baseline emissions are estimates of expected emissions. No alternative given due to expected risks well below 1×10^{-6}.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier, the emissions from disposal of HLW will cause much less than one fatal cancer per year. Therefore, under this approach, expected radionuclide emissions are acceptable.

Decision on Ample Margin of Safety. As stated above, the individual risks from disposal of HLW are very small, less than 1×10^{-6}. In addition, there is 0.0001 fatal cancer a year from radionuclide emissions from disposal of HLW, see Table 14. The emissions are so low that no alternatives were evaluated. The Administrator proposes to determine that emissions from disposal of high-level waste will protect public health with an ample margin of safety. EPA believes that since the emissions are so low and there is no reason to expect that they would increase, no NESHAP is needed.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. An effective dose equivalent of 3 mrem/yr for 70 years equals a risk of 1×10^{-4}. Therefore, under this approach an acceptable level of emissions is the amount that shall not cause any member of the public to receive an effective dose equivalent of more than 3 mrem/y.

Decision on Ample Margin of Safety. EPA believes that risks from emissions from HLW disposal will be so small that current emissions protect public health with an ample margin of safety. In addition, there is no reason to believe that they would increase above expected levels. Therefore, EPA proposes to find that since the risks from radionuclide emissions from HLW disposal are so low and there is no reason to expect they would increase, no NESHAP is needed.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. An effective dose equivalent of 0.03 mrem/yr for 70 years equals a risk of 1×10^{-6}. Therefore, under this approach, an acceptable level of emissions is the amount that shall not cause any member of the public to receive an effective dose equivalent of more than 0.03 mrem/y.

Decision on Ample Margin of Safety. EPA believes the risks from air emissions from HLW disposal are so small that estimated emissions protect public health with an ample margin of safety. In addition, there is no reason to believe they will be higher than expected. Therefore, EPA finds that since the risks from radionuclide emissions from HLW disposal are so low and there is no reason to expect them to increase, no NESHAP is needed.

G. Radon Releases from Department of Energy Facilities

1. Introduction.

The DOE administers many facilities, including government-owned,

contractor-operated facilities across the country. Some of these facilities have large stockpiles of radium-containing material. Because this ore was originally high in uranium content, the tailings material that is left has a high radium content and, therefore, emits large quantities of radon. This material is stored in at least five different sites owned or controlled by DOE in Missouri, New Jersey, New York, Ohio and Utah. DOE is presently in the process of taking remedial action at these sites to dispose of the material on a long-term basis.

The current NESHAP covering DOE facilities does not regulate radon emissions. Environmental groups challenged EPA in court to address the problem of radon emissions from DOE facilities. EPA is responding with this proposed NESHAP.

2. Estimates of Exposure and Risk

EPA's risk assessment of DOE facilities is a site-by-site assessment of current emissions. Radon emission estimates were mostly measured values provided by DOE or estimated from measured radium-226 concentrations in the wastes. The meteorological data were taken from nearby stations and populations are based on U.S. census tract data.

According to EPA's analysis, lifetime fatal cancer risk to the most exposed individual is 2.4×10^{-3}. DOE facilities cause an estimated 0.16 fatal cancer per year to the 25.7 million persons within 80 km of the DOE facilities. Approximately 40 percent of the risk to that population comes from individuals whose risk is over 1×10^{-6}. It is noted that this analysis does not consider the planned remedial actions which will be implemented under CERCLA, as amended, in conjunction with either Interagency Agreements or Federal Facilities Agreements with EPA. Remedial action is scheduled at the Monticello Mill Tailings Pile near Monticello, Utah, per a signed Federal Facility Agreement.

Table 15 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2, 3 and 4.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI to the radon emissions from the DOE source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum lifetime individual risk to any individual is 2.4×10^{-3} which is higher than the level generally preferred under the case-by-case approach. The estimated annual incidence is approximately 0.16 fatal cancer per year, and approximately 40 percent of that risk is borne by people whose risk is over 1×10^{-6}. EPA has examined several alternatives before determining the acceptable level; those alternatives and the risks they present are illustrated in Table 15. After examining these different options, the Agency would propose that the risk associated with alternative 2 represents a level that is acceptable under the case-by-case approach. A maximum individual risk higher than the preferred level is acceptable in this case because the risk distribution is such that incidence is only 0.042 per year.

Decision on Ample Margin of Safety. EPA has examined several alternative levels of control of radon emissions from DOE facilities. The costs and benefits of controlling emissions can be seen in Table 16. Based on the costs of further controls to reduce radon emissions, and the small decreases in risk and very small incidence reductions they represent, EPA has determined that it is not necessary to further reduce risks below the acceptable level, alternative 2. Therefore, EPA is proposing a NESHAP limiting radon emissions from DOE facilities to 20 pCi/m^2-s, which will protect public health with an ample margin of safety.

TABLE 15.—ALTERNATIVES FOR ACCEPTABLE RISK FROM RADON FROM DOE FACILITIES

	Alternative 1 (baseline)	Alt. 2	Alt. 3	Alt. 4
Maximum individual risk (lifetime)	2.4×10^{-3}	2.9×10^{-4}	1.8×10^{-4}	1.3×10^{-4}
Incidence within 80 km (death/y)	0.16	0.042	0.021	0.012
Risk individual:				
E-2 to E-1	0	0	0	0
E-3 to E-2	90	0	0	0
E-4 to E-3	3,500	180	70	45
E-5 to E-4	26,000	4,800	2,000	500
E-6 to E-5	1.4M	96,000	44,000	15,000
Less E-6	27M	28M	28M	28M
Risk incidence:				
E-2 to E-1	0	0	0	0
E-3 to E-2	0.002	0	0	0
E-4 to E-3	0.011	0.0004	0.0001	0.00007
E-5 to E-4	0.007	0.0020	0.00057	0.0002
E-6 to E-5	0.040	0.0027	0.0012	0.0005
Less E-6	0.10	0.037	0.020	0.01

Other Health Impacts: Non-fatal cancers no more than 5 percent of deaths.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier, the radon emissions from DOE facilities cause less than one fatal cancer per year. Therefore, under this approach, current emissions are acceptable.

TABLE 16.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR RADON FROM DOE FACILITIES

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	2.4×10^{-3}	0.16	.....	.....	.....	.....	.....
2	2.9×10^{-4}	0.042	0.12	0.12	$29M	$1.5M	$1.5M
3	1.8×10^{-4}	0.021	0.021	0.14	14M	0.7M	2.2M
4	1.3×10^{-4}	0.012	0.009	0.15	13M	0.7M	2.8M

Regulatory Status: Self regulated by DOE. AEA rules for uranium mill tailings are appropriate for this source category.

Comments:

Alternative 1: Baseline, no rule—Self-regulated by DOE.

Based on radon risk factor of 360 fatal cancers per million-WLM, ranging from 160 to 720 fatal cancers per million person-WLM, the Alternative 1 risk may range from 1.1×10^{-3} to 5.8×10^{-3}.

Alternative 2: Cover source to limit emissions to 20 pCi/m²s—This is the same level as the current AEA rule set by EPA for uranium mill tailings.

Alternative 3: Cover source to limit emissions to 6 pCi/m²s—Most of the cost is to control emissions from the Monticello tailings pile.

Alternative 4: Cover source to limit emissions to 2 pCi/m²s—Most of the cost is to control emissions from the Monticello tailings pile.

Alternative 5: Table does not contain alternative to bring the MIR to 1.1×10^{-6} because of the difficulties of estimating the impact. Additional radon controls would be required, amounting to about 8 meters of additional dirt cover. Costs could be in excess of $5 million.

MIR value does not decrease directly in proportion to emission flux because of the differing assumptions associated with each facility. Facilities are not alike.

Decision on Ample Margin of Safety. Based on an analysis of the costs of various control alternatives and decreases in risk and incidence they represent, see Table 16, EPA has determined that it is necessary to reduce risks to the level of alternative 2, but that further reductions are unnecessary. Therefore, EPA is proposing a NESHAP limiting radon emissions from DOE facilities to 20 pCi/m²−s, which will protect public health with an ample margin of safety.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. *Decision on Acceptable Risk.* Since the dose/risk relationship for radon is reasonably well established, an acceptable level of emissions can be estimated under this approach. A radon emission limit of 2 pCi/m²−s yields a lifetime risk of 1×10^{-4} to the maximum exposed individual. Therefore, under this approach an acceptable level of emission is 2 pCi/m²−s.

Decision on Ample Margin of Safety. Due to the costs and difficulty of further reducing emissions, EPA believes that no further reductions below a risk level of 1×10^{-4} are needed. Therefore, EPA is proposing a NESHAP limiting emissions of radon to 2 pCi/m²−s which would protect public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. A radon emission limit of 0.02 pCi/m²−s yields a lifetime risk of 1×10^{-6} to the maximum exposed individual. Therefore, under this approach, an acceptable level of emissions is 0.02 pCi/m²−s.

Decision on Ample Margin of Safety. Due to the costs and difficulty of further reducing emissions, EPA believes that no further reductions below a risk level of 1×10^{-6} are needed. Therefore, EPA is proposing a NESHAP limiting emissions to 0.02 pCi/m²−s which would protect public health with an ample margin of safety.

4. Implementation

This NESHAP is a flux standard that limits the emission of radon from DOE facilities. The standard limits the amount of radon that can be emitted per unit area (m²) per unit of time (s). This standard is not an average per facility but is an average per radon source. This will require that all radon sources must be disposed of in a manner that will reduce the radon flux to meet the standard.

The proposed standard will be effective immediately upon promulgation. While EPA believes that DOE will be able to meet this standard, EPA recognizes that in some cases DOE may need some time to perform all the actions necessary to reduce radon emissions to the required levels. In such a case, DOE may request a waiver of the compliance deadline of up to two years, under section 112(c)(1)(b)(ii) of the CAA. If two years are not sufficient time EPA is prepared to discuss schedules for compliance. EPA recognizes that the requirements of CERCLA and other environmental laws will have to be considered in these discussions.

Since the reports of the testing provide EPA with the information it needs, DOE-facilities are exempted from the requirements of 61.10.

H. Phosphogypsum Stacks

1. Introduction

Phosphogypsum stacks are large piles of waste from wet acid phosphorus fertilizer production. Phosphogypsum stacks are found at 41 different sites in 12 states. Because phosphate ore is relatively high in uranium and radium, phosphogypsum stacks are also high in these elements. The presence of radium in the stacks causes them to release radon into the atmosphere. In connection with the litigation, EPA has agreed to propose a standard for this source category.

2. Estimates of Exposure and Risk

EPA has performed a pile-by-pile assessment of radon releases at 58 phosphogypsum stacks at 41 sites. Radon emissions are based on measured radon fluxes at stacks in Florida and Idaho, the radium content of the phosphate rock and the estimated area of the stacks. Maximum individual risks are based on the locations of nearby residents obtained from industry or topographical maps. Where information was unavailable, people were assumed to be 800 meters from the site boundary. Populations within 80 km were taken from census tract data.

The estimated maximum individual risk of fatal cancer from radon emissions from phosphogypsum stacks is 2.0×10^{-4}. The radon emissions cause 0.97 fatal cancers per year to the population within 80 km. Approximately 90% of the risk to the population is borne by people whose risk is less than 1×10^{-5}, and 40% of the risk is borne by people whose risk is less than 1×10^{-6}.

Table 17 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2 and 3.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI, to the phosphogypsum stacks source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum individual risk to any individual is 2.0×10^{-4} which is slightly higher than the level generally preferred under the case-by-case approach. Of the 58 stacks, only 4 had risks greater than 1×10^{-4}. The estimated annual incidence of fatal cancer is less than 1 per year, and almost all of that risk is borne by people whose risk is less than 1×10^{-5}. EPA has examined several alternatives before determining the acceptable level. Those alternatives and the risks they present are illustrated in Table 17. After examining these different alternatives, the Administrator has determined that baseline emissions, alternative 1, represents a level that is acceptable under the case-by-case approach. A maximum individual risk higher than the preferred level is acceptable in this case because only a few individuals are exposed to this level and because the risk distribution is such that incidence is only 0.97 per year.

Decision on Ample Margin of Safety. Based on the costs of further controls to reduce radon emissions, and the decreases in risk and small incidence reductions they represent, see Table 18, EPA has determined that it is not necessary to further reduce risks below the safe baseline level, alternative 1. EPA proposes a NESHAP limiting radon emissions from phosphogypsum stacks to 20 pCi/m^{2-s}, which represents current emissions, which will protect public health with an ample margin of safety.

TABLE 17.—ALTERNATIVE FOR ACCEPTABLE RISK FOR DISPOSAL OF PHOSPHOGYPSUM STACKS

	Alternative 1 (baseline)	Alternative 2	Alternative 3
Maximum individual risk (lifetime)	2.0×10^{-4}	1.6×10^{-4}	5.6×10^{-5}
Incidence within 80 km (death/y)	0.97	0.83	0.29
Risk individual			
E-2 to E-1	0	0	0
E-3 to E-2	0	0	0
E-4 to E-3	[1]	[1]	0
E-5 to E-4	400,000	290,000	17,000
E-6 to E-5	16M	14M	2.6M
Less E-6	78M	81M	92M
Risk incidence			
E-2 to E-1	0	0	0
E-3 to E-2	0	0	0
E-4 to E-3	[1]	[1]	0
E-5 to E-4	0.094	0.064	0.0033
E-6 to E-5	0.52	0.41	0.068
Less E-6	0.34	0.34	0.21

Other Health Impacts: Non-fatal cancers no more than 5% deaths.

[1] At least one person may be at this risk level, total number of people unknown because site visit has not been made.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier, the radon emission from phosphogypsum stacks cause less than one fatal cancer per year. Therefore, by this approach, current emissions provide an acceptable level of risk. However, the current incidence estimate is 0.97 fatal cancer a year, which is very close to the acceptable level. Future analysis could demonstrate that current emissions are not acceptable and need to be reduced.

Decision on Ample Margin of Safety. Based on the costs of further controls to reduce radon emissions, and the decreases in risk and small incidence reductions they represent, see Table 18, EPA has determined that it is not necessary to further reduce risk below the safe baseline level, alternative 1.

TABLE 18.-ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR DISPOSAL OF PHOSPHOGYPSUM STACKS

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	2.0×10^{-4}	0.97					
2	1.6×10^{-4}	0.83	0.14	0.14	$500M	$ 43M	$ 43M
3	5.6×10^{-5}	0.29	0.54	0.68	$500M	$ 25M	$ 68M

Regulatory Status: Presently unregulated. This source category is analogous to uranium mill tailings, but has much less radon emission per unit area. EPA is required under court order to propose a standard for this category.

Comments:

Alternative 1: Baseline rule, cover source to limit emissions to 20 pCi/m^{2}s—Stacks have emissions of 4 to 15 pCi/m^{2}s; no cover would be needed. This rule would be equivalent to the current AEA rule set by EPA for uranium mill tailings.

Based on radon risk factor of 360 fatal cancers per million person-WLM, ranging from 160 to 720 fatal cancers per million person-WLM, the Alternative 1 risk may range from 8.9×10^{-5} to 4.0×10^{-4}.

Alternative 2: Cover source to limit emissions to 6 pCi/m^{2}s—Stacks are covered with 0.5 meters of dirt. Usually dirt is not locally available and must be hauled to the site.

Alternative 3: Cover source to limit emissions to 2 pCi/m^{2}s—Stacks are covered with 1 meter of dirt.

Alternative 4: Table does not contain alternative to bring the MIR to 1×10^{-6} because the impacts cannot be accurately estimated. If all stacks would need a dirt cover of average depth of 4 meters, the total annualized cost would seem to approach $300 million.

However, to prevent emissions from increasing, EPA is proposing a NESHAP for this source category limiting radon emissions from phosphogypsum stacks to 20 pCi/m^2-s. This represents current emissions and will protect public health with an ample margin of safety.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. A radon emission limit of 2 pCi/m^2-s corresponds approximately to a lifetime risk of 1×10^{-4} to the maximum exposed individual. Under this approach, an acceptable level of emissions is an average radon flux of 2 pCi/m^2-s from phosphogypsum stacks.

Decision on Ample Margin of Safety. Due to the costs and difficulty of further reducing emissions, EPA believes that no further reductions below a risk level of 1×10^{-4} are needed. Therefore, EPA is proposing limiting emissions to 2 pCi/m^2-s, which would protect public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. A radon emission limit of 0.02 pCi/m^2-s corresponds approximately to a lifetime risk of 1×10^{-6} to the maximally exposed individual. Under this approach, an acceptable level of emissions is an average radon flux of .02 pCi/m^2-s.

Decision on Ample Margin of Safety. Due to the costs and difficulty of further reducing emissions, EPA believes that no further reductions below a risk level of 1×10^{-6} are needed. Therefore, EPA is proposing limiting radon emissions levels to 0.02 pCi/m²-s, which would protect public health with an ample margin of safety.

4. Implementation

This NESHAP is a flux standard that limits the emission of radon from phosphogypsum stacks. The standard limits the amount of radon that can be emitted per unit area (m²) per unit of time (s). This standard is not an average per facility but is an average per phosphogypsum stack. This will require that all stacks be disposed of in a manner that will reduce the radon flux to meet the standard.

Sixty days after the effective date of this rule or sixty days after the operator ceases using a phosphogypsum stack the operator must test the stack to determine whether or not the stack is in compliance with the flux standard. If Approach A or B is selected it is expected that all stacks will be in compliance with the standard. If Approach C or D are selected the stacks will most likely not be in compliance unless they cover the stack with dirt, or something else, to reduce the radon flux off the stack. If an operator knows that the stack cannot meet the standard, the operator can admit noncompliance instead of testing the stack.

Stacks must be retested every two years unless EPA requires more frequent testing or EPA determines that less frequent testing is sufficient to assure compliance with the standard. EPA will also reduce the need for testing if EPA determines that testing will interfere with ongoing operations designed to cover the stack.

Since the reports of the testing provide EPA with the information it needs, phosphogypsum stacks are exempted from the requirements of 61.10.

I. Underground Uranium Mines

1. Introduction

When these mines are operating, their ventilation systems emit large amounts of radon into the atmosphere. The levels of radon in an unventilated mine are a hazard to the miners. Ventilating to reduce radon exposure to the miners increases exposure to the general population.

Underground uranium mines are regulated by an existing NESHAP. This NESHAP requires bulkheading of unused portions of the mines in an effort to reduce the internal wall surface area of the mine and thereby reduce radon emissions into the mine air. EPA has found that this system is unworkable for existing mines, and it is unproven for new mines. The interiors of these mines are so extensively interconnected that any attempt at bulkheading either produces no results or prevents fresh air from getting to the miners.

2. Estimates of Exposure and Risk

EPA's risk assessment of underground uranium mines is a site-by-site assessment of all operating or operable mines. Emission estimates were based on radon concentration or working level measurements and ventilation rates provided by mine operators.

The meteorological data was taken from nearby stations and populations from 5 to 80 km are based on U.S. census tract data. Population distributions within 5 km were taken from site visits or obtained from mine owners.

The maximum individual risk of fatal cancer from radon emissions from underground uranium mines is 1.2×10^{-3}. The radon emissions cause 0.77 fatal cancer per year to the population within 80 km.

Table 19 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2 and 3.

TABLE 19.—ALTERNATIVES FOR ACCEPTABLE RISK FPR UNDERGRAOUN URANIUM MINES

	alternative 1 (baseline)	alternative 2	alternative 3
Maximum individual risk (lifetime)	1.2×10^{-3}	2.7×10^{-4}	1.9×10^{-4}
Incidence within 80 km (death/y)	0.77	0.43	0.20
Risk individual			
E-2 to E-1	0	0	0
E-3 to E-2	6	0	0
E-4 to E-3	90,000	15,000	1500
E-5 to E-4	1.6M	880,000	280,000
E-6 to E-5	250,000	1.0M	1.6M
Less E-6	7,000	20,000	22,000
Risk incidence			
E-2 to E-1	0	0	0
E-3 to E-2	0.00008	0	0
E-4 to E-3	0.21	0.028	0.0024
E-5 to E-4	0.54	0.30	0.099
E-6 to E-5	0.021	0.096	0.099
Less E-6	0.00005	0.00025	0.00035

Other Health Impacts: Non-fatal cancers no more than 5% of deaths.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI, to the surface uranium mines source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum individual risk to any individual is 1.2×10^{-3} which is higher than the level preferred under the case-by-case approach. The estimated annual incidence is 0.77 fatal cancer per year. EPA has examined several alternatives before determining the acceptable level; those alternatives and the risks they present are illustrated in Table 19. After examining these

different alternatives, the Agency would propose that the risks associated with alternative 2 represents the level that is acceptable under the case-by-case approach. Alternative 2 limits the emissions to 1500 Ci/y of radon. An emissions limit of 1500 Ci/y provides an acceptable level of risk.

However, EPA recognizes that, among the source categories analyzed, uranium mines present a unique situation in determining an acceptable level of risk. This occurs because Mine Safety and Health Administration (MSHA) standards require owners to protect mine workers by operating mine ventilation equipment to reduce the radon levels within the mines. This results in emissions of whatever amount of radon is necessary to reduce the radon levels in the mines to the required levels.

After considering the conflict in the goals of the MSHA regulations and the goals of the CAA, EPA has concluded that emissions higher than 1500 Ci/y can be allowed without increasing the risk to the nearby individuals. If a mine releases its exhaust fan emissions from a 30-meter stack, then radon emissions of 5,000 Ci/y would result in the same level of risk to the most exposed individuals as a ground level releases of 1500 Ci/y. This alternative provides an effective means to ventilate the mine, reducing radon levels in the mine, while protecting those persons exposed to the emissions from a mine. Therefore, the Agency would propose that the risks associated with exhaust vent emissions of radon from underground uranium mines emitted either at ground level with an emission limit of 1500 Ci/y or from a stack that is at least 30 meters high with an emission limit of 5000 Ci/y provides an acceptable level of risk.

Decision on Ample Margin of Safety. Based on the costs of further controls to reduce radon emissions, including the likelihood of closures and the decreases in risk and very small incidence reductions they represent, see Table 20, EPA has determined that it is not necessary to further reduce risks below the acceptable level, alternative 2. EPA recognizes that closures are not in themselves a reason not to further reduce risks.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier the radon emissions from underground uranium mines cause less than one fatal cancer per year. Therefore, under this approach, current emissions are acceptable.

TABLE 20.—Alternatives for Ample Margin for Safety for Underground Uranium Mines

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	1.2×10^{-3}	0.77	.....	.....	.....	.....	.....
1-A	1.2×10^{-3}	0.77	.....	.....	.....	.....	.....
2	2.7×10^{-4}	0.43	0.34	0.34	$15M	$8M	$8M
3	1.9×10^{-4}	0.20	0.23	0.57	$ *	$ *	$ *

Regulatory Status: Currently there is a NESHAP in place requiring work practices to limit radon emissions (bulkheads).

Comments:

Alternative 1: Baseline, no rule—existing NESHAPS would be vacated. Bulkheading is no longer believed effective.

Based on radon risk factor of 360 fatal cancers per million person-WLM, ranging from 160 to 720 fatal cancers per million person-WLM, the Alternative 1 risk may range from 5.3×10^{-4} to 2.4×10^{-3}.

Alternative 1-A: Baseline rule—10,000 Ci/y radon emissions limit. The largest mine emits 8900 Ci/y radon.

Alternative 2: Emission limit of 1,500 Ci/y radon for ground level release or 5,000 Ci/y radon if there is a 30 meter stack. Three mines exceed 5,000 Ci/y radon and would have to reduce operating time by 2-5 months. Several mines would in addition need to cut new vent shafts.

Alternative 3: Emission limit of 1,000 Ci/y radon. This alternative is more stringent than Alternative 2: (* Additional costs are in terms of mines shut down which cannot be quantified at this time.)

Alternative 4: Table does not contain alternative to bring the MIR to 1×10^{-6} because it is difficult to estimate the impact of such action. Most likely, mines could not operate at this level. Six mines would close; new mines could not be opened.

Decision on Ample Margin of Safety. EPA has examined several alternatives before determining the alternative that results in emissions that are safe with an ample margin of safety; those alternatives are presented in Table 20. After examining these different alternatives, the Administrator has determined that alternative 2 represents the level that is safe with an ample margin of safety. Alternative 2 limits the emissions to 1500 Ci/y of radon. An emissions limit of 1500 Ci/y provides a level of emissions that is safe with an ample margin of safety.

However, EPA recognizes that, among the source categories analyzed, uranium mines present a unique situation in determining an acceptable level of risk. This occurs because Mine Safety and Health Administration (MSHA) standards require owners to protect mine workers by operating mine ventilation equipment to reduce the radon levels within the mines. This results in emissions of whatever amount of radon is necessary to reduce the radon levels in the mines to the required levels.

After considering the conflict in the goals of the MSHA regulations and the goals of the CAA, EPA has concluded that emissions higher than 1500 Ci/y can be allowed without increasing the risk to the nearby individuals. If a mine releases its exhaust fan emissions from a 30-meter stack, then radon emissions of 5,000 Ci/y would result in the same level of risk to the most exposed individuals as a ground level release of 1500 Ci/y. This alternative provides an effective means to ventilate the mine, reducing radon levels in the mine, while protecting those persons exposed to the emissions from a mine. Therefore, the Administrator has determined that exhaust vent emissions of radon from underground uranium mines emitted either at ground level with an emission limit of 1500 Ci/y or from a stack that is at least 30 meters high with an emission limit of 5000 Ci/y protects public health with an ample margin of safety.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. Since the dose/risk relationship for radon is well established, it is straightforward to determine the correct standard under this approach. A radon emission limit of 500 Ci/y of radon under current release conditions equals a lifetime risk of 1×10^{-4} to the most exposed individual. Therefore, under this approach, an acceptable level of emissions is 500 Ci/y of radon from any single mine.

Decision on Ample Margin of Safety. Based on the considerations expressed earlier, EPA believes that no further reductions below emissions of 500 Ci/y of radon would be needed. Therefore, EPA is proposing a NESHAP of 500 Ci/y of radon from any single mine, which would protect public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. A radon emissions limit of 5 Ci/y of radon would expose an individual to a lifetime risk of 1×10^{-6}. Therefore, under this approach, an acceptable level of emissions is 5 Ci/y of radon from any single underground uranium mine.

Decision on Ample Margin of Safety. A standard of 5 Ci/y radon would be impossible for most underground uranium mines to meet. Since this standard would shut down the industry, there is no need to look at lowering it further. EPA is proposing that underground uranium mines not emit more than 5 Ci/y radon-222 into the atmosphere in any year.

4. Implementation

This standard is an emission standard. Mines are limited in the amount of radon they emit from their exhaust vents. Due to Mine Safety and Health Administration (MSHA) regulations, which are designed to protect the miners from high levels of radon in the mine, the exhaust fans must be operating whenever there are miners working in the mine. This limits EPA flexibility in developing other types of standards to control radon emissions.

Under Approach A and B the limit is 1500 curies of radon a year. If mines emit radon from a stack 30 meters in height or higher, the risks to nearby individuals is reduced such that larger radon emissions will still result in risk levels that are safe with an ample margin of safety. In an effort to provide flexibility for the mine owners in meeting their obligations under MSHA regulations, EPA will allow mines that have 30 meter stacks to emit up to 5,000 curies a year.

Under Approach C, mines can emit up to 500 curies of radon a year, and under Approach D, they can emit up to 5 curies of radon a year. Under all the Approaches, mines will be required to measure and report their annual emissions. Although the report is based on a calendar year the emission limit applies to any year, i.e. any period of 12 consecutive months. Since these reports provide EPA with the information it needs, underground uranium mines are exempted from the requirements of 61.10.

J. Surface Uranium Mines

1. Introduction

Surface mining is accomplished by the excavation of one or more pits to expose uranium ore for removal. While this technique has accounted for about 50–70% of the uranium ore tonnage produced in this country between 1956 and 1985, much of today's uranium production is from underground mines and other sources. In the past, annual production from surface mines ranged from a few hundred tons of ore to 100,000 tons or more. In recent years, surface mining operations have been very large, typically 100,000 tons or more. Due to the dramatic decline in the uranium industry since 1981, the number of surface mines in operation in the U.S. has dropped from 50 in 1981 to just 2 in 1987. While only 2 mines are currently active, there remain about 1,200 mines in the U.S. in various stages of reclamation.

During surface mining, topsoil may be segregated and saved for reclamation; overburden is piled on land beside the pit. The pit and overburden represents a large surface area from which radon can escape into the atmosphere. Radon emissions are higher than usual because radium concentrations are larger than average near bodies of uranium ore.

Health, safety and environmental hazards associated with uranium mining are regulated by a variety of Federal and State laws. As a result of the laws and regulations, uranium mines, especially surface operations, are vastly different operations today than during the 1950s and 1960s. Many of the inactive mines are presently being reclaimed under state law. Reclamation of the mines significantly reduces radon emissions. In the past, EPA decided not to promulgate a NESHAP for this category. That decision was challenged in litigation and is being reexamined in this rulemaking.

2. Estimates of Exposure and Risk

EPA conducted a field study during the summer of 1988 to obtain information with which to model the surface mining industry so that estimates of risk from surface mining could be made. Radiometric surveys were conducted of the two active mines, located in Texas and Wyoming, and 25 inactive mines located in Arizona, New Mexico, Colorado, South Dakota, Texas and Wyoming. In addition, the demographic and meteorologic data were gathered in and around each mining site.

The maximum individual risk of fatal cancer from radon emissions from surface uranium mines is 1.0×10^{-4}. The radon emissions cause 0.016 fatal cancer per year to the population within 80 km. Over 80% of the risk to the population is borne by people whose risk is less than 1×10^{-5}, and 50% of the risk is borne by people whose risk is less than 1×10^{-6}.

Table 21 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels, (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternative 2.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI, to the surface uranium mines source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum individual risk to any individual is 1.0×10^{-4} which is the level generally preferred under the case-by-case approach. The estimated annual incidence is less than 0.0067 fatal cancer per year, and most of that risk is borne by people whose risk is less than 1×10^{-5}. EPA has examined several alternatives before determining the acceptable level, those alternatives and the risks they present are illustrated in Table 21. After examining these different alternatives, the Agency has determined that baseline emissions, alternative 1, represents the level that is acceptable under the case-by-case approach.

Decision on Ample Margin of Safety. Based on the costs of further controls to reduce radon emissions, and the decreases in risk and very small incidence reductions they represent, see Table 22, EPA has determined that it is not necessary to further reduce risks below the safe baseline level, alternative 1. Current emissions have an associated risk which is safe with an ample margin of safety. Especially important in this determination is the extremely low population risk and the current state reclamation system which is working to reduce its already low risks.

Due to the depressed state of the uranium mining industry, there is no reason to believe that any new surface mines will be constructed. Therefore, the baseline risks are not expected to increase in the future, and EPA proposes not to regulate this source category.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier, the radon emissions from surface uranium mines

cause much less than one fatal cancer per year. Therefore, under this approach, current emissions are acceptable.

TABLE 21.—ALTERNATIVE FOR ACCEPTABLE RISK FOR SURFACE URANIUM MINES

	Alternative 1 (baseline)	Alternative 2
Maximum individual risk (lifetime).	1.0×10^{-4}	6.6×10^{-5}
Incidence within 80 km (death/y).	0.016	0.0029
Risk individual:		
E-2 to E-1	0	0
E-3 to E-2	0	0
E-4 to E-3	240	0
E-5 to E-4	1,400	750
E-6 to E-5	62,000	28,000
Less E-6	5.8M	5.8M
Risk incidence:		
E-2 to E-1	0	0
E-3 to E-2	0	0
E-4 to E-3	0.0004	0
E-5 to E-4	0.0008	0.0005
E-6 to E-5	0.0020	0.0007
Less E-6	0.0035	0.0017

Other Health Impacts: Non-fatal cancers no more than 5 percent of deaths.

Decision on Ample Margin of Safety. Based on the costs of further controls to reduce radon emissions, and the decreases in risk and very small incidence reductions they represent, see Table 22, EPA has determined that it is not necessary to further reduce risks below the safe baseline levels, alternative 1, to protect health with an ample margin of safety. Therefore, EPA is proposing not to regulate under this approach.

TABLE 22.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR SURFACE URANIUM MINES

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	1.0×10^{-4}	0.016					
2	6.6×10^{-5}	0.0029	0.013	0.013	$15M	$0.8M	$0.8M
3	2.2×10^{-5}	0.0015	0.0014	0.014	$51M	$2.6M	$3.3M
4	1.3×10^{-5}	0.0007	0.0008	0.014	$110M	$5.6M	$8.9M

Regulatory Status: Presently unregulated by EPA. State reclamation rules apply to most of these mines. These requirements reduce radon emissions when the mine is closed and reclaimed. Some mines are located on Federal (23%) and Indian (7%) lands; reclamation rules established by Interior, Agriculture, or DOE then apply.

Comments:

Alternative 1: Baseline, no rule—State reclamation rules apply. Analysis assumes larger production mines characterize the risk associated with surface uranium mining. Analysis is based on 25 mines. States with reclamation requirements include Colorado, Texas, Utah, Wyoming and South Dakota.

Based on radon risk factor of 360 fatal cancers per million person-WLM, ranging from 160 to 720 fatal cancers per million person-WLM, the Alternative 1 risk may range from 4.4×10^{-5} to 2.0×10^{-4}.

Alternative 2: Cover source to limit emissions to 40 pCi/m²s—This alternative represents Federalization of State laws covering reclamation. Assumes 0.2 meters of dirt cover.

Alternative 3: Cover source to limit emissions to 20 pCi/m²s—Assumes 0.9 meters of dirt cover.

Alternative 4: Cover source to limit emissions to 6 pCi/m²s—Assumes 2.4 meters of dirt cover.

Alternative 5: Table does not contain alternative to bring the MIR to 1×10^{-6} because of the difficulty in accurately estimating the impacts. Most likely, in addition to State laws covering reclamation, EPA would add additional dirt cover requirements amounting to about 3 meters of dirt to further reduce radon emissions. The total annualized costs would approach $20 million for the 25 largest mines. There are over 1000 of these mines, although most are small operations.

Approach C: 1×10^{-4} or less Maximum Individual Risk Approch. Decision on Acceptable Risk. Current emissions from surface uranium mines present risks of 1.0×10^{-4} to the maximum exposed individual. Therefore, under this approach current emissions provide an acceptable level of risk.

Decision on Ample Margin of Safety. Based on the costs of further controls to reduce radon emissions, and the decreases in risk and very small incidence reductions they represent, see Table 22, EPA has determined that it is not necessary to further reduce risks below the safe baseline level, alternative 1, to protect health with an ample margin of safety. Therefore, EPA is proposing not to regulate under this approach.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. A radon emission limit of 0.02 pCi/m²— yields to the most exposed individual. Therefore, under this approach, an acceptable level of emissions is 0.02 pCi/m²—s.

Decision on Ample Margin of Safety. Due to the costs and difficulty of further reducing emissions, EPA believes that no further reductions below a risk level of 1×10^{-6} are needed. EPA is proposing a NESHAP limiting emissions of radon to 0.02 pCi/m ²—s which would protect public health with an ample margin of safety.

4. Implementation

This NESHAP is a flux standard that limits the emission of radon from uranium mines. The standard limits the amount of radon that can be emitted per unit area (m²) per unit of time (s). This standard is an average per mine including the overburden. This will require that all mimes must be disposed of in a manner that will reduce the radon flux to meet the standard.

Sixty days after the effective date of this rule or sixty days after the operator ceases using a surface uranium mine the operator must test the mine to determine whether or not the mine is in compliance with the flux standard. If an operator knows that the mine cannot meet the standard, the operator can admit noncompliance instead of testing.

Mines must be retested every two years unless EPA requires more frequent testing or EPA determines that less frequent testing is sufficient to assure compliance with the standard. EPA will also reduce the need for testing if EPA determines that testing will interfere with ongoing operations designed to reduce the flux from the mine.

Since the reports of the testing provide EPA with the information it needs, surface uranium mines are exempted from the requirements of 61.10.

K. Radon Releases from Operating Uranium Mill Tailings Piles

1. Introduction

The process of separating uranium from its ore creates waste material that is called uranium mill tailings. Since uranium ore generally contains less than 1 percent uranium, uranium milling produces large quantities of tailings. These tailings are collected in impoundments that vary in size from 20 to 400 acres. The tailings contain large amounts of radium, and, therefore, they emit large quantities of radon. There are 26 licensed uranium mills in the western United States. Due to the depressed state of the uranium industry, most of these mills are not currently operating.

The Uranium Fuel Cycle standard, 40 CFR 190, does not regulate radon emissions from the tailings piles. Radon emmissions during operating are currently regulated by a NESHAP which is a work practice standard which specifies two methods, one of which must be used in the construction of any new tailings impoundment. Existing tailing piles cannot be used after December 31, 1992. Extensions and exceptions can be granted that would allow an existing pile to continue to operate beyond the 1992 deadline. The piles must be disposed of in accordance with EPA's AEA standard, 40 CFR 192.

For the current radionuclides NESHAP rulemaking, EPA is proposing rules for three different subcategories that deal with mill tailings: Operating mill tailings—existing piles, operating mill tailings—new technology, and disposal of uranium mill tailings (as a separate source category; see section VII.L of this notice).

This source category, operating mill tailings, has two subcategories because existing and future mill tailings piles present different problems. Existing mill tailings piles are large piles of wastes that emit radon. There is nothing that can be done to reduce the amount of radon they emit except cover them. New piles can be designed to utilize disposal systems that reduce the problem before very large (hundreds of acres) piles that require disposal accumulate. The new technology cannot readily be used on old piles. It is easier and cheaper to simply cover up the existing piles than to break them up into a series of smaller piles and dispose of them separately.

EPA has determined that it is not feasible to prescribe an emission standard for radon emissons from uranium mill tailing piles. Radon is emitted from the surfaces of tailings piles in a manner analogous to fugitive dust emissions and cannot be emitted through a conveyance designed and constructed to capture such radom emissions. Instead, EPA is requiring on improved work practice for the disposal of newly generated tailings and is specifying a date of which all newly generated tailings must be managed by this work practice.

A crucial issue with all uranium mill tailing piles is that of timing. The ony way to permanently reduce radon emissions from a pile is to cover it up and dispose of it. The piles continue to emit radon at significant levels which they remain uncovered. EPA has not dealt with this timing issue before. We are dealing with it at this time because there has been little, if any, action taken to dispose of the piles. If EPA promulgates a disposal NESHAP, it can require that disposal be started within a set period of time after operations cease or after the rule is promulgated. If this issue is not addressed with a disposal NESHAP, then a NESHAP covering operational piles could require termination of operations and start of final disposal within a set time.

Timing is also a significant issue for the owners of operating mill tailings piles. Operators want to be able to continue to use their existing piles for as long as possible. This allows them to avoid spending money on disposal or new impoundments. In the current NESHAP, EPA dealt with this issue by allowing the continued use of all existing piles until December, 1992, and creating a system of exceptions and extensions that would allow continued use for low risk piles until 2001. This system has been challenged as violating the section 112 requirement that NESHAP compliance be attained within 2 years.

2. Estimates of Exposure and Risk

EPA's risk assessment of operating uranium mill tailings is a site-by-site assessment of all 26 currently licensed mills. Emissions were estimated from the radium-226 concentrations in the tailings, the amount of tailings, and the assumption that 1 pCi/g of radium-226 in the tailings produces 1 pCi/m ^{2}-s of radon. The meteorological data was taken from nearby stations and populations from 5 to 80 km are based on U.S. census tract data. Populations within 5 km were counted at each of the sites. EPA analyzed current emissions and the emissions that would be expected when new tailings impoundments are created in the future.

There are twelve licensed piles that are either operating or on standby. According to EPA's analysis, the lifetime fatal cancer risk to the most exposed individual is 3.3×10^{-3} from these twelve piles. Uranium mill tailings are estimated to cause 1.6 fatal cancer per year to the 4.5 million persons within 80 km of the tailings piles.

Tables 23 and 24 present example scenarios to show how different emission levels would result in different health risk profiles. The tables present the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The tables also present available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2, 3 and 4.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI, to the radon emissions from the uranium mill tailings source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum individual risk to any individual is 3.3×10^{-3} which is higher than the level generally preferred under the case-by-case approach. The estimated annual incidence within 80 km is 1.6 fatal cancers per year, and most of that risk is borne by people whose risk is less than 1×10^{-4}. Many of the piles are closing which will increase emissions from the tailings as they dry out. EPA has examined several alternatives before determining the acceptable level; those alternatives and the risks they present are illustrated in Tables 23 and 24.

After examining these different alternatives, the Agency would propose that the risks associated with alternative 3 for these twelve existing piles which limits the length of time that mills can continue to place new tailings on existing impoundments to 2 years, and limits the emissions to 6 pCi/m^2−s radon after disposal is completed, and alternative 2 for new technology for future piles, which requires a single large impoundment, represents the level that is acceptable under the case-by-case approach.

Decision on Ample Margin of Safety. Mills cannot create new impoundments to replace the existing impoundments in less than two years. EPA has determined that no alternatives more restrictive than alternative 3 need to be analyzed. The costs of this alternative are described in Table 25. Therefore, EPA is proposing to allow existing

impoundments to operate for no more than two years unless they meet the work practice requirements for new impoundments. There is no reason to require closure of an existing impoundment which meets the requirements for new impoundments so that a new impoundment which is similar would need to be constructed.

For new impoundments, EPA has analyzed the costs of further controls to reduce radon emissions, and the decreases in risk and very small incidence reductions they represent, see Table 26.

TABLE 23.—ALTERNATIVES FOR ACCEPTABLE RISK FOR OPERATING URANIUM MILL TAILINGS PILES—EXISTING PILES [1]

	Alternative 1 (baseline)	Alternative 2	Alternative 3
Maximum individual risk (< lifetime exposure)	3.3×10^{-3}	1.4×10^{-3}	4.6×10^{-4}
Incidence within 80 km	1.6 for 15y (24)	1.6 for 6y (9.6)	1.6 for 2y (3.2)
Risk individual			
E-2 to E-1	0	0	0
E-3 to E-2	600	300	0
E-4 to E-3	40,000	20,000	6,000
E-5 to E-4	400,000	200,000	60,000
E-6 to E-5	400,000	200,000	60,000
Less E-6	3.4M	3.8M	4.1M
Risk incidence			
E-2 to E-1	0	0	0
E-3 to E-2	1.2	0.5	0.16
E-4 to E-3	12.0	4.8	1.6
E-5 to E-4	9.0	3.6	1.2
E-6 to E-5	1.5	0.6	0.2
Less E-6	0.0015	0.0006	0.0002

Other Health Impacts: Non-fatal cancers no more than 5 percent deaths. Incidence at greater than 80 km is comparable to that within 80 km.

[1] This assessment assumes that a disposal NESHAP has been promulgated, which would force closure of the piles as soon as they are filled.

TABLE 24.—ALTERNATIVES FOR ACCEPTABLE RISK FOR OPERATING URANIUM MILL TAILINGS PILES—NEW TECHNOLOGIES

	Alternative 1 (baseline)	Alt. 2	Alt. 3	Alt. 4
Maximum individual risk (lifetime)	3.3×10^{-3}	1.8×10^{-4}	6.0×10^{-5}	2.0×10^{-5}
Incidence within 80 km (death/y)	0.78	0.11	0.053	0.018
Risk individual:				
E-2 to E-1	0	0	0	0
E-3 to E-2	550	0	0	0
E-4 to E-3	98,000	23,000	0	0
E-5 to E-4	450,000	120,000	72,000	24,000
E-6 to E-5	1.8M	1.1M	300,000	130,000
Less E-6	110	1.2M	2.0M	2.2M
Risk incidence:				
E-2 to E-1	0	0	0	0
E-3 to E-2	0.016	0	0	0
E-4 to E-3	0.47	0.027	0	0
E-5 to E-4	0.17	0.051	0.028	0.0043
E-6 to E-5	0.12	0.023	0.016	0.0081
Less E-6	0.0000	0.01	0.02	0.007

Other Health Impacts: Non-fatal cancers no more than 5% of deaths Incidence at greater than 80 km is comparable to that within 80 km.

EPA has determined that no further reductions to alternative 3 or 4 are called for to provide an ample margin of safety. EPA believes that a NESHAP requiring the work practices of either phased disposal in 40-acre impoundments (alternative 3) or continuous disposal (alternative 4) will protect public health with an ample margin of safety.

TABLE 25.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR 12 OPERATING URANIUM MILL TAILINGS—EXISTING PILES

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	3.3×10^{-3}	1.6/15 yr (total 24)					
2	1.4×10^{-3}	1.6/6 yr (total 10)	(14 Total)	(14 Total)	$230M	$33M	$33M
3	4.6×10^{-4}	1.6/2 yr (total 3)	(7 Total)	(21 Total)	$160M	$46M	$42M

Regulatory Status: Currently there is a NESHAP in place requiring work practices to limit radon emissions. Analysis assumes existing NESHAPS for new licensed mills is not vacated and there is a disposal NESHAP that requires disposal within 2 years of being closed.

(If a disposal rule is not promulgated then a uniform but unknown amount of risk, up to a maximum risk of 1.6 deaths/y and MIR of 2×10^{-3}, would be added to each alternative. Or, this increase could be prevented by promulgating a rule for this category that requires immediate closure.)

Comments: Alternative 1: Baseline, no rule—allows use of existing piles until full (15 years). Existing NESHAP would be vacated for operations of licensed mills. Existing NESHAP for operations at new licensed mills is not vacated.

Based on radon risk factor of 360 fatal cancers per million person-WLM, ranging from 160 to 720 fatal cancers per million person-WLM, the Alternative 1 risk may range from 1.5×10^{-3} to 6.6×10^{-3}.

Alternative 2: Current NESHAP—allows use of existing piles for a maximum of 6 years. Costs include early disposal and capacity replacement.

Alternative 3: Same as current NESHAP—except allows use of existing piles for 2 years. After NESHAP is implemented the annual incidence rate is 0.07 due to radon from all existing piles after they are covered. Costs include early disposal and capacity replacement. Total annualized cost is not the sum of incremental annualized cost because alternative 2 and 3 represent changes in time of performing procedures instead of changes in the stringency of controls.

Alternative 4: Table does not contain alternative to bring the MIR to 1×10^{-6} because there are no further alternatives beyond Alternative 3 other than immediate stop use of the tailings piles.

TABLE 26.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR OPERATING URANIUM MILL TAILINGS—NEW TECHNOLOGIES

Alternative	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
1	3.3×10^{-3}	0.78					
2	1.8×10^{-4}	0.11	0.67	0.69	$30M	$2.4M	$2.4M
3	6.0×10^{-5}	0.053	0.06	0.73	7M	0.56M	3.0M
4	2.0×10^{-5}	0.018	0.04	0.77	<$8M>	<$0.64M>	<$2.3M>

Regulatory Status: Currently there is a NESHAP in place requiring work practices to limit radon emissions.

(If a disposal rule is not promulgated then a uniform but unknown amount of risk, up to a maximum risk of 1.6 deaths/y and MIR of 2×10^{-2}, would be added to each alternative. Or, this increase could be prevented by promulgating a rule for this category that requires immediate closure.)

Comments:

Alternative 1: Baseline, no rule—current technology is used. Assumes 12 existing mills.

Based on radon risk factor of 360 fatal cancers per million person-WLM, ranging from 160 to 720 fatal cancers per million person-WLM, the Alternative 1 risk may range from 1.5×10^{-3} to 6.6×10^{-3}.

Alternative 2: Single large lined impoundment. Assumes 8 mills.

Alternative 3: Current NESHAP—several small lined impoundments with 40 acre limit (phased disposal). Assumes 8 mills.

Alternative 4: Current NESHAP—tailings are dried and disposed of immediately. Total capital cost is less than other two alternatives. Assumes 8 mills.

Alternative 5: To bring MIR to 1×10^{-6}, uranium tailings piles should not operate.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier, the radon emissions from uranium mill tailings impoundments cause more than one fatal cancer per year. Therefore, under this approach, current emissions must be reduced to provide an acceptable level of risk. However if current NESHAP work practices are continued for new impoundments, radon emissions will cause less than one fatal cancer per year and therefore present acceptable risks. For new technologies, Alternative 1 represents an acceptable level of risk for a relatively small industry (i.e., 12 mills), provided the industry remains at the current level.

Decision on Ample Margin of Safety. Mills cannot create new impoundments to replace the existing impoundments in less than two years, even if they ceased operations in the interim. EPA has determined that no alternatives more restrictive than alternative 3 need to be analyzed. Therefore EPA will allow existing impoundments that do not use new technology to operate for no more than two years. There is no reason to require closing an existing impoundment which meets the requirements for new impoundments so that a new impoundment which is similar would need to be constructed.

For new impoundments, EPA has analyzed the costs of further controls to reduce radon emissions, and the decreases in risk and very small incidence reductions they represent, see Table 26. EPA has determined that no further reductions to alternative 3 or 4 are called for to provide an ample margin of safety. EPA believes that a NESHAP requiring the work practices of either phased disposal in 40 acre impoundments or continuous disposal will protect public health with an ample margin of safety.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. A work practice standard of either phased or continuous disposal results in a lifetime risk of less than 1×10^{-4} to the most exposed individual. There is no reason to require closing an existing impoundment which meets the requirements for new impoundments so that a new impoundment which is similar would need to be constructed. The risks that result from allowing the continued use of existing disposal methods that do not meet these work practices bring the risks above the level of 1×10^{-4}. Therefore, under this approach, a work practice standard of phased or continuous disposal starting on the effective date of the rule provides an acceptable level of emissions.

Decision on Ample Margin of Safety. Due to the costs and difficulty of further reducing emissions, see Table 26, and the low risks resulting from the use of the new work practice standards, alternatives 3 and 4, EPA believes that no further measures are needed. Existing impoundments that meet the work practice standard will be allowed to continue to operate. Therefore, EPA is proposing a work practice NESHAP requiring either phased or continuous disposal of tailings starting on the effective date of the rule would protect public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. A radon emission limit of 0.02 pCi/m^2-s results in a lifetime risk of 1×10^{-6} to the most exposed individual. Therefore, under this approach, an acceptable level of emissions is 0.02 pCi/m^2-s.

Decision on Ample Margin of Safety. A NESHAP limiting any increase of ambient radon levels to 0.02 pCi/m^2-s would protect public health with an ample margin of safety. EPA believes there is no method to manage mill tailings which will result in this low an ambient radon level. Therefore, under this approach, EPA is proposing to prohibit the production of new tailings.

4. Implementation

This NESHAP is a work practice standard designed to reduce radon emissions by forcing mill operators to manage their tailings in a way that will reduce radon emissions. Under Approach A or B, mill operators would not be allowed to put any tailings on a mill tailings impoundment which does not meet the new work practices, phased or continuous disposal, two years after the effective date of this NESHAP. EPA is making a generic finding that at least two years is required for the construction of new impoundments using the new control technology and that during that two year period all persons will be protected from imminent endangerment from uranium mill tailings piles.

Under Approach C, mill operators would have to go to the new work practices after the effective date of the rule. Under Approach D, no new mill tailings may be produced starting after the effective date of the rule. EPA is forced to go to this extreme solution because it knows of no way to manage new tailings that will result in risks of less than 1×10^{-6}.

Since EPA already has the information it needs, uranium mill tailings are exempted from the requirements of 61.10.

L. Radon Releases From the Disposal of Uranium Mill Tailings Piles

1. Introduction

After uranium mill tailings impoundments can no longer be used, they must be disposed of. In addition to

the fourteen licensed piles that commercial licensees are decommissioning, DOE controls 24 abandoned uranium mill tailings piles. The 1978 Uranium Mill Tailings Radiation Control Act (UMTRCA) gave DOE responsibility for remedial actions at these sites. This Act also requires EPA to set environmental standards which control the releases from all disposed uranium mill tailings impoundments.

In the past, EPA decided not to regulate under the CAA the disposal of uranium mill tailing impoundments regulated under UMTRCA. That decision has been challenged in court, so EPA is reexamining this category. The UMTRCA regulation limits postclosure radon releases to 20 pCi/m^2−s from the tailings piles.

2. Estimates of Exposure and Risk

EPA's risk assessment of uranium mill tailings is a site-by-site assessment of all 24 inactive piles and 14 licensed piles that are being decommissioned. An additional uncertainty to this risk assessment occurs because DOE currently has plans to relocate eleven of the inactive mill tailings piles to unpopulated areas; in addition, DOE plans to stabilize the remaining 13 piles pursuant to regulations in 40 CFR Part 192, Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings. EPA has information in the rulemaking record concerning DOE's plans which will be considered for use in the development of the final rule.

Emissions were estimated from the estimated area of the tailings pile combined with the assumed radon flux of 20 pCi/m^2−s for reclaimed piles and 1 pCi/m^2−s per pCi/g of radium for unreclaimed piles. The meteorological data was taken from nearby stations, and populations from 5 to 80 km are based on U.S. census tract data. Populations within 5 km were measured at the sites.

According to EPA's analysis, lifetime fatal cancer risk to the most exposed individual is 2.1×10^{-3}. The tailings piles cause 2.5 fatal cancers per year to the 9.7 million persons within 80 km.

Table 27 presents example scenarios to show how different emission levels would result in different health risk profiles. The table presents the risk estimates at baseline in terms of estimated annual fatal cancer incidence, maximum individual lifetime risk, total population exposed at or above particular risk levels (i.e., risk distribution), and annual incidence attributable to the population exposed at each risk level. The table also presents available estimates of annual incidence and maximum individual lifetime risk for a lower emission level identified as alternatives 2, 3 and 4.

3. Application of Alternative Policy Approaches

The decisions that would result from the application of the four policy approaches described in Section VI to the radon emissions from the uranium mill tailings source category are described below.

Approach A: Case-by-Case Approach. Decision on Acceptable Risk. As stated earlier, the maximum risk to any individual is 2.1×10^{-3} which is much higher than the level generally preferred under the case-by-case approach. The estimated annual incidence within 80 km is 2.5 fatal cancers per year. Most of that risk is borne by people whose risk is less than 1×10^{-4}. EPA examined several alternatives before determining the acceptable level; those alternatives and the risks they present are illustrated in Table 27. After examining these different alternatives, the Agency would propose that the risks associated with alternative 3 is acceptable under the case-by-case approach.

Decision on Ample Margin of Safety. Based on the costs of further controls to reduce radon emissions, and the small decreases in risk, see Table 28, EPA has determined that it is not necessary to further reduce risks below the safe level, alternative 3. EPA is proposing a NESHAP limiting radon emissions from the disposal of uranium mill tailings to 6 pCi/m^2−s, which will protect public health with an ample margin of safety.

Approach B: Incidence Based Approach. Decision on Acceptable Risk. As explained earlier, the radon emissions from the disposal of uranium mill tailings cause 2.5 fatal cancers per year. Therefore, under this approach, current emissions provide a level of risk which is not acceptable. In order to reach an acceptable risk, current emissions must be reduced by a factor of 2.5.

TABLE 27.—ALTERNATIVES FOR ACCEPTABLE RISK FOR DISPOSAL OF URANIUM MILL TAILINGS

(Inactive and licensed)

	Alternative 1 (baseline)	Alt. 2	Alt. 3	Alt. 4
Maximum individual risk (lifetime)	2.1×10^{-3}	1.0×10^{-3}	3.0×10^{-4}	1.0×10^{-4}
Incidence within 80 km (death/y)	2.7	0.12	0.040	0.013
Risk individual:				
E-2 to E-1	350	0	0	0
E-3 to E-2	12,000	(1)	0	0
E-4 to E-3	300,000	1,000	300	100
E-5 to E-4	3.4M	100,000	20,000	10,000
E-6 to E-5	2.5M	1.6M	300,000	200,000
Less E-6	3.6M	6.0M	9.4M	9.5M
Risk incidence:				
E-2 to E-1	0.08	0	0	0
E-3 to E-2	0.3	(1)	0	0
E-4 to E-3	1.2	0.004	0.0005	0.0002
E-5 to E-4	0.9	0.04	0.005	0.002
E-6 to E-5	0.2	0.045	0.014	0.005
Less E-6	0.004	0.03	0.02	0.007

[1] We believe there could be a few people at this risk, but DOE may move the piles in question.

Note.—*Other Health Impacts:* Non-fatal cancers no more than 5% of deaths.

Decision on Ample Margin of Safety. Based on an analysis of the costs of various control alternatives and decreases in risk and incidence they represent, see Table 28, EPA has determined that it is necessary to reduce risks to the level of alternative 3, but that further reductions are unnecessary. EPA is proposing a NESHAP limiting

radon emissions from disposal of uranium mill tailings to 6 pCi/m²s, which will protect public health with an ample margin of safety.

TABLE 28.—ALTERNATIVES FOR AMPLE MARGIN OF SAFETY FOR DISPOSAL OF URANIUM MILL TAILINGS

	MIR	Incidence	Incremental incidence reduction	Total incidence reduction	Incremental capital cost	Incremental annualized cost	Total annualized cost
Alternative:							
1	2.1×10^{-3}	2.7					
2	1.0×10^{-3}	0.12	2.6	2.6	$210M	$22M	$22M
3	3.0×10^{-4}	0.040	0.08	2.7	63M	7M	29M
4	1.0×10^{-4}	0.013	0.03	2.7	53M	6M	34M

Regulatory Status: Current AEA rule limits radon emission after disposal to 20 pCi/m²s. Previously, we deferred to this rule and did not propose a CAA rule.
Comments:
Alternative 1: Baseline, no rule—AEA rule remains in force, but no deadline for disposal. MIR reflects piles that are currently uncovered.
Based on radon risk factor of 360 fatal cancers per million person-WLM, ranging from 160 to 720 fatal cancers per million person-WLM, the Alternative 1 risk may range from 9.3×10^{-3} to 4.2×10^{-2}.
Alternative 2: Cover source to limit emissions to 20 pCi/m²s—the same level as the current AEA rule set by EPA.
Alternative 3: Cover source to limit emissions to 6 pCi/m²s.
Alternative 4: Cover source to limit emissions to 2 pCi/m²s. Emission rate is close to background emission rate of the cover. Implementation becomes difficult.
Alternative 5: Table does not contain alternative to bring MIR to 1×10^{-6} because it is not possible to accurately predict the impacts. Compared to Alternative 3, an additional 8 meters of dirt cover would probably be needed to provide the necessary reduction by a factor of 300. The additional annualized cost would be approximately $70 million.

Approach C: 1×10^{-4} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. Since the dose/risk relationship for radon is well established it is easy to determine the correct standard under this approach. A radon emission limit of 2 pCi/m²–s results in a lifetime risk of 1×10^{-4} to the most exposed individual. Therefore, under this approach, an acceptable level of emissions is 2 pCi/m²–s.

Decision on Ample Margin of Safety. Due to the costs and difficulty of further reducing emissions, EPA believes that no further reductions below a risk level of 1×10^{-4} are needed. Therefore, EPA is proposing a NESHAP limiting any emissions of radon to 2 pCi/m²–s, which will protect public health with an ample margin of safety.

Approach D: 1×10^{-6} or Less Maximum Individual Risk Approach. Decision on Acceptable Risk. A radon emission limit of 0.02 pCi/m²–s results in a lifetime risk of 1×10^{-6} to the most exposed individual. Therefore, under this approach, an acceptable level of emissions is 0.02 pCi/m²–s.

Decision on Ample Margin of Safety. Due to the costs and difficulty of further reducing emissions, EPA believes that no further reductions below a risk level of 1×10^{-6} are needed. Therefore, EPA is proposing a NESHAP limiting any release of radon to 0.02 pCi/m²–s, which would protect public health with an ample margin of safety.

4. Implementation

Under this NESHAP, all uranium mill tailings will have to be covered to reduce the amount of radon they release. Under approaches A, B, C, and D, the standard limits the emission of radon from the mill tailings impoundments. The standard limits the amount of radon that can be emitted per unit area (m²) per unit of time (s). This standard is an average per mill tailings pile.

Sixty days after the effective date of this rule or sixty days after the pile ceases to be operational, the owner will test the pile to determine whether or not the pile is in compliance with the flux standard. If owner knows that the pile cannot meet the standard, the owner can admit noncompliance instead of testing the pile.

Piles must be retested every two years unless EPA requires more frequent testing or EPA determines that less frequent testing is sufficient to assure compliance with the standard. EPA will also reduce the need for testing if EPA determines that testing will interfere with ongoing operations designed to cover the pile.

Since the reports of the testing provide EPA with the information it needs, uranium mill tailings are exempted from the requirements of 61.10.

This standard like all NESHAPS requires compliance by existing sources within 90 days after the effective date in accordance with the CAA, 42 U.S.C. 7412(c)(1)(B)(i). EPA, however, is aware that many sources covered by this subpart will not be able to come into compliance that quickly. EPA is prepared to develop expeditious compliance schedules in consultation with affected parties within the framework of the waiver provision of 42 U.S.C. 7412(c)(1)(B)(ii) following the procedures described in 40 CFR 61.10 and 61.11 or through the enforcement mechanisms of 42 U.S.C. 7413, as appropriate. EPA recognizes that the requirements of CERCLA and other environmental laws will have to be considered in these consultations.

VIII. Legal Issues Raised by Parties in the Radionuclides Litigation

The following is a discussion of the legal issues which have been raised in the current litigation. We have omitted reference to issues where they are resolved in the detailed discussion of the source categories earlier in the Preamble.

1. Can EPA Not Issue Standards Under Section 112 in Situations Where People Will Be Killed by a Source of Pollution? Can EPA Disregard Projected Deaths as Insignificant?

Response: EPA is presenting four different approaches for defining acceptable risk. Under all of these approaches, it is possible that a situation may present an acceptable risk even though some fatal cancers are estimated to be caused by the pollution. Any emissions of a pollutant assumed to be nonthreshold is assumed to entail some risk, however small, of fatal cancer. Section 112 does not require EPA to define a safe level as that level that entails no risk of fatal cancer. The DC Circuit Court, in the *vinyl chloride* decision, clearly stated that safe does not mean risk free. EPA agrees with the Court that section 112 requires a finding of acceptable risks, acceptable for the world in which we live. This means that some risk of fatal cancer may be acceptable.

2. Must NESHAPS Provide "Equal Protection" for All Individuals, Including Those in Small Population Groups?

Response: EPA believes that everyone is entitled to be protected by a standard that, overall, protects health with an ample margin of safety. Such a standard need not assure that every individual faces the same precise MIR. As with any regulation of a point source of pollution, the sources considered for regulation in this Preamble give higher risks to the people who are closer to the facility than to people who are farther away. It is impossible to protect all people equally unless the emission limit and, therefore, the risk is zero. Under the CAA, EPA is only required to protect public health (which includes the health of individuals) with an ample margin of safety; equal protection of all individuals is not required.

3. Can EPA Set a Standard That EPA Does Not Find Protects Public Health With an Ample Margin of Safety?

Response: EPA recognizes its duty to set NESHAPS that protect public health with an ample margin of safety. EPA will not establish a NESHAP that it does not find protects public health with an ample margin of safety.

4. Can EPA Set a Dose Standard?

Response: Section 112 requires that EPA set standards which protect public health with an ample margin of safety. The section allows EPA to set emission standards or work practice standards. Dose standards are, in effect, emission standards, since the standards require the source to have emissions that are low enough to meet the dose standard. There is a direct correlation between dose and risk. Sources would use the computer compliance models to track the doses caused by their emissions.

For categories involving very large numbers of different radionuclides, EPA has chosen not to set specific radionuclide emission standards because they would be completely impractical. All radionuclides are different—they have different half-lives, emit different levels of different kinds of energy and affect different parts of the body. Health physicists for years have used the concept of radiological dose to account for these many effects.

If EPA were not allowed to take advantage of this extensive body of knowledge, EPA would be forced to set separate emission standards for hundreds of distinct radionuclides. Since different sources use different radionuclides in different combinations, and many individual radionuclides are present in small amounts in only a few places; judged individually, it would generally be difficult to justify standards that would require any decrease in emissions. Yet the combination of the individual radionuclide with the scores of others that may be released from a facility can cause a significant risk that should be regulated.

5. Is the Use of 1970 Census Data Instead of 1980 Census Data Acceptable?

Response: 1980 census data has been used in the present rulemaking.

6. Can EPA Allow Non-Regulation and Rely on Industry Practices?

Response: EPA is obligated in this litigation to reexamine each source category and assure that public health is protected with an ample margin of safety. EPA may find that standards are unnecessary so long as public health is protected with an ample margin of safety. For example, if the risks caused by a source category's current emissions are low enough to protect public health with an ample margin of safety, then the decision whether or not to set a baseline standard will be based on whether EPA has any reason to believe that there is a need to insure that future emissions will not increase.

7. Does EPA's Use of a Non-Threshold Hypothesis Require a Finding of Significant Risk?

Response: EPA thoroughly considered the results of risk assessments before making a finding of significant risk regarding radionuclides. This assessment was based, in part, on the scientific consensus of the non-threshold carcinogenicity of radionuclides. EPA does not believe a finding of carcinogenicity need automatically result in a finding of significant risk. However, for radionuclides, the risk assessment supports EPA's finding of significant risk. See, Section 112 discussion earlier in preamble and discussion of individual source categories.

8. Must Radon Emissions From Underground Uranium Mines Contribute a Significant Increment to the Total Human Exposure Burden in Order for Those Emissions To Be Regulated Under the Clean Air Act?

Response: A level of emissions is not considered to be acceptable merely because it is below background. The relevant question under section 112 is whether, in the judgment of the Administrator, radionuclides cause, or contribute to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness. The Agency believes, based on substantial scientific evidence, that radionuclide emissions from underground uranium mines meet that test. See, preamble discussion of underground uranium mines.

9. Are the Risks From Underground Uranium Mines Radon Emissions Real or Hypothetical? Does It Matter?

Response: EPA utilizes scientifically accurate procedures in evaluating the risks posed by each source category. While EPA is ultimately forced to estimate these risks, the Agency has confidence in its methodology and considers the results to be a proper foundation for decisionmaking.

10. Can Calculations Based on a Hypothetical "Maximally Exposed Individual" Be Used To Support a Finding of Significant Risk?

Response: As a matter of expert judgment, EPA used a reasonable mix of data sources, using measured and estimated data inputs.

IX. Request for Comments

Throughout this notice, comments and information are requested on specific areas. In addition, partly in response to *Vinyl Chloride*, EPA is reexamining assumptions and decision methods it has relied upon in making section 112 hazardous air pollutant regulatory determinations. As part of that process, EPA is seeking to engage the public and all interested parties in discussion concerning both specific elements of alternative proposals for radionuclide standards and a broader reexamination of assumptions and decision methods.

In an effort to structure that discussion, EPA has formulated the four alternative approaches noted earlier for the control of hazardous air pollutant emissions under section 112 of the CAA. Today's **Federal Register** notice proposes these four approaches for the control of air emissions of radon and other radionuclides and thereby provides the opportunity for EPA to solicit comments from the public on a variety of issues associated with this reexamination of the Federal program for hazardous air pollutants. Determinations on many of these specific issues within the proposed radionuclides and benzene regulations for proposal benzene regulations, see 53 FR 28496–28592, July 28, 1988) may be expected to set precedents for the approach to be used for the substantial number of forthcoming NESHAP decisions. Major areas on which the

Administrator requests public comment include, among others:

(1) Should EPA consider all risk information in decision on risk acceptability or rely on a single numerical risk criterion? If multiple risk measures are to be used as the basis for decisions on risk acceptability, how should EPA balance individual versus population risk reductions?

(2) What health risk is acceptable not considering the cost and technical feasibility of achieving it? Moreover, what constitutes an ample margin of safety in cases where all exposures pose some risk?

(3) Should EPA require standards pursuant to the ample margin of safety decisions under section 112 that are "technology forcing"? What criteria should EPA use to define the "availability" and "feasibility" of technological controls?

(4) In the ample margin of safety determination, how should EPA balance the residual health risks versus the possibility of plant closures?

(5) How should uncertainty in risk estimates be considered in these decisions?

(6) How should EPA balance the various risk, technical, and economic considerations in ample margin of safety decisions? How should EPA consider the ramifications of potential errors and uncertainty of judgments on technology capability and costs?

(7) Should EPA set a risk limit rather than a dose limit or an emission limit?

(8) Should EPA establish a system for certifying that phosphogypsum piles and/or surface uranium mines are not going to be used anymore and, therefore, are ready for disposal? If so, what should that system be?

(9) Should EPA keep the current underground uranium mine NESHAP to control radon emissions for new mines?

(10) Is the proposed regulatory approach for underground uranium mines appropriate? Should EPA consider other combinations of stack height and radon emission limits?

(11) Is EPA's decision to list radionuclides under section 112 of the CAA appropriate?

(12) Should EPA determine compliance with a dose standard on the basis of the point of maximum concentration where there is a residence, school, business or office or should some other point or criteria be used?

(13) If EPA uses schools, businesses or offices as potential compliance points should EPA's implementation system adjust the exposure received at those points with occupancy factors? If so, what should they be?

(14) Considering that accidental releases are included in the emissions subject to the standard, should EPA include some additional provision in its compliance procedures dealing with accidents?

X. Miscellaneous

A. Docket

The docket is an organized and complete file of all information considered by EPA in the development of the standards. The docket allows interested persons to identify and locate documents so they can effectively participate in the rulemaking process. It also serves as the record for judicial review.

Transcripts of the hearings, all written statements, the Agency's response to comments, and other relevant documents have been placed in the docket and are available for inspection and copying during normal working hours.

B. General Provisions

Except where otherwise specifically stated, the general provisions of 40 CFR Part 61, Subpart A apply to all sources regulated by this rule.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C 3501 *et seq.* An Information Collection Request document has been prepared by EPA (ICR NO. 1100), and a copy may be obtained from Carla Levesque, Information Policy Branch; EPA; 401 M St., SW. (PM-223); Washington, DC 20460 or by calling (202) 382-2468.

Public reporting burden for this collection of information is estimated to vary from 16 to 40 hours per response, with an average of 22 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 or any other aspect of this collection of information, including suggestions for reducing this burden may be sent to the above address, but should be sent to the Office of Information and Regulatory Affairs, Paperwork Reduction Project (2060-0115), Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." In developing the final rule EPA will respond to any OMB or public comments on the information collection requirements contained in this proposal.

D. Executive Order 12291

Under Executive Order 12291, EPA is required to judge whether this regulation is a "major rule" and therefore subject to certain requirements of the Order. The EPA has determined that regulations proposed for Approaches A, B and C for all categories and for D for all non-radon radionuclide categories will result in none of the adverse economic effects set forth in section I of the Order as grounds for finding a regulation to be a "major rule." These regulations are not major because: (1) Nationwide annual compliance costs do not meet the $100 million threshold; (2) the regulations do not significantly increase prices or production costs; and (3) the regulations do not cause significant adverse effects on domestic competition, employment, investment, productivity, innovation, or competition in foreign markets.

The regulations proposed under Approach D for radon categories, especially for the disposal of mill tailings for radon, may cause industries to incur costs exceeding $100 million and therefore may be determined to be a major rule under Executive Order 12291. The regulations could cause significant adverse effects on domestic competition, employment, investment, productivity, innovation, or competition in foreign markets. However, as provided by section 8 of the Order, the Agency has not conducted a Regulatory Impact Analysis (RIA) of these proposed regulations because of the time constraint of the judicially-ordered schedule.

All of the proposed regulations presented in this notice were submitted to OMB for review as required by Executive Order 12291. Any written comments from OMB to EPA and any written EPA response to those comments will be included in the docket.

E. Regulatory Flexibility Analysis

Section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603, requires EPA to prepare and make available for comment an "initial regulatory flexibility analysis" in connection with any rulemaking for which there is a statutory requirement that a general notice of proposed rulemaking be published. The "initial regulatory flexibility analysis" describes the effect of the proposed rule on small business entities.

However, section 604(b) of the Regulatory Flexibility Act provides that

section 603 "shall not apply to any proposed * * * rule if the head of the Agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

EPA believes that virtually all small businesses covered by this final rule already comply. In addition, EPA has placed reporting exemptions in the rule for NRC-licensees to limit the amount of paperwork that would be required by the smaller operators. Therefore, this rule will have little or no impact on small businesses. A small business is one that has 750 employees or fewer.

For the preceding reasons, I certify that this rule will not have significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 61

Air pollution control, Hazardous materials, Asbestos, Beryllium, Mercury, Vinyl chloride, Benzene, Arsenic, and Radionuclides.

Dated: February 28, 1989.

William K. Reilly,

Administrator.

PART 61—[AMENDED]

It is proposed to amend Part 61 of chapter I of title 40 of the Code of Federal Regulations as follows:

1. The authority citation for Part 61 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. By revising Subpart H to read as follows:

Subpart H—National Emission Standards for Emissions of Radionuclides Other Than Radon From Department of Energy Facilities

Sec.
61.90 Designation of facilities.
61.91 Definitions.
61.92 Standard.
61.93 Emission monitoring and test procedures.
61.94 Compliance and reporting.
61.95 Recordkeeping requirements.
61.96 Applications to construct or modify.
61.97 Exemption from the reporting and testing requirements of 40 CFR 61.10.

Subpart H—National Emission Standards for Emissions of Radionuclides Other Than Radar From Department of Energy Facilities

§ 61.90 Designation of facilities.

The provisions of this subpart apply to operations at any facility owned or operated by the Department of Energy that emits any radionuclide other than radon-222 into the air, except that this subpart does not apply to disposal at facilities subject to 40 CFR Part 191 subpart B or 40 CFR Part 192.

§ 61.91 Definitions.

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act or subpart A of Part 61. The following terms shall have the following specific meanings:

(a) "Effective dose equivalent" means the sum of the products of absorbed dose and appropriate factors to account for differences in biological effectiveness due to the quality of radiation and its distribution in the body. The unit of the effective dose equivalent is the rem. For purposes of this subpart, doses caused by radon-220, radon-222 and their respective decay products are not included. The method for calculating effective dose equivalent is outlined in the International Commission on Radiological Protection's Publication No. 26.

(b) "Facility" means all buildings, structures and operations on one contiguous site.

(c) "Radionuclide" means a type of atom which spontaneously undergoes radioactive decay.

(d) "Residence" means any home, house, apartment building, or other place of dwelling which is occupied during any portion of the relevant year.

§ 61.92 Standard.

Approach A and Approach B

Emissions of radionuclides to the air from Department of Energy facilities shall not exceed those amounts that would cause any member of the public to receive an effective dose equivalent of 10 mrem/yr.

Approach C

Emissions of radionuclides to the air from Department of Energy facilities shall not exceed those amounts that would cause any member of the public to receive an effective dose equivalent of 3 mrem/yr.

Approach D

Emissions of radionuclides to the air from Department of Energy facilities shall not exceed those amounts that would cause any member of the public to receive an effective dose equivalent of 0.03 mrem/yr.

§ 61.93 Emission monitoring and test procedures.

(a) To determine compliance with the standard, radionuclide emissions shall be determined and effective dose equivalent values to members of the public calculated using EPA approved sampling procedures, computer models AIRDOS–EPA and RADRISK (CAP–88 version), or other procedures which EPA has determined to be suitable.

(b) Radionuclide emission rates from point sources (stacks or vents) shall be measured in accordance with the following requirements:

(1) Effluent flow rate measurements shall be made using the following methods:

(i) Reference Method 2 of Appendix A to Part 60 shall be used to determine velocity and volumetric flow rates for stacks and large vents.

(ii) Reference Method 2A of Appendix A to Part 60 shall be used to measure flow rates through pipes and small vents.

(2) Radionuclides shall be extracted, collected and measured using the following methods:

(i) Reference Method 1 of Appendix A Part 60 shall be used to select sampling sites.

(ii) Representative samples of an effluent stream shall be withdrawn continuously for the sampling site following the guidance presented in ANSI–N13.1 "Guide to Sampling Airborne Materials in Nuclear Facilities" (including the guidance presented in Appendix A of ANSI–N13.1), as specified in paragraph 61.18. Samples shall be collected continuously whenever there is potential for radionuclides to be emitted. The requirements for continuous sampling are applicable to batch processes when the unit is in operation. Periodic sampling (grab samples) may be used only with EPA's prior approval. Such approval may be granted in cases where continuous sampling is not practical and radionuclide emission rates are relatively constant.

(iii) Radionuclides shall be collected and measured using procedures based on the principles of measurement described in Appendix B, Method 114. Use of methods based on principles of measurement different from those described in Appendix B, Method 114 must have prior approval from the Administrator. EPA reserves the right to approve of measurement procedures.

(iv) A quality assurance program shall be conducted that meets the performance requirements described in Appendix B, Method 114.

(3) When it is impractical to sample an effluent stream at an existing source in accordance with the site selection and sample extraction requirements of paragraphs § 61.93(b), the facility operator may use alternative site selection and sample extraction procedures provided that:

(i) It can be shown that the requirements of paragraph § 61.93(b) are impractical for the effluent stream.

(ii) The alternative procedure will not significantly underestimate the emissions.

(iii) The alternative procedure is fully documented.

(iv) The operator has received prior approval from EPA.

§ 61.94 Compliance and reporting.

(a) Compliance with this standard shall be determined by calculating the effective dose equivalent to any member of the public at the offsite point of maximum annual air concentration, where there is a residence, school, business or office. The operators of each facility shall submit an annual report to EPA by June 30 which includes the results of the monitoring and the dose calculations required by § 61.93 for the previous calendar year.

(b) In addition to the requirements of paragraph (a) of the section, an annual report shall include the following information:

(1) The name of the facility.

(2) A list of the radioactive materials used at the facility.

(3) A description of the handling and processing that the radioactive materials undergo at the facility.

(4) A list of the stacks or vents or other points where radioactive materials are released to the atmosphere.

(5) A description of the effluent controls that are used on each stack, vent, or other release point and an estimate of the efficiency of each control device.

(6) Distances from the points of release to the nearest residence, school, business or office and the nearest farms producing vegetables, milk, and meat.

(7) The values used for all other user-supplied input parameters for the computer models (e.g., meteorological data) and the source of these data.

(8) All information required in an application to construct or modify a facility under 61 subpart A, for all construction and modifications which are completed in the calendar year for which the report is prepared, but for which the requirement to apply for approval to construct or modify was waived under § 61.96.

(9) Each report shall be signed and dated by the principal executive officer or public official in charge of the facility and contain the following declaration immediately above the signature line: "I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment. See, 18 U.S.C. 1001."

(c) If the facility is not in compliance with the emission limits of § 61.92 in the calendar year covered by the report then the facility must report to the Administrator on a monthly basis the information listed in paragraph (b) of this section, for the preceding month. These reports will be due 30 days following the end of each month. This increased level of reporting will continue until the Administrator has determined that the monthly reports are no longer necessary. In addition to all the information required in paragraph (b) of this section, monthly reports shall also include the following information:

(1) All controls or other changes in operation of the facility that will be or are being installed to bring the facility into compliance.

(2) If the facility is under a judicial or administrative enforcement decree the report will describe the facilities performance under the terms of the decree.

§ 61.95 Recordkeeping requirements.

All facilities must maintain records documenting the source of input parameters including the results of all measurements upon which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used to determine dose. In addition, the documentation should be sufficient to allow an independent auditor to verify the correctness of the determination made concerning the facility's compliance with the standard. These records must be kept at the site of the facility for at least five years and upon request be made available for inspection by the Administrator, or his authorized representative.

§ 61.96 Applications to construct or modify.

(a) In addition to any activity that is defined as construction under 61 subpart A, any fabrication, erection or installation of a new building or structure within a facility is also defined as new construction for purposes of 40 CFR Part 61, subpart A.

(b) An application for approval under § 61.07 does not need to be filed for any new construction of or modification within an existing facility if the effective dose equivalent, caused by all emissions from the new construction or modification, is less than 1% of the limit prescribed in § 61.92. The effective dose equivalent shall be calculated using the source term derived using Appendix D as input to the dispersion and other computer models described in § 61.93. In addition, based on its last annual report the facility is in compliance with this subpart.

§ 61.97 Exemption from the reporting and testing requirements of 40 CFR 61.10

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

3. By revising Subpart I to read as follows:

Subpart I—National Emission Standards for Radionuclide Emissions From Facilities Licensed by the Nuclear Regulatory Commission and Federal Facilities Not Covered by Subpart H

Sec.
61.100 Applicability.
61.101 Definitions.
61.102 Standard.
61.103 Determining Compliance.
61.104 Reporting requirements.
61.105 Recordkeeping requirements.
61.106 Applications to construct or modify
61.107 Emission Determination.
61.108 Exemption from the reporting and testing requirements of 40 CFR 61.10

Subpart I—National Emission Standards for Radionuclide Emissions From Facilities Licensed by the Nuclear Regulatory Commission and Federal Facilities Not Covered by Subpart H

§ 61.100 Applicability.

The provisions of this subpart apply to NRC-licensed facilities and to facilities owned or operated by any Federal agency other than the Department of Energy, except that this subpart does not apply to disposal at facilities under 40 CFR Part 191 subpart B, or to low energy accelerators or to any NRC-licensee that possesses and uses radionuclides only in the form of sealed sources.

§ 61.101 Definitions.

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act or subpart A of Part 61. The following terms shall have the following specific meanings:

(a) "Agreement State" means a State with which the Atomic Energy Commission or the Nuclear Regulatory Commission has entered into an effective agreement under subsection 274(b) of the Atomic Energy Act of 1954, as amended.

(b) "Effective dose equivalent" means the sum of the products of absorbed dose and appropriate factors to account

for differences in biological effectiveness due to the quality of radiation and its distribution in the body. The unit of the effective dose equivalent is the rem. For purposes of this subpart doses caused by radon-220, radon-222 and their decay products formed after their release from the facility are not included. The method for calculating effective dose equivalent is outlined in the International Commission on Radiological Protection's Publication No. 26.

(c) "Facility" means all buildings, structures and operations on one contiguous site.

(d) "Federal facility" means any facility owned or operated by any department, commission, agency, office, bureau or other unit of the government of the United States of America except for facilities owned or operated by the Department of Energy.

(e) "NRC-licensed facility" means any facility licensed by the Nuclear Regulatory Commission or any Agreement State to receive title to, receive, possess, use, transfer, or deliver any source, by-product, or special nuclear material.

(f) "Radionuclide" means a type of atom which spontaneously undergoes radioactive decay.

§ 61.102 Standard.

Approach A and Approach B

Emissions of radionuclides to the air from a NRC-licensed or federal facility shall not exceed those amounts that would cause any member of the public to receive an effective dose equivalent of 10 mrem/yr.

Approach C

Emissions of radionuclides to the air from a NRC-licensed or federal facility shall not exceed those amounts that would cause any member of the public to receive an effective dose equivalent of 3 mrem/yr.

Approach D

Emissions of radionuclides to the air from a NRC-licensed or federal facility shall not exceed those amounts that would cause any member of the public to receive an effective dose equivalent of 0.03 mrem/yr.

§ 61.103 Determining compliance.

The only criteria by which compliance with the emission standard in this subpart shall be determined is the doses calculated by either the EPA computer code COMPLY or the alternative requirements of Appendix E. The source terms to be used for input into COMPLY shall be determined through the use of the measurement procedures listed in § 61.107 or the emission factors in Appendix D.

§ 61.104 Reporting requirements.

(a) The owner or operator of a facility must submit an annual report to the EPA by March 30 of the following year.

(1) The report or application must provide the following information:

(i) The name of the facility.

(ii) The name of the person responsible for the operation of the facility and the name of the person preparing the report (if different).

(iii) The location of the facility, including suite and/or building number, street, city, county, state, and zip code.

(iv) The mailing address of the facility, if different from item (iii).

(v) A list of the radioactive materials used at the facility.

(vi) A description of the handling and processing that the radioactive materials undergo at the facility.

(vii) A list of the stacks or vents or other points where radioactive materials are released to the atmosphere.

(viii) A description of the effluent controls that are used on each stack, vent, or other release point and an estimate of the efficiency of each device.

(ix) Distances from the point of release to the nearest residence, school, business or office and the nearest farms producing vegetables, milk, and meat.

(x) The effective dose equivalent calculated using the compliance procedures in § 61.103.

(xi) The physical form and quantity of each radionuclide emitted from each stack, vent or other release point, and the method(s) by which these quantities were determined.

(xii) The volumetric flow, diameter, effluent temperature, and release height for each stack, vent or other release point where radioactive materials are emitted, the method(s) by which these were determined.

(xiii) The height and width of each building from which radionuclides are emitted.

(xiv) The values used for all other user-supplied input parameters (e.g., meteorological data) and the source of these data.

(xv) All information required in an application to construct or modify a facility under 61 subpart A, for all construction and modifications which were completed in the relevant calendar year but for which the requirement to apply for approval to construct or modify was waived under § 61.106.

(xvi) Each report shall be signed and dated by the principal executive officer or public official in charge of the facility and contain the following declaration immediately above the signature line:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment. See, 18 U.S.C. 1001.

(b) Facilities emitting radionuclides in an amount that would cause less than 10% of the dose listed in § 61.102, as determined by the compliance procedures from § 61.103, are exempt from the reporting requirements of § 61.104. Facilities shall annually make a new determination whether they are exempt from reporting.

(c) If the facility is not in compliance with the emission limits of § 61.102 in the calendar year covered by the report then the facility must report to the Administrator on a monthly basis the information listed in paragraph (a) of this section, for the preceding month. These reports will be due 30 days following the end of each month. This increased level of reporting will continue until the Administrator has determined that the monthly reports are no longer necessary. In addition to all the information required in paragraph (a) of this section, monthly reports shall also include the following information:

(1) All controls or other changes in operation of the facility that will be or are being installed to bring the facility into compliance.

(2) If the facility is under a judicial or administrative enforcement decree the report will describe the facilities performance under the terms of the decree.

§ 61.105 Recordkeeping requirements.

The owner or operator of any facility must maintain records documenting the source of input parameters including the results of all measurements upon which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used to determine compliance. In addition, the documentation should be sufficient to allow an independent auditor to verify the correctness of the determination made concerning the facility's compliance with the standard, and, if claimed, qualification for exemption from reporting. These records must be kept at the site of the facility for at least five years and upon request be made available for inspection by the Administrator, or his authorized representative.

§ 61.106 Applications to construct or modify.

(a) In addition to any activity that is defined as construction under 61 subpart A, any fabrication, erection or installation of a new building or structure within a facility is also defined as new construction for purposes of 40 CFR Part 61, subpart A.

(b) An application for approval under § 61.07 does not need to be filed for any new construction of or modification within an existing facility if one of the following conditions is met:

(1) The effective dose equivalent calculated by using methods described in § 61.103, that is caused by all emissions from the facility including the proposed new construction or modification, is less than 10% of the limit prescribed in § 61.102.

(2) The effective dose equivalent calculated by using methods described in § 61.103, that is caused by all emissions from the new construction or modification, is less than 1% of the limit prescribed in § 61.102.

§ 61.107 Emission determination.

(a) Facility owners or operators may, in lieu of monitoring, estimate radionuclide emissions in accordance with Appendix D.

(b) Radionuclide emission rates from point sources (stacks or vents) shall be measured in accordance with the following requirements:

(1) Effluent flow rate measurements shall be made using the following methods:

(i) Reference Method 2 of Appendix A to Part 60 shall be used to determine velocity and volumetric flow rates for stacks and large vents.

(ii) Reference Method 2A of Appendix A to Part 60 shall be used to measure flow rates through pipes and small vents.

(2) Radionuclides shall be extracted, collected and measured using the following methods:

(i) Reference Method 1 of Appendix A to Part 60 shall be used to select sampling sites.

(ii) Representative samples of an effluent stream shall be withdrawn continuously for the sampling site following the guidance presented in ANSI-N13.1 "Guide to Sampling Airborne Materials in Nuclear Facilities" (including the guidance presented in Appendix A of ANSI-N13.1), as specified in paragraph § 61.18. Samples shall be collected continuously whenever there is potential for radionuclides to be emitted. The requirements for continuous sampling are applicable to batch processes when the unit is in operation. Periodic sampling (grab samples) may be used only with EPA's prior approval. Such approval may be granted in cases where continuous sampling is not practical and radionuclide emission rates are relatively constant.

(iii) Radionuclides shall be collected and measured using procedures based on the principles of measurement described in Appendix B, Method 114. Use of methods based on principles of measurement different from those described in Appendix B, Method 114 must have prior approval from the Administrator. EPA reserves the right to approve of measurement procedures.

(iv) A quality assurance program shall be conducted that meets the performance requirements described in Appendix B, Method 114.

(3) When it is impractical to sample an effluent stream at an existing source in accordance with the site selection and sample extraction requirements of paragraphs § 61.107(b)(2), the facility operator may use alternative site selection and sample extraction procedures provided that:

(i) It can be shown that the requirements of paragraphs § 61.107(b)(2) are impractical for the effluent stream.

(ii) The alternative procedure will not significantly underestimate the emissions.

(iii) The alternative procedure is fully documented.

(iv) The operator has received prior approval from EPA.

§ 61.108 Exemption from the Reporting and Testing Requirements of 40 CFR 61.10

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

4. By revising subpart K to read as follows:

Subpart K—National Emission Standards for Radionuclide Emissions From Elemental Phosphorus Plants

Sec.

61.120 Applicability.
61.121 Definitions.
61.122 Emission standard.
61.123 Emission testing.
61.124 Recordkeeping requirements.
61.125 Test methods and procedures.
61.126 Monitoring of operations.
61.127 Certification of stable operation.
61.128 Exemption from the reporting and testing requirements of 40 CFR 61.10.

Subpart K—National Emission Standards for Radionuclide Emissions From Elemental Phosphorus Plants

§ 61.120 Applicability.

The provisions of this subpart are applicable to owners and operators of calciners and nodulizing kilns at elemental phosphorus plants.

§ 61.121 Definitions.

(a) "Elemental phosphorus plant" or "plant" means any facility that processes phosphate rock to produce elemental phosphorus. A plant includes all buildings, structures, operations, calciners and nodulizing kilns on one contiguous site.

(b) "Calciner" or "Nodulizing kiln" means a unit in which phosphate rock is heated to high temperatures to remove organic material and/or to convert it to a modular form. For the purpose of this subpart, calciners and nodulizing kilns are considered to be similar units.

(c) "Operator" means any person who owns, operates or controls elemental phosphorous plant.

§ 61.122 Emission standard.

Approach A and B

Emissions of polonium-210 to air from all calciners and nodulizing kilns at an elemental phosphorus plant shall not exceed a total of 10 curies a year.

Approach C

Emissions of polonium-210 to air from all calciners and nodulizing kilns at an elemental phosphorus plant shall not exceed a total of 0.6 curies a year.

Approach D

Emissions of polonium-210 to air from all calciners and nodulizing kilns at an elemental phosphorus plant shall not exceed a total of 0.006 curies a year.

§ 61.123 Emission testing.

(a) Each owner or operator of an elemental phosphorus plant shall test emissions from the plant according to the following requirements:

(1) Within 90 days of the effective date of this standard for a plant that has an initial start-up date preceding the effective date of this standard; or

(2) Within 90 days of start-up for a plant, that has an initial startup after the effective date of the standard.

(b) The Administrator shall be notified at least 30 days prior to an emission test so that EPA may, at its option, observe the test.

(c) An emission test shall be conducted at each operational calciner or nodulizing kiln. If emissions from a calciner or nodulizing kiln are discharged through more than one stack, then an emission test shall be conducted at each stack and the total emission rate from the calciner or kiln shall be the sum of the emission rates from each of the stacks.

(d) Each emission test shall consist of three sampling runs that meet the requirements of § 61.125. The phosphate rock processing rate during each run shall be recorded. An emission rate in curies per metric ton of phosphate rock processed shall be calculated for each run. The average of all three runs shall apply in computing the emission rate for the test. The annual polonium-210 emission rate from a calciner or nodulizing kiln shall be determined by multiplying the measured polonium-210 emission rate in curies per metric ton of phosphate rock processed by the annual phosphate rock processing rate in metric tons. In determining the annual phosphate rock processing rate, the values used for operating hours and operating capacity shall be values that will maximize the expected processing rate. For determining compliance with the emission standard of § 61.122, the total annual emission rate is the sum of the annual emission rates for all operating calciners and nodulizing kilns.

(e) If the owner or operator changes his operation in such a way as to increase his emissions of polonium-210, such as changing the type of rock processed, the temperature of the calciners or kilns, or increasing the annual phosphate rock processing rate, then a new emission test shall be conducted under these conditions.

(f) Each owner of an elemental phosphorus plant shall furnish the Administrator a written report of the results of the emission test within 60 days of conducting the test. The report must provide the following information:

(1) The name of the facility.

(2) The name of the person responsible for the operation of the facility and the name of the person preparing the report (if different).

(3) A description of the effluent controls that are used on each stack, vent, or other release point and an estimate of the efficiency of each device.

(4) The results of the testing, including the results of each sampling run completed.

(5) The values used for all other user-supplied input parameters (e.g., meteorological data) and the source of these data.

(6) Each report shall be signed and dated by the principal executive officer in charge of the facility and contain the following declaration immediately above the signature line:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment. See, 18 U.S.C. 1001.

§ 61.124 Recordkeeping requirements.

The owner of any plant must maintain records documenting the source of input parameters including the results of all measurements upon which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used in emission testing. In addition, the documentation should be sufficient to allow an independent auditor to verify the correctness of the results of the emission testing. These records must be kept at the site of the plant for at least five years and, upon request, be made available for inspection by the Administrator, or his authorized representative.

§ 61.125 Test methods and procedures.

(a) Each owner or operator of a source required to test emissions under § 61.123, unless an equivalent or alternate method has been approved by the Administrator, shall use the following test methods:

(1) Test Method 1 of Appendix A to Part 60 shall be used to determine sample and velocity traverses;

(2) Test Method 2 of Appendix A to Part 60 shall be used to determine velocity and volumetric flow rate;

(3) Test Method 3 of Appendix A to Part 60 shall be used for gas analysis.

(4) Test Method 5 of Appendix A to Part 60 shall be used to collect particulate matter containing the polonium-210; and

(5) Test Method 111 of Appendix B to this part shall be used to determine the polonium-210 emissions.

§ 61.126 Monitoring of operations.

(a) The owner or operator of any source subject to this subpart using a wet-scrubbing emission control device shall install, calibrate, maintain, and operate a monitoring device for the continuous measurement of the pressure loss of the gas stream through the scrubber. The monitoring device must be certified by the manufacturer to be accurate within ±250 pascals (±1 inch of water). Records of these measurements shall be maintained at the source and made available for inspection by the Administrator for a minimum of 5 years.

(b) The owner or operator of any source subject to this subpart using an electrostatic precipitator control device shall install, calibrate, maintain, and operate a monitoring device for the continuous measurement of the primary and secondary current and the voltage in each electric field. Baseline operating values for these parameters shall be maintained within ±30 percent of their baseline operating values. Records of these measurements shall be maintained at the source and made available for inspection by the Administrator for a minimum of 5 years.

(c) For the purpose of conducting an emission test under § 61.123, the owner or operator of any source subject to the provisions of this subpart shall install, calibrate, maintain, and operate a device for measuring the phosphate rock feed to any affected calciner or nodulizing kiln. The measuring device used must be accurate to within 6±5 percent of the mass rate over its operating range. Records of these measurements shall be maintained at the source and made available for inspection by the Administrator for a minimum of 5 years.

§ 61.127 Certification of stable operation.

Every 6 months the owner of a plant shall certify to the Administrator that no changes in operation that would require new testing under § 61.123(e) have occurred or inform the Administrator of the date on which new testing will occur.

§ 61.128 Exemption from the reporting and testing requirements of 40 CFR 61.10.

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

5. By adding the following Subpart Q:

Subpart Q—National Emission Standards for Radon Emissions From Department of Energy Facilities

Sec.

61.190 Designation of facilities.
61.191 Definitions.
61.192 Standard.
61.193 Radon monitoring and compliance procedures.
61.194 Recordkeeping requirements.
61.195 Exemption from the reporting and testing requirements of 40 CFR 61.10.

Subpart Q—National Emission Standards for Radon Emissions From Department of Energy Facilities

§ 61.190 Designation of facilities.

The provisions of this subpart apply to the design and operation of all storage and disposal facilities for radium-containing material (i.e., byproduct material as defined under section 11.e(2) of the Atomic Energy Act of 1954 (as amended)) that are owned or operated by the Department of Energy that emit radon-222 into air, including these facilities: 1) The Feed Materials Production Center, Fernald, Ohio; 2) the Niagara Falls Storage Site, Lewiston, NY; 3) the Weldon Spring Site, Weldon

Spring, Mo.; 4) the Middlesex Sampling Plant, Middlesex, NJ; 5) the Monticello Uranium Mill Tailings Pile, Monticello, Utah. This subpart does not apply to facilities listed in, or designated by the Secretary of Energy under Title I of the Uranium Mill Tailings Control Act of 1978.

§ 61.191 Definitions.

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act or subpart A of Part 61. The following terms shall have the following specific meanings:

(a) "Facility" means all buildings, structures and operations on one contiguous site.

(b) "Source" means any building, structure, pile, impoundment or area that is or contains waste material containing radium in sufficient concentration to emit radon-222 in excess of this standard prior to remedial action.

§ 61.192 Standard.

Approach A and Approach B

No source at Department of Energy facilities shall emit more than 20 pCi/m^{2}s of radon-222 into the air.

Approach C

No source at Department of Energy facilities shall emit more than 2 pCi/m^{2}s of radon-222 into the air.

Approach D

No source at Department of Energy facilities shall emit more than 0.02 pCi/m^{2}s of radon-222 into the air.

§ 61.193 Radon monitoring and compliance procedures.

(a) Sixty days after the effective date of this subpart each DOE facility shall conduct testing for all sources within the facility, in accordance with the procedures described in Appendix B, Method 115 and provide EPA with a report detailing the actions taken and the results of the radon-222 flux testing. In lieu of testing the facility may make an admission that the source is in noncompliance.

(b) Each facility shall retest each source in accordance with the procedures described in Appendix B, Method 115 every two years and report to EPA. The Administrator may temporarily or permanently waive the retesting requirement or change the time between tests, if the Administrator determines that more frequent testing is required, the actions being conducted at the facility to reduce radon emissions preclude testing, or the facility demonstrates that the actions taken to reduce the radon flux from the source are of such a nature that a reduction in the frequency of the tests is appropriate.

(c) Ninety days after the testing is required, each facility shall report the results of the testing or an admission of noncompliance. Each report shall include the following information:

(1) The name of the facility.

(2) A list of the sources at the facility

(3) A description of the control measures taken to decrease the radon flux from the source and any actions taken to insure the long term effectiveness of the control measures.

(4) The results of the testing conducted, including the results of each measurement.

(5) Each report shall be signed and dated by the principal executive officer or public official in charge of the facility and contain the following declaration immediately above the signature line:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment. See, 18 U.S.C. 1001.

§ 61.194 Recordkeeping requirements.

The facility must maintain records documenting the source of input parameters including the results of all measurements upon which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used to determine compliance. In addition, the documentation should be sufficient to allow an independent auditor to verify the correctness of the determination made concerning the facility's compliance with the standard, and, if claimed, qualification for exemption from reporting. These records must be kept at the facility for at least five years and upon request be made available for inspection by the Administrator, or his authorized representative.

§ 61.195 Exemption from the reporting and testing requirements of 40 CFR 61.10.

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

6. By adding the following Subpart R:

Subpart R—National Emission Standards for Radon Emissions From Phosphogypsum Stacks

Sec.

61.200 Designation of facilities.
61.201 Definitions.
61.202 Standard.
61.203 Radon monitoring and compliance procedures.
61.204 Recordkeeping requirements.
61.205 Exemption from the reporting and testing requirements of 40 CFR 61.10.

Subpart R—National Emission Standards for Radon Emissions From Phosphogypsum Stacks

§ 61.200 Designation of facilities.

The provisions of this subpart apply to the phosphogypsum that is produced as a result of phosphorus fertilizer production and all existing phosphogypsum stacks.

§ 61.201 Definitions.

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act or subpart A of Part 61. The following terms shall have the following specific meanings:

(a) "Operator" means any person who owns, operates or controls a phosphogypsum stack.

(b) "Phosphogypsum stacks" or "stacks" are piles of waste from phosphorus fertilizer production containing phosphogypsum.

§ 61.202 Standard.

Approach A and Approach B

All phosphogypsum shall be disposed of in stacks or in phosphate mines which shall not emit more than 20 pCi/m^{2}s of radon-222 into the air.

Approach C

All phosphogypsum shall be disposed of in stacks or in phosphate mines which shall not emit, more than 2 pCi/m^{2}s of radon-222 into the air.

Approach D

All phosphogypsum shall be disposed of in stacks or in phosphate mines which shall not emit, more than 0.02 pCi/m^{2}s of radon-222 into the air.

§ 61.203 Radon monitoring and compliance procedures.

(a) Sixty days after the effective date of the rule or sixty days after the operator ceases use of a phosphogypsum stack, whichever is later, the operator shall conduct testing for the stack in accordance with the procedures described in Appendix B, Method 115 and provide EPA with a report detailing the actions taken and the results of the radon-222 flux testing. In lieu of testing the facility may make an admission that the source is in noncompliance.

(b) Each operator shall retest each source in accordance with the procedures described in Appendix B,

Method 115 every two years and report to EPA. The Administrator may temporarily or permanently waive the retesting requirement or change the time between tests, if the Administrator determines that more frequent testing is required, the actions being conducted on the stack to reduce radon emissions preclude testing, the stack is in compliance without the use of any control measures, or the operator demonstrates that the actions taken to reduce the radon flux from the stack are of such a nature that a reduction in the frequency of the tests is appropriate.

(c) Ninety days after the testing is required, each operator shall report the results of the testing or an admission of noncompliance. Each report shall include the following information:

(1) The name of the facility.

(2) A list of the stacks controlled by the operator.

(3) The name of the person responsible for the operation of the facility and the name of the person preparing the report (if different).

(4) A description of the control measures taken to decrease the radon flux from the source and any actions taken to insure the long term effectiveness of the control measures.

(5) The results of the testing conducted, including the results of each measurement.

(6) Each report shall be signed and dated by the principal executive officer in charge of the facility and contain the following declaration immediately above the signature line:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment. See 18 U.S.C. 1001.

(d) Sixty days after the effective date of the rule and annually thereafter, the operator shall file a report with the Administrator. This report will inform the Administrator which stacks are still being used for the disposal of additional phosphogypsum and which stacks are no longer being used for the disposal of additional phosphogypsum and, therefore, are ready for disposal.

§ 61.204 Recordkeeping requirements.

An operator must maintain records documenting the source of input parameters including the results of all measurements upon which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used to determine compliance. In addition, the documentation should be sufficient to allow an independent auditor to verify the correctness of the determination made concerning the facility's compliance with the standard. These records must be kept at the facility for at least five years and upon request be made available for inspection by the Administrator, or his authorized representative.

§ 61.205 Exemption from the reporting and testing requirements of 40 CFR 61.10.

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

7. By adding the following Subpart S:

Subpart S—National Emission Standards for Radon Emissions From Surface Uranium Mines

Sec.

61.210 Designation of facilities.
61.211 Definitions.
61.212 Standard.
61.213 Radon monitoring and compliance procedures.
61.214 Recordkeeping requirements.
61.215 Exemption from the reporting and testing requirements of 40 CFR 61.10.

Subpart S—National Emission Standards for Radon Emissions From Surface Uranium Mines

§ 61.210 Designation of facilities.

The provisions of this subpart are applicable to any surface uranium mine which:

(a) Has mined or will mine over 100,000 tons of ore during the life of the mine; or

(b) Has had or will have an annual ore production rate greater than 10,000 tons, unless it can be demonstrated that the mine will not exceed total ore production of 100,000 tons during the life of the mine.

§ 61.211 Definitions.

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act or subpart A of Part 61. The following terms shall have the following specific meanings:

(a) "Owner" means any person who owns, operates or controls a surface uranium mine.

(b) "Surface uranium mine" means a man-made excavation made for the purpose of removing material containing uranium for the principle purpose of recovering uranium.

§ 61.212 Standard.

Approach A, B and C

[No Rule]

Approach D

Surface uranium mines shall not emit more than 0.02 pCi/m^{2}s of radon-222 into the air.

61.213 Radon monitoring and compliance procedures.

(a) Sixty days after the effective date of the rule or sixty days after the mine owner ceases use of a mine, whichever is later, the operator shall conduct testing of the mine in accordance with the procedures described in Appendix B, Method 115 and provide EPA with a report detailing the actions taken and the results of the radon-222 flux testing.

(b) Each mine owner shall retest each source in accordance with the procedures described in Appendix B, Method 115 every two years and report to EPA. The Administrator may temporarily or permanently waive the retesting requirement or change the time between tests, if the Administrator determines that more frequent testing is required, the actions being conducted on the stack to reduce radon emissions preclude testing, or the operator demonstrates that the actions taken to reduce the radon flux from the mine are of such a nature that a reduction in the frequency of the tests is appropriate.

(c) Ninety days after the testing is required, each mine owner shall report the results of the testing or admit being in noncompliance. Each report shall include the following information:

(1) The name of the facility.

(2) The name of the person responsible for the operation of the facility and the name of the person preparing the report (if different).

(3) A description of the control measures taken to decrease the radon flux from the source and any actions taken to insure the long term effectiveness of the control measures.

(4) The results of the testing conducted, including the results of each measurement.

(5) Each report shall be signed and dated by the principal executive officer in charge of the facility and contain the following declaration immediately above the signature line:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment. See, 18 U.S.C. 1001.

§ 61.214 Recordkeeping requirements.

The facility must maintain records documenting the source of input parameters including the results of all measurements upon which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used to determine compliance. In addition, the documentation should be sufficient to allow an independent auditor to verify the correctness of the determination made concerning the facility's compliance with the standard. These records must be kept at the site of the facility for at least five years and upon request be made available for inspection by the Administrator, or his authorized representative.

§ 61.215 Exemption from the reporting and testing requirements of 40 CFR 61.10.

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

8. By revising Subpart B to read as follows:

Subpart B—National Emission Standards for Radon Emissions From Underground Uranium Mines

Sec.
61.20 Designation of facilities.
61.21 Definitions.
61.22 Standard.
61.23 Radon monitoring and compliance procedures.
61.24 Recordkeeping requirements.
61.25 Exemption from the reporting and testing requirements of 40 CFR 61.10.

Subpart B—National Emission Standards for Radon Emissions From Underground Uranium Mines

§ 61.20 Designation of facilities.

The provisions of this subpart are applicable to an active underground uranium mine which:

(a) Has mined or will mine over 100,000 tons of ore during the life of the mine; or

(b) Has had or will have an annual ore production rate greater than 10,000 tons, unless it can be demonstrated that the mine will not exceed total ore production of 100,000 tons during the life of the mine.

§ 61.21 Definitions.

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act or subpart A of Part 61. The following terms shall have the following specific meanings:

(a) "Active mine" means an underground uranium mine which is being ventilated to allow workers to enter the mine for any purpose.

(b) "Owner" means any person who owns, operates or controls an underground uranium mine.

(c) "Underground uranium mine" means a man-made underground excavation made for the purpose of removing material containing uranium for the principle purpose of recovering uranium.

§ 61.22 Standard.

Approach A and Approach B

(a) The exhaust vents of an active underground uranium mine shall not emit more than 1500 curies of radon-222 into the atmosphere in any year.

(b) The requirements of paragraph (a) of this section notwithstanding, if all the exhaust vent emissions of radon-222 from underground uranium mines are emitted from stacks that are at least 30 meters high then all the exhaust vents of an active underground uranium mine may emit up to 5,000 curies of radon-222 into the atmosphere in any year.

Approach C

The exhaust vents of an active underground uranium mine shall not emit more than 500 curies of radon-222 into the atmosphere in any year.

Approach D

The exhaust vents of an active underground uranium mine shall not emit more than 5 curies of radon-222 into the atmosphere in any year.

§ 61.23 Radon monitoring and compliance procedures.

(a) An underground uranium mine owner shall conduct testing to determine the radon-222 emissions from their mines in accordance with the procedures described in Appendix B, Method 115 and provide EPA with a report of the results of the testing.

(b) The report of the results for each year shall be sent to EPA by March 31 of the following year. Each report shall include the following information:

(1) The name of the mine.

(2) The name of the person responsible for the operation of the facility and the name of the person preparing the report (if different).

(3) A list of the exhaust vents at the mine, including their location and size.

(4) The results of the testing conducted.

(5) Each report shall be signed and dated by the principal executive officer in charge of the facility and contain the following declaration immediately above the signature line:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment. See, 18 U.S.C. 1001.

(c) If the facility is not in compliance with the emission limits of § 61.22 in the calendar year covered by the report then the facility must report to the Administrator on a monthly basis the information listed in paragraph (b) of this section, for the preceding month. These reports will be due 30 days following the end of each month. This increased level of reporting will continue until the Administrator has determined that the monthly reports are no longer necessary. In addition to all the information required in paragraph (b) of this section, monthly reports shall also include the following information:

(1) All controls or other changes in operation of the facility that will be or are being installed to bring the facility into compliance.

(2) If the facility is under a judicial or administrative enforcement decree the report will describe the facility's performance under the terms of the decree.

§ 61.24 Recordkeeping requirements.

The mine must maintain records documenting the source of input parameters including the results of all measurements upon which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used to determine compliance. In addition, the documentation should be sufficient to allow an independent auditor to verify the correctness of the determination made concerning the facility's compliance with the standard. These records must be kept at the mine for at least five years and upon request be made available for inspection by the Administrator, or his authorized representative.

§ 61.25 Exemption from the reporting and testing requirements of 40 CFR 61.10.

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

9. By revising Subpart W to read as follows:

Subpart W—National Emission Standards for Radon Emissions From Operating Mill Tailings

Sec.
61.250 Designation of facilities.
61.251 Definitions.
61.252 Standard.

Sec.
61.253 Exemption from the reporting and testing requirements of 40 CFR 61.10.

Subpart W—National Emission Standards for Radon Emissions From Operating Mill Tailings

§ 61.250 Designation of Facilities.

The provisions of this subpart apply to owners or operators licensed to manage uranium byproduct materials during and following the processing of uranium ores, commonly referred to as uranium mills and their associated tailings. This subpart does not apply to the disposal of tailings.

§ 61.251 Definitions

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act or subpart A of Part 61. The following terms shall have the following specific meanings:

(a) "Area" means the vertical projection of the pile upon the earth's surface.

(b) "Continuous disposal" means a method of tailings management and disposal in which tailings are dewatered by mechanical methods immediately after generation. The dried tailings are then placed in trenches or other disposal areas and immediately covered to all applicable Federal standards.

(c) "Dewatered" means to remove the water from recently produced tailings by mechanical or evaporative methods such that the water content of the tailings does not exceed 30 percent by weight.

(d) "Operation" means that an impoundment is being used for the continued placement of new tailings or is in standby. An impoundment is in operation from the day that tailings are first placed in the impoundment until the day that final closure beings.

(e) "Owner" means any person who owns or operates a uranium mill or an existing tailings pile or a new impoundment.

(f) "Phased disposal" means a method of tailings management and disposal which uses lined impoundments which are filled and then immediately dried and covered to meet all applicable Federal standards.

(g) "Uranium byproduct material" or "tailings" means the waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content. Ore bodies depleted by uranium solution extraction and which remain underground do not constitute byproduct material for the purposes of this subpart.

§ 61.252 Standard.

Approach A and Approach B

Two years following the effective date of this rule no tailings may be placed in any impoundment which was not designed and constructed to meet one of the two following work practices and in the following manner:

(a) Phased disposal in lined tailings impoundments that are no more than 40 acres in area and meet the requirements of § 192.32(a). The owner shall have no more than two impoundments in operation at any one time.

(b) Continuous disposal of tailings such that tailings are dewatered and immediately disposed with no more than 10 acres uncovered at any time and operated in accordance with § 192.32(a).

Approach C

After the effective date of this rule, no tailings may be placed in any impoundment which was not designed and constructed to meet one of the two following work practices and in the following manner:

(a) Phased disposal in lined tailings impoundments that are no more than 40 acres in area and meet the requirements of § 192.32(a). The owner shall have no more than two impoundments in operation at any one time.

(b) Continuous disposal of tailings such that tailings are dewatered and immediately disposed with no more than 10 acres uncovered at any time and operated in accordance with § 192.32(a).

Approach D

After the effective date of this rule no tailings may be produced.

§ 61.253 Exemption from the reporting and testing requirements of 40 CFR 61.10.

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

10. By adding the following Subpart T:

Subpart T—National Emission Standards for Radon Emissions From the Disposal of Uranium Mill Tailings

Sec.
61.220 Designation of facilities.
61.221 Definitions.
61.222 Standard.
61.223 Compliance procedures.
61.224 Recordkeeping requirements.
61.225 Exemption from the reporting and testing requirements of 40 CFR 61.10.

Subpart T—National Emission Standards for Radon Emissions From the Disposal of Uranium Mill Tailings

§ 61.220 Designation of facilities.

The provisions of this subpart apply to the disposal of tailings at all sites that managed residual radioactive material or uranium byproduct materials during and following the processing of uranium ores, commonly referred to as uranium mills and their associated tailings, that are listed in, or designated by the Secretary of Energy under Title I of the Uranium Mill Tailings Control Act of 1978 or regulated Title II of the Uranium Mill Tailings Control Act of 1978.

§ 61.221 Definitions.

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act or subpart A of Part 61. The following terms shall have the following specific meanings:

(a) "Operational" means a uranium mill tailings pile that is licensed to accept additional tailings, and those tailings can be added without violating subpart W or any other Federal, state or local rule or law.

(b) "Owner" means any person who owns, operates, controls or is responsible for the disposal of a uranium mill tailings pile or impoundment, including the Department of Energy.

(c) "Uranium byproduct material" or "tailings" means the waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content. Ore bodies depleted by uranium solution extraction and which remain underground do not constitute byproduct material for the purposes of this subpart.

§ 61.222 Standard.

Approach A and Approach B

Radon-222 emissions to the air from nonoperational uranium mill tailings piles shall not exceed 6 pCi/m^2s of radon-222.

Approach C

Radon-222 emissions to the air from nonoperational uranium mill tailings piles shall not exceed 2 pCi/m^2s of radon-222.

Approach D

Radon-222 emissions to the air from nonoperational uranium mill tailings piles shall not exceed 0.02 pCi/m^2s of radon-222.

§ 61.223 Compliance procedures.

(a) Sixty days after the effective date of this subpart or 60 days after the pile ceases to be operational, whichever is later, owners of uranium mill tailings shall conduct testing for all piles within the facility in accordance with the procedures described in Appendix B, Method 115 and provide EPA with a report detailing the actions taken and

the results of the radon-222 flux testing. In lieu of testing the owner may make an admission that the source is in noncompliance.

(b) Each owner shall retest each pile in accordance with the procedures described in Appendix B, Method 115 every two years and report to EPA. The Administrator may temporarily or permanently waive the retesting requirements or change the time between tests, if the Administrator determines that more frequent testing is required, the actions being conducted on the pile to reduce radon emissions preclude testing, or the owner demonstrates that the actions taken to reduce the radon flux from the pile are of such a nature that a reduction in the frequency of the tests is appropriate.

(c) Ninety days after the testing is required, each facility shall report the results of the testing or an admission of noncompliance. Each report shall include the following information:

(1) The name of the facility.

(2) A list of the piles at the facility.

(3) A description of the control measures taken to decrease the radon flux from the source and any actions taken to insure the long term effectiveness of the control measures.

(4) The results of the testing conducted, including the results of each measurement.

(5) Each report shall be signed and dated by the principal executive officer or public official in charge of the facility and contain the following declaration immediately above the signature line:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalities for submitting false information including the possibility of fine and imprisonment. See, 18 U.S.C. 1001.

§ 61.224 Recordkeeping requirements.

The facility must maintain records documenting the source of input parameters including the results of all measurements upon which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used to determine compliance. In addition, the documentation should be sufficient to allow an independent auditor to verify the correctness of the determination made concerning the facility's compliance with the standard. These records must be kept at the site of the facility for at least five years and upon request be made available for inspection by the Administrator, or his authorized representative.

§ 61.225 Exemption from the reporting and testing requirements of 40 CFR 61.10.

All facilities designated under this subpart are exempt from the reporting requirements of 40 CFR 61.10.

11. By adding the following Subpart U:

Subpart U—National Emission Standards for Coal-Fired Boilers

Sec.
61.230 Designation of facilities.
61.231 Definitions.
61.232 Standard.

Subpart U—National Emission Standards for Coal-Fired Boilers

§ 61.230 Designation of facilities.

The provisions of this subpart apply to all coal-fired boilers operated by electric utility companies for the generation of electrical power and all industrial boilers whose output is greater than 2 million BTUs an hour.

§ 61.231 Definitions.

As used in this subpart, all terms not defined here have the meaning given them in the Clean Air Act of subpart A of Part 61 or 40 CFR 60.41a or 40 CFR 60.41b.

(a) "Coal-fired boiler" means a boiler that burns coal as an energy source in order to heat water.

§ 61.232 Standard.

Approach D

(a) All coal-fired boilers that are owned by electric utility companies shall meet all the requirements of 40 CFR Part 60 subpart Da that relate to the control of particulate matter.

(b) All industrial coal-fired boilers not regulated under paragraph (a) of this section shall meet all the requirements of 40 CFR Part 60 subpart Db that relate to the control of particulate matter.

12. By adding the following to the list of System International units of measure in § 61.03(a):

m^2=square meter

13. By adding the following to the list of other units of measure in 61.03(b):

Ci=curie
pCi=picocurie=10^{-12} curie
mrem=millirem=10^{-3} rem

14. By adding the following to the methods in Appendix B:

Method 114—Test Methods for Monitoring Radionuclide Emissions from Stationary Sources

1. Purpose and Background

This appendix contains guidance on: (1) Continuous stack sample collection methods appropriate for radionuclides; (2) radiochemical methods which are used in determining the amounts of radionuclides collected by the stack sampling and; (3) quality assurance methods which are conducted in conjunction with these measurements. These methods are appropriate for emissions for stationary sources. A list of references is provided.

Many different types of facilities release radionuclides into air. These radionuclides differ in the chemical and physical forms, half-lives and type of radiation emitted. The appropriate combination of sample extraction, collection and analysis for an individual radionuclide is dependent upon many interrelated factors including the mixture of other radionuclides present. Because of this wide range of conditions, no single method for collection and analysis of a radionuclide is applicable to all types of facilities. Therefore, a series of methods based on "principles of measurement" are described for both sample collection and analysis which are applicable to the measurement of radionuclides found in effluent streams at stationary sources. This approach provides the user with the flexibility to choose the most appropriate combination of collection and analysis methods which are applicable to the effluent stream to be measured.

2. Continuous Stack Sample Collection Methods

Continuous sample collection methods are based on "principles of sample collection" which are applicable to the continuous collection of radionuclides from effluent streams at stationary sources. Radionuclides of most elements will be in the particulate form in these effluent streams and can be readily collected using a suitable filter media. Radionuclides of hydrogen, oxygen, carbon, nitrogen, the noble gases and in some circumstances iodine will be in the gaseous form. Radionuclides of these elements will require either the use of a flow through counter to directly measure the radionuclide, or suitable sorters or bubblers to collect the radionuclides.

2.1 *Radionuclides as Particulates.* The extracted effluent stream is passed through a filter media to remove the particulates. The filter must have a high efficiency for removal of sub-micron particles. The guidance in ANSI-N13.1(1) shall be followed in using filter media to collect particulates.

2.2 *Radionuclides as Gases.*

2.2.1 *The Radionuclide Tritium (H-3).* Tritium in the form of water vapor is continuously collected from the

extracted effluent sample by sorption, condensation or dissolution techniques. Appropriate collectors may include silica gel, molecular sieves, and ethylene glycol or water bubblers.

Tritium in the gaseous form may be measured directly in the sample stream using Method B-1 or may be oxidized using a metal catalyst to tritiated water and collected as described above.

2.2.2 *Radionuclides of Iodine.* Iodine is collected from the continuously extracted sample by sorption or dissolution techniques. Appropriate collectors may include charcoal, impregnated charcoal, metal zeolites and caustic solutions.

2.2.3 *Radionuclides of Argon, Krypton and Xenon.* Radionuclides of these elements are measured directly in the continuously extracted sample stream using a flow through counter or are collected from the extracted sample by low temperature sorption techniques. Appropriate sorters may include charcoal or metal zeolites.

2.2.4 *Radionuclides of Oxygen, Carbon, Nitrogen and Radon.* Radionuclides of these elements are measured directly in the continuously extracted sample using a flow through counter. Radionuclides of carbon in the form of carbon dioxide may be collected by dissolution in caustic solutions.

3. Radionuclide Analysis Methods

A series of methods based on "principles of measurement" are applicable to the analysis of radionuclides collected from airborne effluent streams at stationary sources. These methods are applicable only under the conditions stated and within the limitations described. Some methods specify that only a single radionuclide be present in the sample or the chemically separated sample. This condition should be interpreted to mean that no other radionuclides are present in quantities which would interfere with the measurement.

Also identified are methods for a selected list of radionuclides. The listed radionuclides are those which are most commonly used and which have the greatest potential for causing dose to members of the public.

Use of methods based on principles of measurement other than those described in this section must be approved in advance of use by the Administrator. For radionuclides not listed in this section, any of the described methods may be used provided the user can demonstrate that the applicability conditions of the method have been met.

The type of method applicable to the analysis of a radionuclide is dependent upon the type of radiation emitted, i.e., alpha, beta or gamma. Therefore, the methods described below are grouped according to principles of measurements for the analysis of alpha, beta and gamma emitting radionuclides.

3.1 *Methods for Alpha Emitting Radionuclides.*

3.1.1 *Method A-1 Radiochemistry-Alpha Spectrometry.*

Principle: The element of interest is separated from other elements, and from the sample matrix using radiochemical techniques. The procedure may involve precipitation, ion exchange, or solvent extraction. Carriers (elements chemically similar to the element of interest) may be used. The element is deposited on a planchet in a very thin film by electrodeposition or by coprecipitation on a very small amount of carrier, such as lanthanum fluoride. The deposited element is then counted with an alpha spectrometer. The activity of the nuclide of interest is measured by the number of alpha counts in the appropriate energy region. A correction for chemical yield and counting efficiency is made using a standardized radioactive nuclide (tracer) of the same element. If a radioactive tracer is not available for the element of interest, a predetermined chemical yield factor may be used.

Applicability: This method is applicable for determining the activity of any alpha-emitting radionuclide, regardless of what other radionuclides are present in the sample provided the chemical separation step produces a very thin sample and removes all other radionuclides which could interfere in the spectral region of interest. APHA-605(2), ASTM-D-3972(13).

3.1.2 Method A-2, *Radiochemistry-Alpha Counting.*

Principle: The element of interest is separated from other elements, and from the sample matrix using radiochemistry. The procedure may involve precipitation, ion exchange, or solvent extraction. Carriers (elements chemically similar to the element of interest) may be used. The element is deposited on a planchet in a thin film and counted with an alpha counter. A correction for chemical yield (if necessary) is made. The alpha count rate measures the total activity of all emitting radionuclides of the separated element.

Applicability: This method is applicable for the measurement of any alpha-emitting radionuclide, provided no other alpha emitting radionuclide is present in the seperated sample. It may also be applicable for determining compliance, when other radionuclides of the separated element are present, provided that the calculated emission rate is assigned to the radionuclide which could be present in the sample that has the highest dose conversion factor. IDO-12096(18).

3.1.3 Method A-3, *Direct Alpha Spectrometry.*

Principle: The sample, collected on a suitable filter, is counted directly on an alpha spectrometer. The sample must be thin enough and collected on the surface of the filter so that any absorption of alpha particle energy in the sample or the filter, which would degrade the spectrum, is minimal.

Applicability: This method is applicable to simple mixtures of alpha emitting radionuclides and only when the amount of particulates collected on the filter paper are relatively small and the alpha spectra is adequately resolved. Resolutions should be 50 eV (HWFM) or better, ASTM-D-3084(16).

3.1.4 Method A-4, *Direct Alpha Counting* (Gross alpha determination).

Principle: The sample, collected on a suitable filter, is counted with an alpha counter. The sample must be thin enough so that self-absorption is not significant and the filter must be of such a nature that the particles are retained on the surface.

Applicability: Gross alpha determinations may be used to measure emissions of specific radionuclides only (1) when it is known that the sample contains only a single radionuclide, or the identity and isotopic ratio of the radionuclides in the sample are well-known, (2) measurements using either Method A-1 or A-2 have shown that this method provides a reasonably accurate measurement of the emission rate, and (3) the effective dose equivalent from the emission does not exceed 10 percent of the applicable emission standard. Gross alpha measurements are applicable to mixtures of radionuclides only for the purposes described in section 3.7. APHA-601(3), ASTM-D-1943(10).

3.1.5 Method A-5, *Chemical Determination of Uranium.*

Principle: Uranium may be measured chemically by either colorimetry or fluorometry. In both procedures, the sample is dissolved, the uranium is oxidized to the hexavalent form and extracted into hexone. Impurities are removed from the hexone layer. For colorimetry, dibenzoylmethane is added, and the uranium is measured by the absorbance in a colorimeter. For fluorometry, a portion of the solution is fused with a sodium fluoride-lithium fluoride flux and the uranium is determined by the ultraviolet activated fluorescence of the fused disk in a fluorometer.

Applicability: This method is applicable to the measurements of emission rates of uranium when the isotopic ratio of the uranium radionuclides is well known. ASTM-E-318(15), ASTM-D-2907(14).

3.1.6 Method A-6, *Radon-222—Continuous Gas Monitor.*

Principle: Radon-222 is measured directly in a continuously extracted sample stream by passing the air stream through a calibrated scintillation cell. Prior to the scintillation cell, the air stream is passed through a filter and if needed a desiccant to remove particulates and excess moisture. The alpha particles from radon-222 and its decay products strike a zinc sulfide coating on the inside of the scintillation cell producing light pulses. The light pulses are detected by a photomultiplier tube which generates electrical pulses. These pulses are processed by the system electronics and the read out is in pCi/1 of radon-222.

Applicability: This method is applicable to the measurement of radon-222 in effluent streams which do not contain significant quantities of radon-222. Users of this method should calibrate the monitor in a radon calibration chamber at lesat twice per year. The background of the monitor should also be checked periodically by operating the instrument in a low radon environment. EPA 520/1-86-04(24)

3.2 *Methods of Gaseous Beta Emitting Radionuclides.*

3.2.1 Method B-1, *Direct Counting in Flow-Through Ionization Chambers.*

Principle: An ionization chamber containing a specific volume of gas which flows at a given flow rate through the chamber is used. The sample (effluent stream sample) acts as the counting gas for the chamber. The activity of the radionuclide is determined from the current measured in the ionization chamber.

Applicability: This method is applicable for measuring the activity of a gaseous beta-emitting radionuclide that is suitable as a counting gas, when no other beta-emitting nuclides are present. DOE/EP-0096(17), NCRP-58(23).

3.2.2 Method B-2, *Direct Counting in Flow-Through Chamber with Beta Detectors.*

A chamber of known volume which contains a Geiger-Muller tube or other beta detector is used. The effluent gas stream passes through the chamber at a given flow rate. The activity of the radionuclide is determined from the beta count rate.

Applicability: This method is appropriate for measuring the activity of a gaseous beta-emitting radionuclide with a maximum energy greater than 0.2MeV (beta-max) when no other beta-emitting nuclides are present.

3.3 *Methods for Non-Gaseous Beta Emitting Radionuclides.*

3.3.1 Method B-3, *Radiochemistry-Beta Counting.*

Principle: The element of interest is separated from other elements, and from the sample matrix by radiochemistry. This may involve precipitation, distillation, ion exchange, or solvent extraction. Carriers (elements chemically similar to the element of interest) may be used. The element is deposited on a planchet, and counted with a beta counter. Corrections for chemical yield, and decay (if necessary) are made. The beta count rate determines the total activity of all radionuclides of the separated element. This method may also involve the radiochemical separation and counting of a daughter element, after a suitable period of ingrowth, in which case it is specific for the parent nuclide.

Applicability: This method is applicable for measuring the activity of any beta-emitting radionuclide, with a maximum energy greater than 0.2 MeV, provided no other radionuclide is present in the separated sample. APHA-608(5).

3.3.2. Method B-4, *Direct Beta Counting* (Gross beta determination).

Principle: The sample, collected on a suitable filter, is counted with a beta counter. The sample must be thin enough so that self-absorption corrections can be made.

Applicability: Gross beta measurements are applicable only to radionuclides with maximum beta particle energies greater than 0.2 MeV. Gross beta measurements may be used to measure emissions of specific radionuclides only: (1) When it is known that the sample contains only a single nuclide, (2) measurements made using Method B-3 show reasonable agreement with the gross beta measurement and (3) the effective dose equivalent from the emissions does not exceed 10% of the limits of the applicable standard. Gross beta measurements are applicable to mixtures of radionuclides only for the purposes described in section 3.7. APHA-602(4), ASTM-D-1890(10).

3.3.3 Method B-5, *Liquid Scintillation Spectrometry.*

Principle: An aliquot of a collected sample or the result of some other chemical separation or processing technique is added to a liquid scintillation "cocktail" which is viewed by photomultiplier tubes in a liquid scintillation spectrometer. The spectrometer is adjusted to establish a channel or "window" for the pulse energy appropriate to the nuclide of interest. The activity of the nuclide of interest is measured by the counting rate in the appropriate energy channel. Corrections are made for chemical yield where separations are made.

Applicability: This method is applicable to any beta-emitting nuclide when no other radionuclide is present in the sample or the separated sample provided that it can be incorporated in the scintillation cocktail. This method is also applicable for samples which contain more than one radionuclide but only when the energies of the beta particles are sufficiently separated so that they can be resolved by the spectrometer. This method is most applicable to the measurement of low-energy beta emitters such as tritium and carbon-14. APHA-609(6), EML-LV-0539-17(19).

3.4 *Gamma Emitting Radionuclides.*

3.4.1 Method G-1, *High Resolution Gamma Spectrometry.*

Principle: The sample is counted with a high resolution gamma detector, either a Ge(Li) or a high purity Ge detector, connected to a multichannel analyzer or computer. The gamma emitting radionuclides in the sample are measured for the gamma count rates in the energy regions characteristic of the individual radionuclide. Corrections are made for counts contributed by other radionuclides to the spectral regions of the radionuclides of interest. Radiochemical separations may be made prior to counting but are usually not necessary.

Applicability: This method is applicable to the measurement of any gamma emitting radionuclide with gamma energies greater than 20 kev. It can be applied to complex mixtures of radionuclides. The samples counted may be in the form of particulate filters, absorbers, liquids or gases. The method may also be applied to the analysis of gaseous gamma emitting radionuclides directly in an effluent stream by passing the stream through a chamber or cell containing the detector. ASTM-3649(9), IDO-12096(18).

3.4.2 Method G-2. *Low Resolution Gamma Spectrometry.*

Principle: The sample is counted with a low resolution gamma detector, a thallium activated sodium iodide crystal. The detector is coupled to a photomultiplier tube and connected to a multichannel analyzer. The gamma emitting radionuclides in the sample are measured from the gamma count rates in the energy regions characteristic of the individual radionuclides. Corrections are made for counts contributed by other radionuclides to the spectral regions of the radionuclides of interest.

Radiochemical separation may be used prior to counting to obtain less complex gamma spectra if needed.

Applicability: This method is applicable to the measurement of gamma emitting radionuclides with energies greater than 100 KeV. It can be applied only to relatively simple mixtures of gamma emitting radionuclides. The samples counted may be in the form of particulate filters, absorbers, liquids or gas. The method can be applied to the analysis of gaseous radionuclides directly in an effluent stream by passing the gas stream through a chamber or cell containing the detector. ASTM–D–2459(12), EMSL–LV–0539–17(19).

3.4.3 Method G–3. *Single Channel Gamma Spectrometry.*

Principle: The sample is counted with a thallium activated sodium iodide crystal. The detector is coupled to a photomultiplier tube connected to a single channel analyzer. The activity of a gamma emitting radionuclide is determined from the gamma counts in the energy range for which the counter is set.

Applicability: This method is applicable to the measurement of a single gamma emitting radionuclide. It is not applicable to mixtures of radionuclides. The samples counted may be in the form of particulate filters, absorbers, liquids or gas. The method can be applied to the analysis of gaseous radionuclides directly in an effluent stream by passing the gas stream through a chamber or cell containing the detector.

3.5 *Counting methods.* All of the above methods with the exception of Method A–5 involve counting the radiation emitted by the radionuclide. Counting methods applicable to the measurement of alpha, beta and gamma radiations are listed below. The equipment needed and the counting principles involved are described in detail in ASTM–3648(8).

3.5.1 *Alpha Counting*:

• *Gas flow proportional counters.* The alpha particles cause ionization in the counting gas and the resulting electrical pulses are counted. These counters may be windowless or have very thin windows.

• *Scintillation counters.* The alpha particles transfer energy to a scintillator resulting in a production of light photons which strike a photomultiplier tube converting the light photons to electrical pulses which are counted. The counters may involve the use of solid scintillation materials such as zinc sulfide or liquid scintillation solutions.

• *Solid-state counters.* Semiconductor materials, such as silicon surface-barrier p–n junctions, act as solid ionization chambers. The alpha particles interact with the detector producing electron hole pairs. The charged pair is collected by an applied electrical field and the resulting electrical pulses are counted.

• *Alpha spectrometers.* Semiconductor detectors used in conjunction with multichannel analyzers for energy discrimination.

3.5.2 *Beta Counting*:

• *Ionization chambers.* These chambers contain the beta-emitting nuclide in gaseous form. Either the ionization current or the rate of charge may be measured.

• *Geiger-Muller (GM) counters- or gas flow proportional counters.* The beta particles cause ionization in the counting gas and the resulting electrical pulses are counted. Proportional gas flow counters which are heavily shielded by lead or other metal, and provided with an anti-coincidence shield to reject cosmic rays, are called low background beta counters.

• *Scintillation counters.* The beta particles transfer energy to a scintillator resulting in a production of light photons, which strike a photomultiplier tube converting the light photon to electrical pulses which are counted. This may involve the use of anthracene crystals, plastic scintillator, or liquid scintillation solutions with organic phosphors.

• *Liquid scintillation spectrometers.* Liquid scintillation counters which use two photomultiplier tubes in coincidence to reduce background counts. This counter may also electronically discriminate among pulses of a given range of energy.

3.5.3 *Gamma Counting*:

• *Low-resolution gamma spectrometers.* The gamma rays interact with a thallium-activated sodium iodide or cesium iodide crystal resulting in the release of light photons which strike a photomultiplier tube converting the light pulses to electrical pulses proportional to the energy of the gamma ray. Multi-channel analyzers are used to separate and store the pulses according to the energy absorbed in the crystal.

• *High-resolution gamma spectrometers.* Gamma rays interact with a lithium-drifted (Ge(Li)) or high-purity germanium (HPGe) semiconductor detector resulting in a production of electron-hole pairs. The charged pair is collected by an applied electrical field. A very stable low noise preamplifier amplifies the pulses of electrical charge resulting from the gamma photon interactions. Multichannel analyzers or computers are used to separate and store the pulses according to the energy absorbed in the crystal.

• *Single channel analyzers.* Thallium activated sodium iodide crystals used with a single window analyzer. Pulses from the photomultiplier tubes are separated in a single predetermined energy range.

3.5.4 *Calibration of counters.* Counters are calibrated for specific radionuclide measurements using a standard of the radionuclide under either identical or very similar conditions as the sample to be counted.

For gross alpha and beta measurements of the unidentified mixtures of radionuclides, alpha counters are calibrated with a natural uranium standard and beta counters with a cesium–137 standard. The standard must contain the same weight and distribution of solids as the samples, and be mounted in an identical manner. If the samples contain variable amounts of solids, calibration curves relating weight of solids present to counting efficiency are prepared. Standards other than those prescribed may be used provided it can be shown that such standards are more applicable to the radionuclide mixture measured.

3.6 *Radiochemical methods for selected radionuclides.* Methods for a selected list of radionuclides are listed in Table 1. The radionuclides listed are those which are most commonly used and which have the greatest potential for causing doses to members of the public. For radionuclides not listed in Table 1, methods based on any of the applicable "principles of measurement" described in section 3.1 through 3.4 may be used.

3.7 *Applicability of gross alpha and beta measurements to unidentified mixtures of radionuclides.* Gross alpha and beta measurements may be used as a screening measurement as a part of an emission measurement program to identify the need to do specific radionuclide analyses or to confirm or verify that unexpected radionuclides are not being released in significant quantities.

Gross alpha (Method A–4) or gross beta (Method B–4) measurements may also be used for the purpose of comparing the measured concentrations in the effluent stream with the limiting "Concentration Levels for Environmental Compliance" in Table 2 of Appendix E. For unidentified mixtures, the measured concentration value shall be compared with the lowest environmental concentration limit for any radionuclide which is not known to be absent from the effluent stream.

TABLE 1.—LIST OF APPROVED METHODS FOR SPECIFIC RADIONUCLIDES

Radionuclide	Approved methods of analysis
Am-241	A-1, A-2, A-3, A-4
Ar-41	B-1, B-2, G-1, G-2, G-3
Ba-140	G-1, G-2, G-3
Br-82	G-1, G-2, G-3
C-11	B-1, B-2, G-1, G-2, G-3
C-14	B-5
Ca-45	B-3, B-4, B-5
Ce-144	G-1, G-2, G-3
Cm-244	A-1, A-2, A-3, A-4
Co-60	G-1, G-2, G-3
Cr-51	G-1, G-2, G-3
Cs-134	G-1, G-2, G-3
Cs-137	G-1, G-2, G-3
Fe-55	B-5, G-1
Fe-59	G-1, G-2, G-3
Ga-67	G-1, G-2, G-3
H-3 (H_2O)	B-5
H-3 (gas)	B-1
I-123	G-1, G-2, G-3
I-125	G-1
I-131	G-1, G-2, G-3
In-113m	G-1, G-2, G-3
Ir-192	G-1, G-2, G-3
Kr-85	B-1, B-2, G-1, G-2, G-3
Kr-87	B-1, B-2, G-1, G-2, G-3
Kr-88	B-1, B-2, G-1, G-2, G-3
Mn-54	G-1, G-2, G-3
Mo-99	G-1, G-2, G-3
N-13	B-1, B-2, G-1, G-2, G-3
O-15	B-1, B-2, G-1, G-2, G-3
P-32	B-3, B-4, B-5
Pm-147	B-3, B-4, B-5
Po-210	A-1, A-2, A-3, A-4
Pu-238	A-1, A-2, A-3, A-4
Pu-239	A-1, A-2, A-3, A-4
Pu-240	A-1, A-2, A-3, A-4
S-35	B-5
Se-75	G-1, G-2, G-3
Sr-90	B-3, B-4, B-5
Tc-99	B-3, B-4, B-5
Te-201	G-1, G-2, G-3
Uranium (total alpha).	A-1, A-4
Uranium (isotopic)	A-1, A-3
Xe-133	G-1
Yb-169	G-1, G-2, G-3
Zn-65	G-1, G-2, G-3

4. Quality Assurance Methods

Each facility required to measure their radionuclide emissions shall conduct a quality assurance program in conjunction with the radionuclide emission measurements. This program shall assure that the emission measurements are representative, and are of know precision and accuracy and shall include administrative controls to assure prompt response when emission measurements indicate unexpectedly large emissions. The program shall consist of a system of policies, organizational responsibilities, written procedures, data quality specifications, audits, corrective actions and reports. This quality assurance program shall include the following program elements:

4.1 The organizational structure, functional responsibilities, levels of authority and lines of communications for all activities related to the emissions measurement program shall be identified and documented.

4.2 Administrative controls shall be prescribed to ensure prompt response in the event that emission levels increase due to unplanned operations.

4.3 The samples collection and analysis procedures used in measuring the emissions shall be described including where applicable:

4.3.1 Identification of sampling sites and number of sampling points, including the rationale for site selections.

4.3.2 A description of sampling probes and representativeness of the samples.

4.3.3 A description of any continuous monitoring system used to measure emissions, including the sensitivity of the system, calibration procedures and frequency of calibration.

4.3.4 A description of the sample collection systems for each radionuclide measured, including frequency of collection, calibration procedures and frequency of calibration.

4.3.5 A description of the laboratory analysis procedures used for each radionuclide measured, including frequency of analysis, calibration procedures and frequency of calibration.

4.3.6 A description of the sample flow rate measurement systems or procedures, including calibration procedures and frequency of calibration.

4.3.7 A description of the effluent flow rate measurement procedures, including frequency of measurements, calibration procedures and frequency of calibration.

4.4 The objectives of the quality assurance program shall be documented and shall state the required precision, accuracy and completeness of the emission measurement data including a description of the procedures used to assess these parameters. Accuracy is the degree of agreement of a measurement with a true or known value. Precision is a measure of the agreement among individual measurements of the same parameters under similar conditions. Completeness is a measure of the amount of valid data obtained compared to the amount expected under normal conditions.

4.5 A quality control program shall be established to evaluate and track the quality of the emissions measurement data against preset criteria. The program should include where applicable a system of replicates, spiked samples, split samples, blanks and control charts. The number and frequency of such quality control checks shall be identified.

4.6 A sample tracking system shall be established to provide for positive identification of samples and data through all phases of the sample collection, analysis and reporting system. Sample handling and preservation procedures shall be established to maintain the integrity of samples during collection, storage and analysis.

4.7 Periodic internal and external audits shall be performed to monitor compliance with the quality assurance program. These audits shall be performed in accordance with written procedures and conducted by personnel who do not have responsibility for performing any of the operations being audited.

4.8 A corrective action program shall be established including criteria for when corrective action is needed, what corrective actions will be taken and who is responsible for taking the corrective action.

4.9 Periodic reports to responsible management shall be prepared on the performance of the emissions measurements program. These reports should include assessment of the quality of the data, results of audits and description of corrective actions.

4.10 The quality assurance program should be documented in a quality assurance project plan which should address each of the above requirements.

5. References

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(2) American Public Health Association, "Methods of Air Sampling", 2nd Edition, Method 605, "Tentative Method of Analysis for Plutonium content of Atmospheric Particulate Matter, American Public Health Association, New York, NY (1977).

(3) Ibid, Method 601, "Tentative Method of Analysis for Gross Alpha Radioactivity Content of the Atmosphere."

(4) Ibid, Method 602 "Tentative Method of the Analysis for Gross Beta Radioactivity Content of the Atmosphere."

(5) Ibid, Method 608, "Tentative Method of Analysis for Strontium-90 Content of Atmospheric Particulate Matter."

(6) Ibid, Method 609, "Tentative Method of Analysis for Tritium Content of the Atmosphere."

(7) Ibid, Method 603, "Tentative Method of Analysis for Iodine-131 Content of the Atmosphere."

(8) American Society for Testing and Materials, 1986 Annual Book ASTM Standards, Designation D-3648-78, "Standard Practices for the Measurement of Radioactivity." American Society for Testing and Materials, Philadelphia, PA (1986).

(9) Ibid, Designation D-3649-85, "Standard Practice for High Resolution Gamma Spectrometry."

(10) Ibid, Designation D-1943-81 "Standard Test Method for Alpha Particle Radioactivity of Water."

(11) Ibid, Designation D-1890-81 "Standard Test Method for Beta Particle Radioactivity of Water."

(12) Ibid, Designation D-2459-72, "Standard Test Method for Gamma Spectrometry of Water."

(13) Ibid, Designation D-3972-82, "Standard Test Method for Isotopic Uranium in Water by Radiochemistry."

(14) Ibid, Designation D-2907-83, "Standard Test Methods for Microquantities of Uranium in Water by Fluorometry."

(15) Ibid, Designation E-318, "Standard Test Method for Uranium in Aqueous Solutions by Colorimetry."

(16) Ibid, Designation D-3084-75, "Standard Practice for Alpha Spectrometry of Water."

(17) Corley, J.P. and C.D Corbit, "A Guide for Effluent Radiological Measurements at DOE Installations" DOE/EP-0096, Pacific Northwest Laboratories, Richland, Washington (1983).

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(20) Environmental Protection Agency, "Radiochemistry Procedures Manual" EPA 520/5-84-006, Eastern Environmental Radiation Facility Montgomery, Alabama (1984).

(21) National Council on Radiation Protection and Measurements, NCRP Report No. 50, Environmental Radiation Measurements", National Council on Radiation Protection and Measurement, Bethesda, Maryland (1976).

(22) Ibid, Report No. 47, "Tritium Measurement Techniques." (1976)

(23) Ibid, Report No. 58 "A Handbook of Radioactivity Measurement Procedures" (1985).

(24) Environmental Protection Agency, "Interim Indoor Radon and Radon Decay Product Measurement Protocols", EPA 520/1-86-04, U.S. Environmental Protection Agency, Washington, DC (1986).

Appendix B—[Amended]

15. By adding the following Method to the list of method in Appendix B:

Method 115—Monitoring for radon-222 emissions

This Appendix describes the monitoring methods which must be used in determining the radon-222 emissions from underground uranium mines, uranium mill tailings piles, phosphogypsum stacks, and other piles of waste material emitting radon.

1. Radon-222 Emissions from Underground Uranium Mine Vents

1.1 Sampling Frequency and Calculation of Emissions. Radon-222 emissions from underground uranium mine vents shall be determined using one of the following methods:

1.1.1 Continuous Measurement. These measurements shall be made and the emissions calculated as follows:

(a) The radon-222 concentration shall be continuously measured at each mine vent whenever the mine ventilation system is operational.

(b) Each mine vent exhaust flow rate shall be measured at least 4 times per year.

(c) A weekly radon-222 emission rate for the mine shall be calculated and recorded weekly as follows:

$$A_w = C_1Q_1T_1 + C_2Q_2T_2 + \ldots C_iQ_iT_i$$

Where:

A_w = Total radon-222 emitted from the mine during week(Ci)

C_i = Average radon-222 concentration in mine vent i(Ci/m^3)

Q_i = Volumetric flow rate from mine vent i(m^3/hr)

T_i = Hours of mine ventilation system operation during week for mine vent i(hr)

(d) The annual radon-222 emission rate is the sum of the weekly emission rates during a calendar year.

1.1.2 Periodic Measurement. This method is applicable only to mines that continuously operate their ventilation system except for extended shutdowns. Mines which start up and shut down their ventilation system frequently must use the continuous measurement method described in Section 1.1.1 above. Emission rates determined using periodic measurements shall be measured and calculated as follows:

(a) The radon-222 shall be continuously measured at each mine vent for at least one week every three months.

(b) Each mine vent exhaust flow rate shall be measured at least once during each of the radon-222 measurement periods.

(c) A weekly radon-222 emission rate shall be calculated for each weekly period according to the method described in Section 1.1.1 In this calculation T=168 hr.

(d) The annual radon-222 emission rate from the mine should be calculated as follows:

$$A_y = \frac{52 - W_s}{n} (A_{w1} + A_{w2} + \ldots A_{wi}$$

Where:

A_y = Annual radon-222 emission rate from the mine (Ci)

A_{wi} = Weekly radon-222 emission rate during the measurement period i(Ci)

n = Number of weekly measurement periods per year

W_s = Number of weeks during the year that the mine ventilation system is shut down in excess of 7 consecutive days, i.e. the sum of the number of weeks each shutdown exceeds 7 days.

1.2 *Test Methods and Procedures.* Each underground mine required to test its emission, unless an equivalent or alternative method has been approved by the Administrator, shall use the following test methods:

1.2.1 Test Method 1 of Appendix A to Part 60 shall be used to determine velocity traverses. The sampling point in the duct shall be either the centroid of the cross section or the point of average velocity.

1.2.2 Test Method 2 of Appendix A to Part 60 shall be used to determine velocity and volumetric flow rates.

1.2.3 Test Method 6A of Appendix B, Method 114 to Part 61 shall be used for the analysis of radon-222.

2. Radon-222 Emissions From Uranium Mill Tailings Piles

2.1 Measurement and Calculation of the Mean Radon Flux.

2.1.1 *Frequency of Flux Measurements.* Radon flux measurements shall be performed on uranium mill tailings piles after disposal as described below. Additional measurements shall be performed at any time if the cover on the pile is disturbed or erodes in a manner that could cause a significant increase of the mean radon flux of the pile.

2.1.2 *Distribution and Number of Flux Measurements.* Radon flux measurements shall be made at approximately regularly spaced locations over the surface of the tailings pile. The minimum number of radon flux measurements required to determine the mean flux is 100 or two per acre whichever is smaller.

2.1.3 *Restrictions to Radon Flux Measurements.* The following restrictions are placed on making radon flux measurements:

(a) Measurements shall not be initiated within 24 hours of a rainfall.

(b) If a rainfall occurs during the 24-hour measurement period, the measurement is invalid if the seal has washed away or if the collector is surrounded by water.

(c) Measurements shall not be performed if the ambient temperature is below 35°F or if the ground is frozen.

2.1.4 *Radon Flux Measurements.* Measuring radon flux involves the adsorption of radon on activated

charcoal in a large-area collector. The radon collector is placed on the surface of the tailings pile area to be measured and allowed to collect radon for a time period of 24 hours. The radon collected on the charcoal is measured by gamma-ray spectroscopy. The detailed measurement procedure provided in Appendix A of EPA 520/5-85-029(1) shall be used to measure the radon flux on the tailings piles, except the surface of the tailings pile cover shall not be penetrated by the lip of the collector as directed in the procedure, rather the collector shall be carefully positioned on a flat surface with soil or fine sand, containing no more than background quantities of radium-226, used to seal the edge.

2.1.5 *Calculations.* The radon flux calculations shall be made as provided in Appendix A of reference EPA86(1). The mean radon flux for the uranium mill tailings pile shall be calculated by summing all individual flux measurements and dividing by the total number of flux measurements.

2.1.6 *Reporting.* The results of individual flux measurements, the approximate measurement locations on the tailings pile, and the mean radon flux shall be included in the emission test report. Any condition or unusual event that occurred during the measurements that could significantly affect the results shall also be reported.

3.0 Radon-222 Emissions From Phosphogypsum Stacks

3.1 Measurement and Calculation of the Mean Radon Flux. Radon flux measurements shall be made on phosphogypsum stacks as described below:

3.1.1 *Distribution and number of flux measurements.* The distribution and number of radon flux measurements required on a stack will depend on clearly defined areas of the stack (called regions) that can have significantly different radon fluxes due to surface conditions. The mean radon flux shall be determined for each individual region of the stack. Regions that shall be considered are:

(a) Water covered areas,
(b) Water saturated areas (beaches),
(c) Loose and dry top surface areas,
(d) Hard-packed roadways, and
(e) Sides.

3.1.2 *Number of flux measurements.* Radon flux measurements shall be made within each region on the phosphogypsum stack, except for those areas covered with water. Measurements shall be made at regularly spaced locations across the surface of the region, realizing that surface roughness will prohibit measurements in some areas of a region. The minimum number of flux measurements considered necessary to determine a representative mean radon flux value for each type of region is:

(a) Water covered area—no measurements required as radon flux is assumed to be zero,
(b) Water saturated beaches—50 radon flux measurements,
(c) Loose and dry top surface—100 radon flux measurements,
(d) Hard-packed roadways—50 radon flux measurements, and
(e) Sides—100 radon flux measurements.

A minimum of 300 measurements are required. A stack that has no water cover can be considered to consist of two regions, top and sides, and will require a minimum of only 200 measurements.

3.1.3 *Restrictions to radon flux measurements.* The following restrictions are placed on making radon flux measurements:

(a) Measurements shall not be initiated within 24 hours of a rainfall.
(b) If a rainfall occurs during the 24 hour measurement period, the measurement is invalid if the seal around the lip of the collector has washed away or if the collector is surrounded by water.
(c) Measurements shall not be performed if the ambient temperature is below 35°F if the ground is frozen.

3.1.4 *Areas of stack regions.* The approximate area of each region of the stack shall be determined in units of square meters.

3.1.5 *Radon flux measurements.* Measuring radon flux involves the adsorption of radon on activated charcoal in a large-area collector. The radon collector is placed on the surface of the stack area to be measured and allowed to collect radon for a time period of 24 hours. The radon collected on the charcoal is measured by gamma-ray spectroscopy. The detailed measurement procedure provided in Appendix A of EPA 520/5-85-0029(1) shall be used to measure the radon flux on phosphogypsum stacks, except the surface of the phosphogypsum shall not be penetrated by the lip of the radon collector as directed in the procedure, rather the collector shall be carefully positioned on a flat surface with soil or phosphogypsum used to seal the edge.

3.1.6 *Calculations.* The mean radon flux for each region of the phosphogypsum stack and for the total stack shall be calculated and reported as follows:

(a) The individual radon flux calculations shall be made as provided in Appendix A EPA 86 (1). The mean radon flux for each region of the stack shall be calculated by summing all individual flux measurements for the region and dividing by the total number of flux measurements for the region.

(b) The mean radon flux for the total phosphogypsum stack shall be calculated as follows:

$$J_s = \frac{J_1A_1 + J_2A_2 + J_iA_i}{A_t}$$

Where:

J_s=Mean flux for the total stack (pCi/m^2-s)
J_i=Mean flux measured in region i(pCi/m^2-s)
A_i=Area of region i(m^2)
A_t=Total area of the stacks

3.1.7 *Reporting.* The results of individual flux measurements, the approximate locations on the stack, and the mean radon flux for each region and the mean radon flux for the total stack shall be included in the emission test report. Any condition or unusual event that occurred during the measurements that could significantly affect the results should be reported.

4.0 References.

(1) Hartley, J.N. and Freeman, H.D., "Radon Flux Measurements on Gardinier and Royster Phosphogypsum Piles Near Tampa and Mulberry, Florida," U.S. Environmental Protection Agency Report, EPA 520/5-85-029, January 1986.

16. By adding the following Appendix D to Part 61:

Appendix D—Estimated Emissions Methods for Estimating Radionuclide Emissions

1. Purpose and Background

Facility owners or operators may estimate radionuclide emissions to the atmosphere for dose calculations instead of measuring emissions. Particulate emissions from mill tailing piles should be estimated using the procedures listed in reference #2. All other emissions may be estimated by using the "Procedures" listed below, or using the method described in reference #1.

2. Procedure

To estimate emissions to the atmosphere:

(a) Determine the amount (in curies) used at facilities for the period under consideration. Radioactive materials in sealed packages that remain unopened, and have not leaked during the assessment period should not be included in the calculation.

(b) Multiply the amount used by the following factors which depend on the

physical state of the radionuclide. They are:

(i) 1 for gases;

(ii) $^{-3}$ for liquids or particulate solids; and

(iii) 10^{-6} for solids.

If any nuclide is heated to a temperature of 100 degrees Celsius or more, boils at a temperature of 100 degrees Celsius or less, or is intentionally dispersed into the environment, it must be considered to be a gas.

(c) If a control device is installed between the place of use and the point of release, multiply emissions from (b) by an adjustment factor. These are presented in Table 1.

TABLE 1.—ADJUSTMENT TO EMISSION FACTORS FOR EFFLUENT CONTROLS

Controls	Types of radionuclides controlled	Adjustment factor to emissions	Comments and conditions
HEPA Filters	Particulates	0.01	Not applicable to gaseous radionuclides; periodic testing is prudent to ensure high removal efficiency.
Fabric Filter	Particulates	0.1	Monitoring would be prudent to guard against tears in filter.
Sintered Metal	Particulates	1	Insufficient data to make recommendation.
Activated Carbon Filters	Iodine Gas	0.1	Efficiency is time dependent; monitoring is necessary to ensure effectiveness.
Douglas Bags: Held 1 week or longer for decay	Xenon	(1) 0.5	Based on xenon half-life of 5.3 days;
Released within 1 week	Xenon	1	Provides no reduction of exposure to general public.
Venturi Scrubbers	Particulates	0.05	Although venturis may remove gases, variability in gaseous removal efficiency dictates adjustment factor for particulates only.
	Gases	1	
Packed Bed Scrubbers	Gases	0.1	Not applicable to particulates.
Electrostatic Precipitators	Particulates	0.05	Not applicable for gaseous radionuclides.
Xenon Traps	Xenon	0.1	Efficiency is time dependent; monitoring is necessary to ensure effectiveness.
Fume Hoods	All	1	Provides no reduction to general public exposures.
Vent Stacks	All	1	Generally provides no reduction of exposure to general public.

[1] Per week.

References

(1) Environmental Protection Agency, "A Guide for Determining Compliance with the Clean Air Act Standards for Radionuclides Emissions from NRC-Licensed and Non-DOE Federal Facilities", EPA 5201/1-89-002, January 1989.

(2) Nuclear Regulatory Commission, "Methods for Estimating Radioactive and Toxic Airborne Source Terms for Uranium Milling Operations", U.S. Nuclear Regulatory Commission Regulatory Guide 3.59, March 1987.

17. By adding the following Appendix E to Part 61:

Appendix E—Compliance Procedures Methods for Determining Compliance With Subpart I

1. Purpose and Background

This Appendix provides simplified procedures to reduce the burden on Nuclear Regulatory Commission (NRC) licensees, and non-Department of Energy Federal facilities in determining compliance with 40 CFR Part 61, Subpart I. The procedures consist of a series of increasingly more stringent steps, depending on the facility's potential to exceed the standard.

First, a facility can be found in compliance if the quantity of radioactive material possessed during the year is less than that listed in a table of annual possession quantities. A facility will also be in compliance if the average annual radionuclide emission concentration is less than that listed in a table of air concentration levels. If the facility is not in compliance by these tables, it can establish compliance by estimating a dose using screening procedure developed by the National Council on Radiation Protection and Measurements with a radiological source term derived using EPA approved emission factors. These procedures are described in a "Guide for Determining Compliance with the Clean Air Act Standards for Radionuclide Emissions From NRC-Licensed and Non-DOE Federal Facilities."

A user-friendly computer program called COMPLY has been developed to reduce the burden on the regulated community. The Agency has also prepared a "User's Guide for the COMPLY Code" to assist the regulated community in using the code, and in handling more complex situations such as multiple release points. The basis for these compliance procedures are provided in "Background Information Document: Procedures Approved for Demonstrating Compliance with 40 CFR Part 61, Subpart I". The compliance model is the highest level in the COMPLY computer code and provides for the most realistic assessment of dose by allowing the use of site-specific information.

2. Table of Annual Possession Quantity.

(a) Table 1 may be used for determining if facilities are in compliance with the standard. The possession table can only be used if the following conditions are met:

(i) No person lives within 10 meters of any release point; and

(ii) No milk, meat, or vegetables are produced within 100 meters of any release point.

(b) All restrictions on selecting the physical state of the radionuclide from section 61.103 apply to section 61.104. (c) If the quantity of any radionuclide possessed annually is less than the value listed in Table 1, the facility is in a compliance. If a facility uses multiple radionuclides, and the sum of the amount of each used annually divided by the limit from Table 1 is less than unity, then the facility is in compliance.

TABLE 1.—ANNUAL POSSESSION QUANTITIES FOR ENVIRONMENTAL COMPLIANCE

Radionuclide	Annual possession quantities (Ci/yr)		
	Gaseous [1] form	Liquid/powder form	Solid form
Ag-110m	8E-05	8E-02	8E+01
Am-241	2E-07	2E-04	2E-01
Ar-41	1E+00	E	
Au-198	4E-02	4E+01	4E-04
Ba-140	2E-03	2E+00	2E+03
C-14	3E-01	3E+02	3E+05
Ce-144	1E-03	1E+00	1E+03
Cm-244	3E-06	3E-03	3E+00
Co-60	1E-05	1E-02	1E+01
Cr-51	5E-02	5E+01	5E+04
Cs-134	4E-05	4E-02	4E+01
Cs-137	2E-05	2E-02	2E+01
Eu-154	1E-05	1E-02	1E+01
Fe-59	1E-03	1E+00	1E+03
Ga-67	1E-01	1E+02	1E+05
Gd-152	1E-06	1E-03	1E+00
H-3	8E+00	8E+03	8E+06
Hf-181	2E-03	2E+00	2E+03
Hg-197	2E-01	2E+02	2E+05
Hg-203	4E-03	4E+00	4E+03
I-123	4E-01	4E+02	4E+05
I-125	5E-03	5E+00	5E+03
I-131	6E-03	6E+00	6E+03
In-113m	2E+00	2E+03	2E+06
Ir-192	8E-04	8E-01	8E+02
K-40	6E-05	6E-02	6E+01
Kr-83m	7E+03		
Kr-85	5E+02		
Kr-85m	9E+00		
Kr-87	2E+00		
Mn-54	2E-04	2E-01	2E+02
Mo-99 [2]	7E-02	7E+01	7E-04
Na-24	2E-02	2E+01	2E+04
Nb-95	2E-03	2E+00	2E+03
Ni-63	3E-01	3E+02	3E+05

[1] Radionuclides boiling at 100 °C or less, or exposed to a temperature of 100 °C or more, must be considered to be a gas.

[2] Mo-99 contained in a generator to produce technetium-99 can be assumed to be a solid.

TABLE 1.—ANNUAL POSSESSION QUANTITIES FOR ENVIRONMENTAL COMPLIANCE (CONTINUED)

Radionuclide	Annual possession quantities (Cr/yr)		
	Gaseous form [1]	Liquid powder form	Solid form
P-32	5E-03	5E+00	5E+03
Pb-210	5E-05	5E-02	5E+01
Po-210	9E-05	9E-02	9E+01
Ru-103	3E-03	3E+00	3E+03
S-35	3E-02	3E+00	3E+04
Sb-124	5E-04	5E-01	5E+02
Sc-46	3E-04	3E-01	3E+02
Se-75	1E-03	1E+00	1E+03
Sn-113	2E-03	2E+00	2E+03

TABLE 1.—ANNUAL POSSESSION QUANTITIES FOR ENVIRONMENTAL COMPLIANCE (CONTINUED)—Continued

Radionuclide	Annual possession quantities (Cr/yr)		
	Gaseous form [1]	Liquid powder form	Solid form
Sr-85	2E-03	2E+00	2E+03
Sr-90	8E-04	8E-01	8E+02
Tc-95m	1E-03	1E+00	1E+03
Tc-99m	1E+00	1E+03	1E+06
W-187	9E-02	9E+01	9E+04
Xe-133	4E+01		
Xe-133m	5E+01		
Xe-135	6E-00		
Zn-65	3E-04-	3E-01	3E+02

[1] Radionuclides boiling at 100 °C or less, or exposed to a temperature of 100 °C or more, must be considered to be a gas.

3. Table of Concentration Levels

(a) Table 2 may be used for determining if facilities are in compliance with the standard.

1. The concentration table can only be used if all releases are from point sources and concentrations have been measured using EPA-approved methods, and the distance between each stack or vent and the nearest resident is greater than 3 times the diameter of the stack or vent.

2. If the concentration of any radionuclide released from the facility is less than the value listed in Table 2, the facility is in compliance. If a facility releases multiple radionuclides, and the sum of the concentration of each radionuclide divided by its limiting concentration from Table 2 is less than unity, then the facility is in compliance.

4. NCRP Screening Model

The procedures described in National Council on Radiation Protection and Measurement Commentary No. 3 "Screening Techniques for Determining Compliance with Environmental Standards" may be used to determine the dose to members of the general public from emissions of radionuclides to the atmosphere.

5. The COMPLY Computer Code

The COMPLY computer code may be used to determine compliance with Subpart I. The compliance model in the COMPLY computer code may be used to determine the dose to members of the general public from emissions of radionuclides to the atmosphere. The compliance model contains more radionuclides than the current version of NCRP Commentary No. 3.

TABLE 2.—CONCENTRATION LEVELS FOR ENVIRONMENTAL COMPLIANCE

Radionuclide	Concentration (Ci/m³)	Radionuclide	Concentration (Ci/m³)
Ag-110m	7E-14	Kr-85	7E-07
Am-241	2E-15	Kr-85m	1E-08
Ar-41	1E-09	Kr-87	3E-09
Au-198	1E-11	Mn-54	2E-13
Ba-140	1E-12	Mo-99	8E-12
C-14	4E-12	Na-24	2E-11
Ce-144	7E-13	Nb-95	2E-12
Cm-244	4E-15	Ni-63	1E-11
Co-60	2E-14	P-32	7E-14
Cr-51	5E-11	Pb-210	3E-15
Cs-134	2E-14	Po-210	8E-15
Cs-137	2E-14	Ru-103	2E-12
Eu-154	2E-14	S-35	5E-13
Fe-59	8E-13	Sb-124	4E-13
Ga-67	8E-11	Sc-46	4E-13
Gd-152	2E-14	Se-75	4E-13
H-3	4E-09	Sn-113	5E-13
Hf-181	2E-12	Sr-85	8E-13
Hg-197	2E-11	Sr-90	2E-14
Hg-203	9E-14	Tc-95m	1E-13
I-123	5E-10	Tc-99	2E-13
I-125	9E-14	Tc-99m	2E-9
I-131	3E-9	W-187	2E-11
In-113m	3E-09	Xe-133	5E-8
Ir-192	8E-13	Xe-133m	7E-9
K-40	3E-14	Xe-135	1E-8
Kr-83m	9E-06	Zn-65	7E-14

6. References

(1) Environmental Protection Agency, "A Guide for Determining Compliance with the Clean Air Act Standards for Radionuclides Emissions from NRC-Licensed and Non-DOE Federal Facilities", EPA 5201/1-89-002, January 1989.

(2) Environmental Protection Agency, "User's Guide for the COMPLY code", EPA 520/1-89-003, January 1989.

(3) Environmental Protection Agency, "Background Information Document: Procedures Approved for Demonstrating Compliance with 40 CFR Part 61, Subpart I", EPA 520/1-89-001, January 1989.

(4) National Council on Radiation Protection and Measurement, "Screening Techniques for Determining Compliance with Environmental Standards", NCRP Commentary No. 3, Revision of January 1989.

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Part V

Administrative Committee of the Federal Register

1 CFR Part 2 et al.

Updates and Changes to Publication Procedures; Final Rule

ADMINISTRATIVE COMMITTEE OF THE FEDERAL REGISTER

1 CFR Parts 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21 and 22

Updates and Changes to Publication Procedures; Final Rule

AGENCY: Administrative Committee of the Federal Register.

ACTION: Final rule.

SUMMARY: The Administrative Committee of the Federal Register (ACFR) is updating its regulations for the Office of the Federal Register (OFR) publication system to clarify certain policies and reflect current procedures. These amendments concern availability of OFR publications, procedure and timing of regular schedule, reinstatement of expired regulations, effective dates and time periods, and technical amendments. The action is intended to improve publication procedures and better serve agencies and the public.

EFFECTIVE DATE: April 6, 1989.

FOR FURTHER INFORMATION CONTACT: Frances McDonald or Sandra McLean (202) 523-4534.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 9, 1988 (53 FR 29990) the ACFR proposed to amend some of its regulations to clarify certain policies and to reflect current procedures. All comments received were from Federal agencies with the exception of one comment from a State agency. The ACFR has analyzed all the comments and based on them, has made several changes to the regulations as proposed.

Availability of Office of the Federal Register Publications

No comments were received on the ACFR's proposed consolidation and updating of regulations concerning availability of OFR publications.

The Federal Register Act gives the ACFR the authority to regulate the number of copies of OFR publications to be distributed without charge to members of the Government for official use and to be made available for purchase by the public. (44 U.S.C. 1506)

The ACFR is amending its regulations by consolidating all information on the availability of OFR publications in a new Subchapter D consisting of two parts, Parts 11 and 12. Information on subscriptions and official distribution within the Federal Government is presently dispersed throughout Chapter 1, with information located in 1 CFR 3.4, 1 CFR Part 7, 1 CFR 8.8, 1 CFR 9.3, 1 CFR 10.4, and 1 CFR 10.14.

The consolidation of all regulations concerning the availability of OFR publications provides a central, convenient source of information for users of OFR publications. Additionally, future revision of these consolidated regulations is simplified.

Some of the regulations consolidated in Subchapter D are out-of-date. The ACFR, therefore, revises these regulations. The regulations are also restructured and reworded for consistency. Since several OFR publications are now available in paper, microfiche, and magnetic tape forms, some of the regulations are clarified to identify the specific form to which the text applies. Also, present regulations provide that various OFR publications are distributed in the number needed, without charge to members of the Government for official use. The provision of these copies is based on a written request to the Director of the Federal Register, therefore, this procedure is included when applicable.

The availability of the slip laws and the U.S. Statutes at Large is not controlled by the ACFR and therefore information on their availability is not included in the new Part 11. In addition to paper and microfiche, the **Federal Register**, the Code of Federal Regulations (CFR), and The United States Government Manual, are now available in magnetic tapes. The current prices and availability of these magnetic tapes are added in the new Part 11.

The monthly Federal Register Index and the LSA (List of CFR Sections Affected) are included with each **Federal Register** subscription and each official distribution. Statements to this effect have been added in the new §§ 11.2 and 12.1(e). Additionally, the monthly Federal Register Index and LSA are available as separate subscriptions. A regulation on subscription to the LSA is added at § 11.8. A regulation on subscription to the monthly Federal Register Index is redesignated from § 3.4(b)(8) to § 11.8.

Regulations Affected by Court Decision or Act of Congress

The ACFR proposed § 8.10 to emphasize the requirement that agencies publish documents in the **Federal Register** when their regulations are affected by a court decision or an Act of Congress. The Federal Register Act at 44 U.S.C. 1510 requires that the CFR contain agency regulations having general applicability and legal effect that are relied upon by the agency in the discharge of its functions and are in effect as of certain dates specified by the ACFR. Section 1510(e) specifically contemplates a system wherein agencies publish documents in the **Federal Register**, as necessary, to amend the CFR. The CFR together with these documents are prima facie evidence of the text of the regulations and the fact that they are in effect on and after the revision date of the CFR volume.

Although agency commenters acknowledged their responsibility for keeping their regulations current, proposed § 8.10 created a great deal of confusion as to how to comply with the rule in various fact situations that may arise.

In view of the agencies' difficulties in interpreting the proposed § 8.10, the ACFR believes it may not be appropriate to set out a general rule that would be applicable to widely varying facts and circumstances surrounding particular court decisions and statutes. Moreover, proposed § 8.10 is somewhat redundant in view of the fact that the ACFR is amending § 8.1 to more precisely mirror the language of 44 U.S.C. 1510 providing that the CFR contain regulations having legal effect. As discussed previously, the requirement that the CFR contain documents having legal effect places responsibility on each agency to expeditiously amend its regulations whenever the regulations are rendered ineffective in whole or in part by a court decision or an Act of Congress.

Filing for Public Inspection and Publication Schedules

The Federal Register Act of 1935 provides for an official publication called the **Federal Register** in which all rules and regulations of Federal agencies shall systematically and uniformly be published. Under that Act, the ACFR is charged with regulating the "manner and form" in which the **Federal Register** shall be printed. (44 U.S.C. 1506(3)).

The ACFR provides a regular schedule for filing for public inspection and **Federal Register** publication in 1 CFR 17.2. Section 17.2(a) presently provides that receipt of a document by the OFR in the ordinary course of business (8:45 a.m.–5:15 p.m.) is considered to be a request for filing for public inspection and publication on the regular schedule, that is, 3 working days later.

Before a document can be scheduled for filing for public inspection and publication, it must be reviewed to ensure that it meets publication requirements set out in 1 CFR Chapters I and II. When documents are submitted late in the afternoon, the amount of time available for processing is severely decreased. As long as the number of documents submitted late in the day

was small, this did not pose a problem for the printing and overall production of the Federal Register. Experience now shows, however, that so many documents are being submitted late in the afternoon that assigning the 3-day publication schedule for documents received late in the day is not practical and does not allow efficient use of editorial and printing staff resources.

This rule changes the deadline for receiving documents for filing for public inspection and publication on the regular 3-day schedule to 2:00 p.m. Documents received after 2:00 p.m. receive the next working day's regular filing for public inspection and publication schedule. The 2:00 p.m. deadline greatly improves the situation created by a large number of documents submitted late in the afternoon and allows for a more efficient production process.

One commenter suggested changing the 2:00 p.m. deadline for receiving documents for publication on the regular 3-day schedule to a later cutoff time in order to accommodate the use of agency shuttles after lunchtime. The ACFR cannot move the deadline back and still ensure that the OFR has adequate time for processing documents.

While the Administrative Committee recognizes that requiring receipt of documents by 2:00 p.m. to qualify for OFR's regular schedule may necessitate certain agency administrative adjustments, it believes that the overall benefits justify this change. Emergency processing of documents will continue to be offered as provided in 1 CFR 17.3 and new §§ 17.5 and 17.6.

One commenter expressed concern that the 2:00 p.m. deadline for receiving documents for the regular 3-day schedule might change the OFR's current practice on "emergency filings". The commenter urged that this current practice on emergency filings be codified in 1 CFR 17.2. The commenter further suggested that the provision that a document is filed only after it has been received, processed and assigned a publication date be included in 1 CFR 17.2.

The part heading for Part 17 has been revised to read "Filing for Public Inspection and Publication Schedules" and several sections in the part have been revised to clarify the difference between the regular and emergency schedules for filing for public inspection and the regular and emergency schedules for publication.

In response to the commenters' suggestions, a new paragraph is added to § 17.2 stating that each document received shall be filed for public inspection only after it has been received, processed and assigned a publication date. Also, language is added to clarify that the section provides for both the regular schedule for filing for public inspection and the regular schedule for publication.

New §§ 17.5 and 17.6 are added to codify the OFR's current practice on emergency filing for public inspection.

If an agency wishes to provide immediate notice to the public of a document's contents, the agency may request immediate processing and filing for public inspection. This is known as emergency filing for public inspection. A document may be filed for public inspection on the same day it is received if there is sufficient time for the document to be both processed and assigned a publication date by the OFR staff and inspected by the public. The document remains on public inspection until it is published according to either the regular or deferred schedule.

The ACFR has not provided in regulations for a regular schedule for Sunshine Act documents in the past, although the OFR has historically afforded these documents an expedited schedule. This rule formalizes the OFR's longstanding policy of assigning a 2-day schedule for each correctly submitted notice of meeting issued under the "Government in the Sunshine Act" (5 U.S.C. 522b(e)(3)). In accordance with the OFR's existing policy, each Sunshine Act document received before 4:00 p.m. is scheduled to be published 2 working days later. Each document received after 4:00 p.m. is scheduled to be published 3 working days later.

Sunshine Act documents are published in a separate section of the Federal Register under simplified formatting requirements. This simplified format allows an agency to present statutorily required information in a clear and efficient manner while providing public notice as quickly as possible. The OFR's abbreviated 2-day schedule is available because the simple, standardized format permits quicker processing.

Reinstatement of Expired Regulations

Section 18.16 is added to provide that agencies may reinstate regulations removed from the CFR data base which have expired by their own terms only by republishing the regulations in full text in the Federal Register. This rule is necessary to enable OFR to maintain a more current CFR data base and to promote an orderly system of codification.

The addition of this rule was prompted by agency requests seeking to extend the effective dates of rules after they have expired by their own terms but prior to the annual revision date of the agency's CFR title, with the aim of avoiding republication of reinstated rules in full text in the Federal Register.

However ill-advised this method of reinstating rules is in terms of good rulemaking practice, the ACFR finds that, as a practical matter, it is not possible for agencies to rely on the revision date of the CFR title affected as the deadline for retroactively reinstating expired rules. The tendency of some agencies to fall back on CFR revision dates as a last resort for reviving regulations conflicts with OFR's procedures for updating the CFR.

Under the Federal Register Act, 44 U.S.C. 1510(c), the ACFR is authorized to regulate the codification of the CFR with a view to keeping the Code as current as practicable. In order to compile and issue revised editions of the CFR in a timely fashion, the OFR must update the CFR data base on a regular, if not daily basis. Once defunct regulations are removed from the data base, the only practical means of reinstating them is to republish them in full in the Federal Register.

As originally proposed, § 18.16 contemplated a complete ban on retroactive reinstatement of expired regulations. The ACFR continues to hold that good rulemaking practice calls for expired regulations to be republished in full. However, the ACFR recognizes that in those instances in which it is still possible for text to be retrieved from the CFR data base, the decision of whether to reinstate regulations by retroactive amendment or by full text republication is best left to the discretion of the individual agency.

Commenters who cited the annual revision date of the CFR title affected as the appropriate termination point for reinstating expired regulations should be aware that the CFR data base is subject to continuous updating to keep pace with changes in Federal regulations. It is the status of the text in the regularly updated data base at any given time that determines whether an expired rule may be reinstated, rather than the revision date of the CFR title. This procedure is necessary to ensure that new revisions of the CFR are delivered on a prompt basis.

Commenters should also bear in mind that the once yearly revision of the CFR is a minimum standard. The ACFR proposed § 18.16 to accommodate the prospect that the CFR may be made available in a more frequently updated form in the future.

As originally proposed, § 18.16 did not define the term "expired" within the regulatory text. Several commenters

were confused as to the type of expired material to which § 18.16 applies. To clarify the focus of § 18.16, the ACFR modified the rule language to limit the application of § 18.16 to regulations which have "expired by their own terms". With this modification it should be clear that § 18.16 narrowly applies to rules of expressly limited duration which have expired under the terms set out in the effective dates section of the preamble or in the text of the rule itself.

Another misperception among commenters relates to rules which are currently being enforced but only have application with respect to past years. For example: the IRS retains rules in the CFR applicable to obligations and liabilities arising in past tax years; the Federal Crop Insurance Corporation carries rules relating to past crop years; the Health Care Financing Administration has regulations concerning Medicare and Medicaid benefits and payments which are applicable within various time periods; and the National Highway Traffic Safety Administration retains safety and fuel economy rules relating to a number of past model years.

These types of currently enforceable rules having prior application periods are not rules of expressly limited duration as contemplated by § 18.16. Agencies may continue to carry rules such as these in the CFR.

Another commenter opposed prompt removal of expired regulations from the CFR data base on the basis that removal should only be made at the agency's initiative. The ACFR points out that OFR does not remove regulations on its own initiative. Section 18.16 refers to regulations of expressly limited duration that have expired by their own terms. Removal of such regulations is self-executing in the sense that when the OFR finds it necessary to delete such material from the CFR data base, it is simply carrying out an agency's original instructions. These instructions are found in the effective dates section of the preamble or in text of the rule itself.

It should be noted that § 21.6 already requires agencies to submit notification by document for publication in the **Federal Register** when a codified regulation expires. Although the procedure for removal under § 21.6 might seem to be inconsistent with the procedure inherent in § 18.16, in practice, OFR will only implement an agency's original removal instructions as a last resort when the agency has failed to submit timely notification as required by § 21.6. The ACFR views these two procedures not as contradictory provisions, but rather as a necessary redundancy to ensure that the FR/CFR publication system is currently updated. While the addition of § 18.16 will enable the OFR to work toward a more current data base, the ACFR stresses that it continues to be the agencies' responsibility to follow § 21.16 to keep the CFR current.

Several commenters objected to § 18.16 by citing the expense of republication. The ACFR acknowledges that its requirement of full text republication could result in higher printing costs in some cases. However, such costs are largely avoidable when agencies monitor their regulations and make timely amendments.

Some commenters noted that there are circumstances in which it is not possible for an agency to amend its regulations until after the expiration date has passed. To address this concern as well as cost considerations cited above, the ACFR modified § 18.16 to require that agencies republish expired regulations in full text when the OFR has in fact deleted the regulations from the CFR data base. Agencies should consult with the OFR to determine the status of the text of regulations being reinstated. This should be done before the reinstatement document is submitted to agency officials for clearance and signature.

Even though under the new § 18.16 avoidance of full text republication may still be possible in some instances, the ACFR continues to strongly recommend that agencies publish rules in full when reinstating expired regulations. This procedure unambiguously satisfies the legal requirements for rulemaking and is clearly the most convenient for users of the FR/CFR publication system.

One commenter raised the issue of court ordered stays affecting regulations that are due to expire. The commenter correctly pointed out that OFR would not necessarily be aware of such court orders. The ACFR responds by noting that it is the responsibility of the agency to keep OFR informed. [See 1 CFR 18.17(c).] There should be no difficulty in preserving stayed regulations in the data base if agencies are conscientious in alerting OFR.

Finally, one commenter requested clarification as to whether a document that republishes reinstated rules in full should be a proposed or final rule. The extent to which the notice and comment provisions of the APA, 5 U.S.C. 551 *et seq.*, apply to reinstated rules is a question that is within the individual agency's discretion to determine.

Effective Dates and Time Periods

In 1 CFR 18.17, paragraph (a) is revised in accordance with the OFR's current practice, to reflect the fact that many agencies now rely on computed dates. The ACFR no longer expresses a preference for documents setting forth dates certain over documents setting forth time periods measured by a certain number of days after publication.

One commenter suggested that the ACFR revise 1 CFR 18.17(a) by using the words "rule document" rather than "document" and "shall" rather than "should". The ACFR does not agree with either suggestion. Paragraph (a) applies not only to rule but also proposed rule and notice documents which contain either a date certain or a time period measured by a certain number of days after publication in the **Federal Register**.

Paragraph (a) does not require a specific date or time period measured by a certain number of days after publication, because such a requirement would be inconsistent with the fact that some effective dates are dependent upon Congressional action. Thus, the term "shall" is not appropriate.

The ACFR received 5 comments on paragraph 18.17(c) which would require an agency to promptly publish a document in the **Federal Register** announcing an effective date in the event an act of Congress or court decision establishes or changes the effective date of an agency's regulation.

One commenter wanted a clarification of the term "court". The word "Federal" has been added to make that clarification.

Two commenters were concerned about publishing a document prior to a final determination by a court of last resort. To meet this concern, the word "dispositive" has been added to the regulation.

One commenter was concerned that the regulation would be inconsistent with the notice and comment requirements of the APA, 5 U.S.C. 553. This rule is not inconsistent with the APA. The documents required to be published in the **Federal Register** under 1 CFR 18.17 are ones in which there is no discretion on the part of the agency and therefore nothing for the public to comment on in accordance with 5 U.S.C. 553.

The responsibility for keeping agency regulations current and consistent with relevant acts of Congress and court orders rests with each agency. The APA requires that agencies provide notice of rulemaking by means of publication in the **Federal Register**. The ACFR takes the position that notice of a change to a regulation's effective date is an integral element of any rulemaking. Therefore, any change to an effective date due to act of Congress or court order should be published in the **Federal Register**.

Another commenter pointed out that not only acts of Congress but also Congressional action can establish an effective date. For example, some agencies must submit their regulations for Congressional review for a specified period of time based on days Congress is in session. The regulation has been expanded to also include Congressional action.

The OFR has received agency rulemaking documents that contained effective dates dependent upon Congressional action. Additionally, court orders or acts of Congress occasionally establish or change the effective date of an agency's regulation. In either of these instances, the public is only made aware of the changes in effective dates in a timely, convenient manner if the agency publishes a **Federal Register** document. Clearly the public has an interest in knowing the date on which compliance with agency regulations becomes mandatory. In most cases, the public can rely on the FR/CFR system to supply the effective date for any regulation.

In the past, the OFR has received a few agency documents, which contained both an effective date dependent upon Congressional action and language to the effect that persons interested in the effective date of the regulations should call the agency's contact person. Such an added burden upon the regulated public is unhelpful and unnecessary when **Federal Register** publication is available and required as the source of legal notice of rulemaking by the APA.

Furthermore, a practical consideration includes the burden such a vague effective date places on OFR editors updating the annual CFR volumes. When agency documents refer the public to the agency for a regulation's effective date, OFR editors must call the agency to discover the status of each such regulation prior to updating the yearly revision of the CFR volumes. Thus, the OFR as well as the public, must go outside the FR/CFR system to discover the current status of these regulations.

A second consideration is the ACFR's goal to improve Federal agencies' access to the most current text of the CFR. In order to implement this goal and maintain an orderly scheme of codification, the OFR editors must know the effective date of each regulation.

This regulation satisfies the legal requirements for rulemaking, relieves a presently existing burden on the public, helps maintain an orderly system of codification, and is compatible with ACFR's plans to fully implement a currently maintained data base. For these reasons, the ACFR amends 1 CFR 18.17 by adding a new paragraph (c) to require that an agency promptly publish a document in the **Federal Register** announcing the effective date in the event an effective date is dependent upon Congressional action, or an act of Congress or a dispositive Federal court decision establishes or changes the effective date of an agency regulation.

Updating Regulations

The ACFR has the statutory responsibility for maintaining the entire FR/CFR publication system and preserving its practical usefulness. This governmentwide responsibility requires that the ACFR issue regulations that will ensure and facilitate access to Government documents.

Some of the regulations in 1 CFR are simply out-of-date. The ACFR, therefore, is removing or amending these regulations to reflect current publication procedures.

The ACFR received several comments supporting the proposal to update its regulations and expressing appreciation to the OFR staff for its document drafting and reviewing services. Through this consultative process, the OFR staff will continue to work with agencies to resolve their document drafting problems.

The ACFR makes a nomenclature change in 1 CFR 2.3. The change corrects the name of the OFR's parent agency to the National Archives and Records Administration.

Some of the regulations in 1 CFR are gender specific. Sections that contain gender specific terminology, 1 CFR 2.4, 1 CFR 5.3, 1 CFR 9.1, 1 CFR 16.2, 1 CFR 16.3, 1 CFR 16.4, 1 CFR 17.4, 1 CFR 18.7, 1 CFR 20.1, 1 CFR 21.14, and 1 CFR 21.42 are amended to eliminate gender specification.

The title of "The United States Government Manual" is corrected in 1 CFR 2.5, 1 CFR 9.1, the Part heading of 1 CFR Part 20, and 1 CFR 20.1. Also, the "Federal Register Index" and the "LSA (List of CFR Sections Affected)" are added to the list of publications in paragraph (c) of 1 CFR 2.5.

The ACFR makes minor technical changes to 1 CFR 3.2 and to the section heading of 1 CFR 3.3. One commenter suggested that the word "filed" in 1 CFR 3.2(b) be replaced with the word "available". The ACFR defines the word "filing" in § 1.1 of its regulations as "making a document available for public inspection at the Office of the Federal Register . . .". The addition of the phrase "for public inspection" after the word "filed" or "filing" in 1 CFR 5.2, 5.3, and 18.4 is consistent with the ACFR's use of the word "filing" throughout its regulations. The ACFR has clarified the usage of the term "filing" under the Federal Register Act and will not adopt the commenter's suggested language change as the suggested language could result in confusion.

The regulations at 1 CFR 5.2 and 5.3 are clarified by adding the phrase "filed for public inspection" in place of the word "filed" in accordance with the language and content of 44 U.S.C. 1503. 1 CFR 5.6 is also clarified.

The categories of documents listed in 1 CFR 5.9 are clarified and expanded when necessary to reflect the current publication requirements of the ACFR. One commenter suggested that including "general policy statements" in the rules and regulations category of 1 CFR 5.9(b) is misleading since policy statements that are not related to any rule and do not have general applicability and legal effect appear in the notices category. The ACFR has therefore clarified paragraph (b) to include "general policy statements concerning regulations".

Another commenter asked why temporary and interim rules are not published in the CFR or listed as rule category documents in 1 CFR 5.9. The ACFR regards all permanent, temporary and interim rules simply as "rules" under section 5.9, publishes them in the rules category of the **Federal Register** and codifies them in the CFR if the rules are in effect as of the revision date of the CFR title affected.

In 1 CFR 6.5, the term "index-digests" is changed to "indexes, digests" and the section is clarified. The OFR publishes both indexes and digests, but not index-digests.

The term "general applicability and current or future effect" is changed to "general applicability and legal effect" in 1 CFR 8.1. This change adopts the language used in 44 U.S.C. 1505 and is consistent with the ACFR's language in 1 CFR 5.2.

The language in paragraph (c) of 1 CFR 8.3 is clarified.

The Code of Federal Regulations Index now contains the parallel tables of authorities and rules described in 1 CFR 8.5. The ACFR is updating and clarifying this section to reflect current practice.

The ACFR is clarifying the section heading of 1 CFR 15.4. This section's text pertains to the reproduction and certification of copies of acts and documents.

The ACFR is removing 1 CFR 15.5. Information on the availability of OFR publications controlled by the ACFR has been consolidated in the new Subchapter D. The availability of the slip laws and the U.S. Statutes at Large is not controlled by the ACFR and,

therefore, reference to their availability is removed.

An addition to 1 CFR 16.2 provides that agency liaison officers shall be available to discuss documents submitted for publication with the OFR editors. This provision emphasizes the importance the ACFR places on this aspect of the liaison officer's duties.

The word "agency" is added to the text for identification purposes in 1 CFR 16.2, 16.3, and 16.4.

The OFR's procedures require each agency requesting publication on the emergency schedule to submit its request by letter. Therefore, 1 CFR 17.4 is revised to reflect this procedure by removing the phrase "if time permits".

The services provided in 1 CFR 17.5 in conjunction with the transmittal of documents by telecommunication are no longer needed due to the availability of expedited mail services. Therefore, this section is removed.

The term "unusual tabulations" in 1 CFR 17.6, is changed to "unusual or lengthy tables". Additionally, a provision that the OFR staff will notify an agency if its document must be assigned to a deferred schedule is added to § 17.6 to reflect the OFR's current notification procedure.

The regulation on submission of an original document and copies at 1 CFR 18.1 needs clarification and correction. The provision for documents printed on both sides in § 18.1 does not reflect the current OFR practice. The ACFR is amending § 18.1 to require that if an agency submits a document printed on both sides, one of the copies sent by the agency must be a collated, single-sided copy. Additionally, due to the availability of expedited mail services, paragraph (b) is out-of-date and is removed. The footnote to 1 CFR 18.1 is revised and updated. The footnote's reference to a 1972 document is removed because it is outdated.

The Director of the Federal Register's policy on combined category documents is clarified in the revision of 1 CFR 18.2.

Some of the regulations in 1 CFR include the term "rulemaking" as two words. The sections in the regulations that have rulemaking printed as two words, 1 CFR 18.2, 1 CFR 18.4, and 1 CFR 22.5, are revised to a one word spelling.

In 1 CFR 18.3, a new paragraph (c) is added to clarify that receipt dates of documents are determined at the time a signed original and clear and legible copies are received. Additionally, the ACFR is amending § 18.3(a) by removing the obsolete option of filing with the Administrative Committee.

A revision of 1 CFR 18.4 clarifies certain OFR format requirements. Paragraph (a), containing the format requirements for margins and page size, is removed. The OFR's Document Drafting Handbook is the proper source of technical and editorial information concerning OFR's drafting requirements. Additionally, language is added to 1 CFR 18.4 to reflect the fact that the OFR does not accept press releases for publication in the **Federal Register**.

The ACFR revises and makes minor technical changes to 1 CFR 18.5. Obsolete copying procedures are deleted and paragraph (c) is revised and redesignated more appropriately as 1 CFR 18.3(c).

An existing incomplete sentence is revised in 1 CFR 18.6.

The ACFR revises 1 CFR 18.9 to require that documents conform to the current edition of the U.S. Government Printing Office Style Manual in all matters of style. The Style Manual is intended to facilitate Government printing and ensure editorial quality. One commenter suggested that an edition date be set out in the regulation. By act of Congress, the Public Printer is authorized to determine the form and style of Government printing. Due to its official status, no confusion results from specifying that the most current edition be used.

Material on forms is included in 1 CFR 18.10. Paragraph (a) is clarified to reflect that a clear and legible original form or illustration, or a clear and completely legible reproduction shall be included in the original document and each certified copy when it is necessary to publish a form or illustration. The OFR finds that original forms are often needed in the publication process. Copies of forms occasionally are not completely legible due to the small print used for some portions of the forms.

Obsolete material in § 18.10 is removed and a new provision is added in paragraph (b) to provide that documents containing tabular material may be assigned to the deferred publication schedule. One commenter suggested that paragraph (b) be revised to indicate that "unusual or lengthy" tabular material may be assigned to the deferred publication schedule. This suggestion is not adopted since paragraph (b) references § 17.6 and this language is included in § 17.6.

The ACFR removes 1 CFR 18.11 because it does not reflect the OFR's current practice.

The language in 1 CFR 18.12 is revised and simplified. One commenter suggested that the proposed revision of the introductory text of 1 CFR 18.12(c) could result in agency documents that do not adequately disclose the basis of rules or respond to public comments. It is the responsibility of each agency to issue documents in accordance with the requirements of the APA and applicable case law. The ACFR's use of the word "may" ensures that each agency has discretion to fulfill the requirements of the APA as it sees fit.

Material reflecting the OFR's current procedures for the correction of errors in documents is included in 1 CFR 18.13. A new paragraph (b) is added reflecting the OFR's procedures for filing for public inspection and ultimate retention of revoking or correcting letters.

Two comments were received on proposed 1 CFR 18.13. One commenter requested further guidance on use of correction letters and clarification of paragraph (a). Paragraph (a) has been revised to reflect the OFR's current policy that minor corrections may be made to documents filed for public inspection, but not yet published, with a timely agency letter. Extensive corrections, however, may require agency withdrawal of the document from the publication schedule in order to prepare the correction. The decision as to when changes necessitate withdrawal of a document from a publication schedule is a production determination that is made by the OFR staff.

Another commenter asked how long the withdrawing or correcting letter mentioned in 1 CFR 18.13 will be retained by the OFR. Each letter received under § 18.13 will be attached to the document it affects and retained as long as that document is retained. The prescribed retention schedules for rules, proposed rules and notices are fifteen years, five years and one year, respectively.

The ACFR has also replaced the word "revoking" with "withdrawing" in § 18.13 for consistency with the section heading.

The ACFR removes 1 CFR 18.14 because it does not reflect the OFR's current procedures for correction of errors in documents. One commenter was confused by the removal of 1 CFR 18.14 and requested that a new regulation set forth the OFR's current procedures for the correction of errors in documents. This had already been accomplished in § 18.13.

The ACFR is removing superannuated material from 1 CFR 18.20. Provisions for agency actions by December 31, 1981, and April 1, 1982, are no longer current and are removed.

Part 19, which is based upon two Executive orders, has been amended by E.O. 12080. The ACFR revises the current authority citation for Part 19 and 1 CFR 19.4 to reflect the addition of this Executive order. The ACFR also adds an

informational footnote on the availability of the publication "Specifications for Descriptions of Tracts of Land for Use in Executive Orders and Proclamations" to 1 CFR 19.1.

The text of 1 CFR 20.1 is restructured.

In 1 CFR 20.3, the ACFR removes the language requiring submission of charts in duplicate and clarifies other language in this section. It is not the OFR's current practice to require submission of charts in duplicate.

To avoid unnecessary duplication, a phrase is added to 1 CFR 20.4 providing that descriptions of administrative units common to most agencies will not be accepted for publication in The United States Government Manual.

In order to reflect current OFR procedures, 1 CFR 21.1 is revised to require each agency that prepares a document subject to codification to include words of issuance and amendatory language describing the precise relationship of the new provisions to the CFR.

The ACFR removes 1 CFR 21.4 and 1 CFR 21.15. Neither section reflects the OFR's current procedures.

It is the practice of the OFR to accept an agency document that amends more than one title, or more than one chapter of the CFR. Therefore, the ACFR removes 1 CFR 21.5.

The text of 1 CFR 21.6 is restructured and language is added to clarify the OFR's requirement that agencies must notify the OFR of the expiration of codified material by document for publication in the **Federal Register**.

The ACFR is adding a new paragraph (c) to 1 CFR 21.8 to clarify that chapter and subchapter assignments are made by the OFR, not by the agency. Two commenters suggested that 1 CFR 21.8(c) be revised to state that chapter and subchapter assignments are made by the OFR after agency consultation. The ACFR concurs. The OFR is responsive to agency needs and has always and will continue to consult with appropriate agency personnel prior to making chapter and subchapter assignments.

In 1 CFR 21.11, the standard organization of the CFR is revised to include a new example of paragraph designations.

The reservation of numbers at the end of related parts or sections to allow for future expansion is an agency option. Therefore, the ACFR revises the obsolete requirement for agency reservation of numbers at 1 CFR 21.12 and makes the reservation of numbers optional.

The ACFR is removing 1 CFR 21.13 because it is not consistent with current OFR guidance to agencies.

The ACFR is moving the provision dealing with deviations from the standard designations from its proposed location in 1 CFR 21.11(b) to 1 CFR 21.14(a). Section 21.14 has an existing provision for deviation from standard CFR designations and is revised to include a thorough description of when deviations from standard CFR designation will be permitted.

The ACFR received several comments about proposed § 21.11(b) prohibiting deviations from standard CFR designations unless approved in advance by the OFR. Many commenters asked for a more detailed explanation of this section, particularly whether existing numbering deviations in agency regulations would be permitted to remain in the CFR.

The ACFR is not requiring agencies to reach back and rewrite regulations already in the CFR. However, the ACFR is limiting future numbering deviations by permitting them subject to the prior approval of the OFR. Approval must be requested for all final rule documents that contain unusual numbering, including any documents that amend existing regulations that contain unusual numbering.

In response to commenter's requests for clarification, the ACFR is adding a description of the procedure agencies should follow when requesting approval of a deviation from standard CFR designations.

The table of contents in a document must list appendix headings to the part or subpart in addition to headings for the subparts, undesignated center headings and sections in the part as described in 1 CFR 21.18. The ACFR is updating 1 CFR 21.18 by adding appendix headings to the part or subpart to the list of items that shall appear in the table of contents. This revision reflects the OFR's current practice.

The ACFR removes 1 CFR 21.22. One commenter suggested that 1 CFR 21.4, 21.13, 21.15 and 21.22 be revised rather than removed. These sections no longer reflect the OFR's current editorial and technical procedures and are removed. The ACFR is working towards separating out purely editorial and technical instructions from its regulations. The OFR's functional Document Drafting Handbook is the proper source for nonregulatory document drafting guidance to agencies.

The regulation concerning placing and amending authority citations, 1 CFR 21.43, is clarified and corrected to include the provision that the authority citation shall appear at the end of the table of contents for a part or after each subpart heading within the text of a part.

The ACFR also clarifies 1 CFR 21.45.

The examples in 1 CFR 21.52 are revised to reflect the OFR's format for authority citations.

One commenter suggested that paragraphs (a) and (b) of § 21.52 be clarified. The ACFR agrees. The text of 1 CFR 21.52 is restructured and language is added to clarify that citations to titles of the United States Code, may be cited without Public Law or U.S. Statutes at Large citation. Citations to Public Laws and U.S. Statutes at Large are optional when the United States Code is cited.

The undesignated center headings in Parts 17 and 22 are designated as subpart headings.

An editorial change is made throughout Part 22 from use of the words "rule making proposals" and "notices of proposed rule making" to the words "proposed rules". This change is consistent with the proposed rules category of documents described in new 1 CFR 5.9. To conform with this editorial change, the part heading, table of contents, and subpart headings in Part 22 have been revised.

It is no longer necessary to place the CFR citation referred to in 1 CFR 22.6 in brackets. Obsolete language requiring the use of brackets is removed.

Procedural Matters

This is not a major rule as defined by Executive Order 12291. The rule has no impact on small entities as described in the Regulatory Flexibility Act. (5 U.S.C. 601 et seq.). The rule does not contain any information collection or recordkeeping requirements as defined in the Paperwork Reduction Act of 1980. (44 U.S.C. 3501 et. seq.).

List of Subjects in 1 CFR, Parts 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21 and 22

Administrative practice and procedure, Government publications.

Redesignation Table

Old section	New section
	Parts 11-12 (Subchapter D)
3.4(a)	11.1
3.4(b) introductory text	Removed
3.4(b)(1)	Removed
3.4(b)(2)	Removed
3.4(b)(3)	11.2
3.4(b)(4)	11.3
3.4(b)(5)	11.4
3.4(b)(6)	11.5
3.4(b)(7)	11.6
3.4(b)(8)	11.7
7.1	12.1(a)
7.4	12.1(b)
7.5	12.1(c)
7.6	12.1(d)
8.8	12.2
9.3(a)	12.3(a)

Old section	New section
9.3(b)	12.3 (b) and (c)
10.4	12.4
10.14	12.5
Parts 15–22 (Subchapter D).	Parts 15–22 (Subchapter E)
15.5	Removed
17.6	17.7
18.1(a)	18.1
18.1(b)	Removed
18.5(a)	18.5
18.5(b)	Removed
18.5(c)	18.5(c)
18.9 introductory text and (a).	18.9
18.9(b)	Removed
18.9(c)	Removed
18.10(a)	Removed
18.10(b)	18.10(a)
18.10(c)	Removed
18.11	Removed
18.14	Removed
18.20(a)	Removed
18.20(b)	18.20(a)
18.20(c)	18.20(b)
20.1 introductory text	20.1(a)
20.1(a)	20.1(a)(1)
20.1(b)	20.1(a)(2)
20.1(c)	20.1(a)(3)
20.1(d)	20.1(a)(4)
20.1 final undesignated paragraph.	20.1(b)
20.4	20.4 (a) and (b)
21.4	Removed
21.5	Removed
21.11(a)	21.11(a)(1)
21.11(b)	21.11(a)(2)
21.11(c)	21.11(a)(3)
21.11(d)	21.11(a)(4)
21.11(e)	21.11(a)(5)
21.11(f)	21.11(a)(6)
21.11(g)	21.11(a)(7)
21.11(h)	21.11(a)(8)
21.13	Removed
21.15	Removed
21.22	Removed

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

PART 2—GENERAL INFORMATION

1. The authority citation for Part 2 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189; 1 U.S.C. 112; 1 U.S.C. 113.

§ 2.3 [Amended]

2. In § 2.3(a) remove the words "Service of the General Services."

In § 2.3(c) remove the word "Service" and add, in its place, the word "Administration".

§ 2.4 [Amended]

3. In § 2.4(b) remove the word "his" and add, in its place, the words "the Director's".

4. Section 2.5 is amended by revising paragraph (c) to read as follows:

§ 2.5 Publication of statutes, regulations, and related documents.

* * * * *

(c) Based on source materials that are officially related to the acts and documents filed under paragraph (a) of this section, the Office also publishes "The United States Government Manual," the "Public Papers of the Presidents of the United States," the "Weekly Compilation of Presidential Documents," the "Federal Register Index," and the "LSA (List of CFR Sections Affected)".

PART 3—SERVICES TO THE PUBLIC

1. The authority citation for Part 3 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

§ 3.2 [Amended]

2. In § 3.2(a) remove the word "Current" and capitalize the word "documents"; and remove the figure "8401" and add, in its place, the figure "8301".

In § 3.2(d) remove the words "Manual, typewritten, or other copies" and add, in their place, the word "Photocopies".

3. Section 3.3 is amended by revising the section heading to read as follows:

§ 3.3 Reproduction and certification of copies of acts and documents.

* * * * *

§ 3.4 [Removed]

4. Section 3.4 is removed.

PART 5—GENERAL

1. The authority citation for Part 5 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

2. Section 5.2 is amended by revising the section heading and the introductory text to read as follows:

§ 5.2 Documents required to be filed for public inspection and published.

The following documents are required to be filed for public inspection with the Office of the Federal Register and published in the **Federal Register**:

* * * * *

3. Section 5.3 is revised to read as follows:

§ 5.3 Publication of other documents.

Whenever the Director of the Federal Register considers that publication of a document not covered by § 5.2 would be in the public interest, the Director may allow that document to be filed for public inspection with the Office of the Federal Register and published in the **Federal Register**.

4. Section 5.6 is revised to read as follows:

§ 5.6 Daily publication.

There shall be an edition of the **Federal Register** published for each official Federal working day.

5. Section 5.9 is amended by revising paragraphs (a), (b), (c), and (d) to read as follows:

§ 5.9 Categories of documents.

* * * * *

(a) *The President.* This category contains each Executive order or Presidential proclamation and each other Presidential document that the President submits for publication or orders to be published.

(b) *Rules and regulations.* This category contains each document having general applicability and legal effect, except those covered by paragraph (a) of this section. This category includes documents subject to codification, general policy statements concerning regulations, interpretations of agency regulations, statements of organization and function, and documents that affect other documents previously published in the rules and regulations section.

(c) *Proposed rules.* This category contains each notice of proposed rulemaking submitted pursuant to § 553 of Title 5, United States Code, or any other law, which if promulgated as a rule, would have general applicability and legal effect. This category includes documents that suggest changes to regulations in the Code of Federal Regulations, begin a rulemaking proceeding, and affect or relate to other documents previously published in the proposed rules section.

(d) *Notices.* This category contains miscellaneous documents applicable to the public and not covered by paragraphs (a), (b), and (c) of this section. This category includes announcements of meetings and other information of public interest.

PART 6—INDEXES AND ANCILLARIES

1. The authority citation for Part 6 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

2. Section 6.5 is revised to read as follows:

§ 6.5 Indexes, digests, and guides.

(a) The Director of the Federal Register may order the preparation and publication of indexes, digests, and similar guides, based on laws, Presidential documents, regulatory documents, and notice materials published by the Office, which will serve users of the **Federal Register**. Indexes, digests, and similar guides will

be published yearly or at other intervals as necessary to keep them current and useful.

(b) Each index, digest, and guide is considered to be a special edition of the **Federal Register** whenever the public need requires special printing or special binding in substantial numbers.

PART 7—[REMOVED]

1. Part 7 is removed.

PART 8—CODE OF FEDERAL REGULATIONS

1. The authority citation for Part 8 continues to read as follows:

Authority: 44 U.S.C. 1506, 1510; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

§ 8.1 [Amended]

2. In § 8.1(a) remove the words "current or future" and add, in their place, the word "legal".

§ 8.3 [Amended]

3. Section 8.3(c) is amended by adding the words "as a codified regulation" after the word "published".

4. Section 8.5 is amended by revising paragraphs (a), (b), and (c) to read as follows:

§ 8.5 Ancillaries.

* * * * *

(a) *Parallel tables of statutory authorities and rules.* In the Code of Federal Regulations Index or at such other place as the Director of the Federal Register considers appropriate, numerical lists of all sections of the current edition of the United States Code (except section 301 of Title 5) which are cited by issuing agencies as rulemaking authority for currently effective regulations in the Code of Federal Regulations. The lists shall be arranged in the order of the titles and sections of the United States Code with parallel citations to the pertinent titles and parts of the Code of Federal Regulations.

(b) *Parallel tables of Presidential documents and agency rules.* In the Code of Federal Regulations Index, or at such other place as the Director of the Federal Register considers appropriate, tables of proclamations, Executive orders, and similar Presidential documents which are cited as rulemaking authority in currently effective regulations in the Code of Federal Regulations.

(c) *List of CFR sections affected.* Following the text of each Code of Federal Regulations volume, a numerical list of sections which are affected by documents published in the **Federal Register.** (Separate volumes, "List of Sections Affected, 1949–1963" and "List of CFR Sections Affected, 1964–1972", list all sections of the Code which have been affected by documents published during the period January 1, 1949, to December 31, 1963, and January 1, 1964, to December 31, 1972, respectively.) Listings shall refer to **Federal Register** pages and shall be designed to enable the user of the Code to find the precise text that was in effect on a given date in the period covered.

§ 8.8 [Removed]

5. Section 8.8 is removed.

PART 9—THE UNITED STATES GOVERNMENT MANUAL

1. The part heading is revised to read as shown above.

2. The authority citation for Part 9 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

3. Section 9.1 is revised to read as follows:

§ 9.1 Publication required.

The Director of the Federal Register shall separately publish annually or at times designated by the Administrative Committee of the Federal Register a special edition of the **Federal Register** called "The United States Government Manual" or any other title that the Administrative Committee of the Federal Register considers appropriate. The Director of the Federal Register may issue special supplements to the Manual when such supplementation is considered to be in the public interest.

§ 9.3 [Removed]

4. Section 9.3 is removed.

PART 10—PRESIDENTIAL PAPERS

1. The authority citation for Part 10 is revised to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

§ 10.4 [Removed]

2. Section 10.4 is removed.

§ 10.14 [Removed]

3. Section 10.14 is removed.

Subchapter D—[Redesignated as Subchapter E]

1. Subchapter D consisting of Parts 15 through 22, is redesignated as Subchapter E and new Subchapter D, consisting of Parts 11 and 12, is added to read as follows:

SUBCHAPTER D—AVAILABILITY OF OFFICE OF THE FEDERAL REGISTER PUBLICATIONS

PART 11—SUBSCRIPTIONS

Sec.
11.1 Subscription by the public.
11.2 Federal Register.
11.3 Code of Federal Regulations.
11.4 The United States Government Manual.
11.5 Public Papers of the Presidents of the United States.
11.6 Weekly Compilation of Presidential Documents.
11.7 Federal Register Index.
11.8 LSA (List of CFR Sections Affected).

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

§ 11.1 Subscription by the public.

The publications described in § 2.5 of this chapter are printed by the Government Printing Office and are sold by the Superintendent of Documents, Government Printing Office, Washington, DC 20402. All fees are payable in advance to the Superintendent of Documents, Government Printing Office. They are not available for free distribution to the public.

§ 11.2 Federal Register.

Daily issues, including the monthly Federal Register Index and the LSA (List of CFR Sections Affected), will be furnished by mail to subscribers for $340 per year in paper form; $195 per year in microfiche form; or $37,500 per year for the magnetic tape. Six-month subscriptions are also available at one-half the annual rate. Limited quantities of current or recent copies may be obtained for $1.50 per copy in paper or microfiche form, or $175 per magnetic tape.

§ 11.3 Code of Federal Regulations.

A complete set will be furnished by mail to subscribers for $620 per year for the bound, paper edition; $188 per year for the microfiche edition; or $21,750 per year for the magnetic tape. Individual copies of the bound, paper edition of the Code volumes are sold at prices determined by the Superintendent of Documents under the general direction of the Administrative Committee. The price of an individual volume in microfiche form is $2.00 per copy, or $125 per magnetic tape.

§ 11.4 The United States Government Manual.

Copies of the bound, paper edition of the Manual are sold at a price determined by the Superintendent of Documents under the general direction of the Administrative Committee. The

price of the magnetic tape is $125 per tape.

§ 11.5 Public Papers of the Presidents of the United States.

Copies of annual clothbound volumes are sold at a price determined by the Superintendent of Documents under the general direction of the Administrative Committee.

§ 11.6 Weekly Compilation of Presidential Documents.

Copies will be furnished to subscribers in paper form for $96 per year by first-class mail or $55 per year by non-priority mail. The price of an individual copy in paper form, is $2.00.

§ 11.7 Federal Register Index.

The annual subscription price for the monthly Federal Register Index, purchased separately, in paper form, is $19. Individual copies in paper form are $1.50 per copy.

§ 11.8 LSA (List of CFR Sections Affected).

The annual subscription price for the monthly LSA (List of CFR Sections Affected), purchased separately, in paper form, is $21. Individual copies in paper form are $1.50 per copy.

PART 12—OFFICIAL DISTRIBUTION WITHIN FEDERAL GOVERNMENT

Sec.
12.1 Federal Register.
12.2 Code of Federal Regulations.
12.3 The United States Government Manual.
12.4 Weekly Compilation of Presidential Documents.
12.5 Public Papers of the Presidents of the United States.

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

§ 12.1 Federal Register.

(a) Copies of the daily **Federal Register** in paper or microfiche form shall be made available to the following without charge:

(1) *Members of Congress.* Each Senator and each Member of the House of Representatives will be provided with not more than five copies of each daily issue based on a written request to the Director of the Federal Register.

(2) *Congressional committees.* Each committee of the Senate and the House of Representatives will be provided with the number of copies needed for official use based on a written request from the chairperson, or authorized delegate, to the Director of the Federal Register.

(3) *Supreme Court.* The Supreme Court will be provided with the number of copies needed for official use based on a written request to the Director of the Federal Register.

(4) *Other courts.* Other constitutional or legislative courts of the United States will be provided with the number of copies needed for official use based on a written request from the Director of the Administrative Office of the U.S. Courts, or authorized delegate, to the Director of the Federal Register.

(5) *Executive agencies.* Each Federal executive agency will be provided with the number of copies needed for official use based on a written request from the agency Federal Register authorizing officer, or the alternate, designated under § 16.1 of this chapter, to the Director of the Federal Register.

(b) Requisitions for quantity overruns of specific issues to be paid for by the agency are available as follows:

(1) To meet its needs for special distribution of the **Federal Register** in substantial quantity, any agency may request an overrun of a specific issue.

(2) An advance printing and binding requisition on Standard Form 1 must be submitted by the agency directly to the Government Printing Office, to be received not later than 12 noon on the working day before publication.

(c) Requisitions for quantity overruns of separate part issues to be paid for by the agency are available as follows:

(1) Whenever it is determined by the Director of the Federal Register to be in the public interest, one or more documents may be published as a separate part (e.g., Part II, Part III) of the **Federal Register.**

(2) Advance arrangements for this service must be made with the Office of the Federal Register.

(3) Any agency may request an overrun of such a separate part by submitting an advance printing and binding requisition on Standard Form 1 directly to the Government Printing Office, to be received not later than 12 noon on the working day before the publication date.

(d) An agency may order limited quantities of extra copies of a specific issue of the **Federal Register** for official use, from the Superintendent of Documents, to be paid for by that agency.

(e) Copies of the Federal Register Index and LSA (List of CFR Sections Affected) are included with each **Federal Register** official distribution.

§ 12.2 Code of Federal Regulations.

(a) Copies of the Code of Federal Regulations in paper or microfiche form shall be made available to the following without charge:

(1) *Congressional committees.* Each committee of the Senate and House of Representatives will be provided with the number of copies needed for official use based on a written request from the chairperson, or authorized delegate, to the Director of the Federal Register.

(2) *Supreme Court.* The Supreme Court will be provided with the number of copies needed for official use based on a written request to the Director of the Federal Register.

(3) *Other courts.* Other constitutional and legislative courts of the United States will be provided with the number of copies needed for official use based on a written request from the Director of the Administrative Office of the U.S. Courts, or authorized delegate, to the Director of the Federal Register.

(4) *Executive agencies.* Each Federal executive agency will be provided with the number of copies needed for official use, not to exceed 300 copies of individual titles per agency, based on a written request from the agency Federal Register authorizing officer, or the alternate, designated under § 16.1 of this chapter, to the Director of the Federal Register.

(b) Legislative, judicial, and executive agencies of the Federal Government may obtain additional copies of selected units of the Code, at cost, for official use, by submission, before the press run, of a printing and binding requisition to the Government Printing Office on Standard Form 1.

(c) After the press run, each request for extra copies of selected units of the Code must be addressed to the Superintendent of Documents, to be paid for by the agency making the request.

§ 12.3 The United States Government Manual.

(a) Copies of The United States Government Manual shall be made available to the following without charge:

(1) *Members of Congress.* Each Senator and each Member of the House of Representatives will be provided with twelve copies.

(2) *Congressional committees.* Each committee of the Senate and House of Representatives will be provided with the number of copies needed for official use based on a written request from the chairperson, or authorized delegate, to the Director of the Federal Register.

(3) *Supreme Court.* The Supreme Court will be provided with not more than 18 copies based on a written request to the Director of the Federal Register.

(4) *Other courts.* Other constitutional and legislative courts of the United States will be provided with one copy based on a written request from the Director of the Administrative Office of

the U.S. Courts, or authorized delegate, to the Director of the Federal Register.

(5) *Executive agencies.* Each head of a Federal executive agency and each liaison officer designated under § 16.1 or 20.1 of this chapter will be provided with one copy.

(b) Legislative, judicial, and executive agencies of the Federal Government may obtain additional copies of the Manual, at cost, for official use, by submission, before the press run, of a printing and binding requisition to the Government Printing Office on Standard Form 1.

(c) After the press run, each request for extra copies of the Manual must be addressed to the Superintendent of Documents, to be paid for by the agency making the request.

§ 12.4 Weekly Compilation of Presidential Documents.

(a) Copies of the Weekly Compilation of Presidential Documents shall be made available to the following without charge:

(1) *Members of Congress.* Each Senator and each Member of the House of Representatives will be provided with the number of copies needed for official use based on a written request to the Director of the Federal Register.

(2) *Congressional committees.* Each committee of the Senate and the House of Representatives will be provided with the number of copies needed for official use based on a written request from the chairperson, or authorized delegate, to the Director of the Federal Register.

(3) *Supreme Court.* The Supreme Court will be provided with the number of copies needed for official use based on a written request to the Director of the Federal Register.

(4) *Other courts.* Other constitutional and legislative courts of the United States will be provided with the number of copies needed for official use based on a written request from the Director of the Administrative Office of the U.S. Courts, or authorized delegate, to the Director of the Federal Register.

(5) *Executive agencies.* Each Federal executive agency will be provided with the number of copies needed for official use based on a written request from the agency Federal Register authorizing officer, or the alternate designated under § 16.1 of this chapter, to the Director of the Federal Register.

(b) Legislative, judicial, and executive agencies of the Federal Government may obtain additional copies of selected issues of the Weekly Compilation of Presidential Documents, at cost, for official use, by submission, before the press run, of a printing and binding requisition to the Government Printing Office on a Standard Form 1.

(c) After the press run, each request for extra copies of selected issues must be addressed to the Superintendent of Documents, to be paid for by the agency making the request.

§ 12.5 Public Papers of the Presidents of the United States.

(a) Copies of the Public Papers of the Presidents of the United States shall be made available to the following without charge:

(1) *Members of Congress.* Each Senator and each Member of the House of Representatives will be provided with one copy of each annual publication published during the Member's term in office based on a written request to the Director of the Federal Register.

(2) *Supreme Court.* The Supreme Court will be provided with not more than 12 copies of each publication based on a written request to the Director of the Federal Register.

(3) *Executive agencies.* Each head of a Federal executive agency will be provided with one copy of each annual publication based on a written request from the agency Federal Register authorizing officer, or the alternate, designated under § 16.1 of this chapter, to the Director of the Federal Register.

(b) Legislative, judicial, and executive agencies of the Federal Government may obtain additional copies, at cost, for official use, by submission before the press run, of a printing and binding requisition to the Government Printing Office on Standard Form 1.

(c) After the press run, each request for extra copies must be addressed to the Superintendent of Documents, to be paid for by the agency making the request.

PART 15—SERVICES TO FEDERAL AGENCIES

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

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

2. Section 15.4 is amended by revising the section heading to read as follows:

§ 15.4 Reproduction and certification of copies of acts and documents.

* * * * *

§ 15.5 [Removed]

3. Section 15.5 is removed.

PART 16—AGENCY REPRESENTATIVES

1. The authority citation for Part 16 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

2. Section 16.2 is revised to read as follows:

§ 16.2 Liaison duties.

Each agency liaison officer shall—

(a) Represent the agency in all matters relating to the submission of documents to the Office of the Federal Register, and respecting general compliance with this chapter;

(b) Be responsible for the effective distribution and use within the agency of Federal Register information on document drafting and publication assistance authorized by § 15.10 of this chapter;

(c) Promote the agency's participation in the technical instruction authorized by § 15.10 of this chapter; and

(d) Be available to discuss documents submitted for publication with the editors of the **Federal Register.**

3. Section 16.3 is revised to read as follows:

§ 16.3 Certifying duties.

The agency certifying officer is responsible for attaching the required number of true copies of each original document submitted by the agency to the Office of the Federal Register and for making the certification required by §§ 18.5 and 18.6 of this chapter.

4. Section 16.4 is revised to read as follows:

§ 16.4 Authorizing duties.

The agency authorizing officer is responsible for furnishing, to the Director of the Federal Register, a current mailing list of officers or employees of the agency who are authorized to receive the **Federal Register,** the Code of Federal Regulations, and the Weekly Compilation of Presidential Documents for official use.

PART 17—FILING FOR PUBLIC INSPECTION AND PUBLICATION SCHEDULES

1. The heading to Part 17 is revised to read as shown above.

2. The authority citation for Part 17 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

3. Section 17.1 is designated as Subpart A and a subpart heading is added to read as follows:

Subpart A—Receipt and Processing

4. The undesignated center headings for §§ 17.2, 17.3–17.5, and 17.6 are

designated as Subparts B, C, and D respectively.

5. Section 17.2 is revised to read as follows:

§ 17.2 Procedure and timing for regular schedule.

(a) Each document received shall be filed for public inspection only after it has been received, processed and assigned a publication date.

(b) Except as provided in paragraph (d) of this section, each document received by 2:00 p.m. which meets the requirements of this chapter shall be assigned to the regular schedule. Unless the issuing agency makes special arrangements otherwise, or the Office determines that the document requires a deferred schedule (see 1 CFR 17.7), receipt of a document by 2:00 p.m. is considered to be a request for filing for public inspection and publication on the regular schedule. Documents received after 2:00 p.m. which meet the requirements of this chapter shall be assigned to the next working day's regular schedule.

(c) The regular schedule for filing for public inspection and publication is as follows:

Received before 2:00 p.m.	Filed for public inspection	Published
Monday	Wednesday	Thursday
Tuesday	Thursday	Friday
Wednesday	Friday	Monday
Thursday	Monday	Tuesday
Friday	Tuesday	Wednesday

Where a legal Federal holiday intervenes, one additional work day is added.

(d) Each notice of meeting issued under the "Government in the Sunshine Act" (5 U.S.C. 552b(e)(3)) is placed on immediate public inspection after it has been received, processed, and assigned a publication date.

(1) Each notice received before 4:00 p.m. is scheduled to be published 2 working days later.

(2) Each notice received after 4:00 p.m. is scheduled to be published 3 working days later.

§ 17.3 [Amended]

6. The section heading to § 17.3 is revised to read "Criteria for emergency publication."

7. Section 17.4 is amended by revising the section heading, paragraphs (a) and (b) and adding paragraph (d) to read as follows:

§ 17.4 Procedure and timing for emergency publication.

(a) Each agency requesting publication on the emergency schedule shall briefly describe the emergency and the benefits to be attributed to immediate publication in the **Federal Register**. The request must be made by letter.

(b) The Director of the Federal Register shall assign a document to the emergency schedule whenever the Director concurs with a request for that action and it is feasible.

* * * * *

(d) Each document assigned to the emergency schedule for publication will be filed for public inspection on the working day before publication unless emergency filing for public inspection is also requested.

8. Section 17.5 is revised to read as follows:

§ 17.5 Criteria for emergency filing for public inspection.

An agency may request emergency filing for public inspection for documents to be published under the regular, emergency or deferred publication schedules. Emergency filing for public inspection provides for the fastest possible public access to a document after it has been received, processed and assigned a publication date. Emergency filing for public inspection is considered a special arrangement under § 17.2 of this part that results in deviation from the regular schedule for filing for public inspection. A document receiving emergency filing for public inspection remains on public inspection until it is published according to the schedule for publication.

9. Section 17.6 is redesignated as § 17.7 and a new § 17.6 is added to Subpart C to read as follows:

§ 17.6 Procedure and timing for emergency filing for public inspection.

(a) Each agency requesting emergency filing for public inspection shall briefly describe the emergency and the benefits to be attributed to immediate public access. The request must be made by letter.

(b) The Director of the Federal Register shall approve an emergency filing for public inspection request whenever the Director concurs with a request for that action and it is feasible.

(c) Each document approved for emergency filing for public inspection shall be filed as soon as possible following processing and scheduling.

10. Newly redesignated § 17.7 is amended by revising the section heading, removing the word "tabulations" from paragraph (a) and by adding the words "or lengthy tables" in its place and by adding a paragraph (c) to read as follows:

§ 17.7 Criteria for deferred schedule.

* * * * *

(c) The Office of the Federal Register staff will notify the agency if its documents must be assigned to a deferred schedule.

PART 18—PREPARATION AND TRANSMITTAL OF DOCUMENTS GENERALLY

1. The authority citation for Part 18 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

2. Section 18.1 is revised to read as follows:

§ 18.1 Original and copies required.

Except as provided in § 19.2 of this subchapter for Executive orders and proclamations, each agency submitting a document to be filed and published in the **Federal Register** shall send an original and two duplicate originals or certified copies.[1] However, if the document is printed or processed on both sides, one of the copies sent by the agency must be a collated, single-sided copy.

3. Section 18.2 is revised to read as follows:

§ 18.2 Prohibition on combined category documents.

(a) The Director of the Federal Register will not accept a document for filing and publication if it combines material that must appear under more than one category in the **Federal Register**. For example, a document may not contain both rulemaking and notice of proposed rulemaking material.

(b) Where two related documents are to be published in the same **Federal Register** issue, the agency may insert a cross-reference in each document.

4. Section 18.3 is amended by revising paragraph (a) and adding paragraph (c) to read as follows:

§ 18.3 Submission of documents and letters of transmittal.

(a) Each document authorized or required by law to be filed for public inspection with the Office of the Federal Register and published in the **Federal Register** shall be sent to the Director of the Federal Register.

* * * * *

[1] Agencies with computer processed data are urged to consult with the Office of the Federal Register staff about possible use of the data in the publication process.

(c) Receipt dates are determined at the time a signed original and clear and legible copies are received.

5. Section 18.4 is revised to read as follows:

§ 18.4 Form of document.

(a) A printed or processed document may be accepted for filing for public inspection and publication if it is on bond or similar quality paper, legible, and free of adhesive or correction tape.[2]

(b) A document in the form of a letter or press release may not be accepted for filing for public inspection or publication in the rules and regulations, proposed rules, or notices categories of the **Federal Register**.

6. Section 18.5 is revised to read as follows:

§ 18.5 Certified copies.

The certified copies or duplicate originals of each document must be submitted with the original. Each copy or duplicate must be entirely clear and legible.

7. Section 18.6 is revised to read as follows:

§ 18.6 Form of certification.

Each copy of each document submitted for filing and publication, except a Presidential document or a duplicate original, must be certified as follows:

(Certified to be a true copy of the original)

The certification must be signed by a certifying officer designated under § 16.1 of this chapter.

§ 18.7 [Amended]

8. In § 18.7 in the first sentence, remove the word "his" and add, in its place, the word "the". In the second sentence, remove the word "may" and add, in its place, the word "will".

9. Section 18.9 is revised to read as follows:

§ 18.9 Style.

Each document submitted by an agency for filing and publication shall conform to the current edition of the U.S. Government Printing Office Style Manual in punctuation, capitalization, spelling, and other matters of style.

10. Section 18.10 is revised to read as follows:

§ 18.10 Illustrations, tabular material, and forms.

(a) If it is necessary to publish a form or illustration, a clear and legible original form or illustration, or a clear and completely legible reproduction approximately 8 ½ by 11 inches, shall be included in the original document and each certified copy.

(b) A document that includes tabular material may be assigned to the deferred publication schedule. See § 17.7.

11. Section 18.11 is removed.

12. Section 18.12 is amended by revising the last sentence of paragraph (b) and the introductory text of paragraph (c) to read as follows:

§ 18.12 Preamble requirements.

* * * * *

(b) * * *

(See paragraph (c) of this section).

(c) The agency may include the following information in the preamble, as applicable:

* * * * *

13. Section 18.13 is revised to read as follows:

§ 18.13 Withdrawal or correction of filed documents.

(a) A document that has been filed for public inspection with the Office of the Federal Register but not yet published, may be withdrawn from publication or corrected by the submitting agency. Withdrawals or minor corrections may be made with a timely letter, signed by a duly authorized representative of the agency. Extensive corrections may require agency withdrawal of the document from publication.

(b) Both the originally filed document and the withdrawing or correcting letter shall remain on file. The original document and the withdrawing or correcting letter will be retained by the Office of the Federal Register after the public inspection period expires.

14. Section 18.14 is removed.

15. Section 18.16 is added to read as follows:

§ 18.16 Reinstatement of expired regulations.

Agencies may reinstate regulations removed from the Code of Federal Regulations data base which have expired by their own terms only by republishing the regulations in full text in the **Federal Register**.

16. Section 18.17 is amended by revising paragraph (a) and adding paragraph (c) to read as follows:

§ 18.17 Effective dates and time periods.

(a) Each document submitted for publication in the **Federal Register** that includes an effective date or time period should either set forth a date certain or a time period measured by a certain number of days after publication in the **Federal Register**. When a document sets forth a time period measured by a certain number of days after publication, Office of the Federal Register staff will compute the date to be inserted in the document as set forth in paragraph (b) of this section.

* * * * *

(c) In the event an effective date is dependent upon Congressional action, or an act of Congress or a dispositive Federal court decision establishes or changes the effective date of an agency's regulation, the issuing agency shall promptly publish a document in the **Federal Register** announcing the effective date.

§ 18.20 [Amended]

17. Section 18.20 is amended by removing paragraph (a), redesignating paragraphs (b) and (c) as paragraphs (a) and (b), and amending newly redesignated paragraph (a) introductory text by removing the phrase "Beginning April 1, 1982," and capitalize the word "each".

PART 19—EXECUTIVE ORDERS AND PRESIDENTIAL PROCLAMATIONS

1. The authority citation for Part 19 is revised to read as follows:

Authority: Secs. 1 to 6 of E.O. 11030, 27 FR 5847, 3 CFR, 1959–1963 Comp., p. 610; E.O. 11354, 32 FR 7695, 3 CFR, 1966–1970 Comp., p. 652; and E.O. 12080, 43 FR 42235, 3 CFR, 1978 Comp., p. 224.

§ 19.1 [Amended]

2. Section 19.1(e) is amended by adding footnote 1 after the reference to "Specifications for Descriptions of Tracts of Land for Use in Executive Orders and Proclamations", to read as follows:

[1] Agencies with computer processed data are urged to consult with the Office of the Federal Register staff about possible use of the data in the publication process.

3. Section 19.4 is amended by adding the following sentence to the end to read as follows:

§ 19.4 Proclamations calling for the observance of special days or events.

* * * * *

Notwithstanding the provisions of § 19.2, the Director shall transmit any approved commemorative proclamations to the President.

PART 20—HANDLING OF THE UNITED STATES GOVERNMENT MANUAL STATEMENTS

1. The part heading is revised to read as shown above.

[2] Agencies with computer processed data are urged to consult with the Office of the Federal Register staff about possible use of the data in the publication process.

2. The authority citation for Part 20 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

§ 20.1 [Amended]

3. In § 20.1, the introductory text is designated as paragraph (a) introductory text and amended by capitalizing the word "the" that appears before the words "United States Government Manual"; paragraphs (a) through (d) are redesignated as (a) (1) through (4); and the final undesignated paragraph is designated as paragraph (b) and amended by removing the words "his agency's" and adding, in their place, the word "agency".

4. Section 20.3 is amended by revising paragraphs (a) and (c) to read as follows:

§ 20.3 Organization.

(a) Information about lines of authority and organization may be reflected in a chart if the chart clearly delineates the agency's organizational structure. Charts must be prepared so as to be perfectly legible when reduced to the size of a Manual page. Charts that do not meet this requirement will not be included in the Manual.

* * * * *

(c) Narrative descriptions of organizational structure or hierarchy that duplicate information conveyed by charts or by lists of officials will not be published in the Manual.

5. Section 20.4 is revised to read as follows:

§ 20.4 Description of program activities.

(a) Descriptions should clearly state the public purposes that the agency serves, and the programs that carry out those purposes.

(b) Descriptions of the responsibilities of individuals or of administrative units common to most agencies will not be accepted for publication in the Manual.

PART 21—PREPARATION OF DOCUMENTS SUBJECT TO CODIFICATION

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

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

2. Section 21.1 is amended by revising paragraph (b) to read as follows:

§ 21.1 Drafting.

* * * * *

(b) Each agency that prepares a document that is subject to codification shall include words of issuance and amendatory language that precisely describes the relationship of the new provisions to the Code.

§ 21.4 [Removed]

3. Section 21.4 is removed.

§ 21.5 [Removed]

4. Section 21.5 is removed.

5. Section 21.6 is revised to read as follows:

§ 21.6 Notice of expiration of codified material.

Whenever a codified regulation expires after a specified period by its own terms or by law, the issuing agency shall submit a notification by document for publication in the **Federal Register**.

6. Section 21.8 is amended by adding a new paragraph (c) to read as follows:

§ 21.8 Chapters and subchapters.

* * * * *

(c) Chapter and subchapter assignments are made by the Office of the Federal Register after agency consultation.

7. Section 21.11 is revised to read as follows:

§ 21.11 Standard organization of the Code of Federal Regulations.

(a) The standard organization consists of the following structural units:

(1) Titles, which are numbered consecutively in Arabic throughout the Code;

(2) Subtitles, which are lettered consecutively in capitals throughout the title;

(3) Chapters, which are numbered consecutively in Roman capitals throughout each title;

(4) Subchapters, which are lettered consecutively in capitals throughout the chapter;

(5) Parts, which are numbered in Arabic throughout each title;

(6) Subparts, which are lettered in capitals;

(7) Sections, which are numbered in Arabic throughout each part. A section number includes the number of the part followed by a period and the number of the section. For example, the section number for section 15 of Part 21 is "§ 21.15"; and

(8) Paragraphs, which are designated as follows:

level 1 (a), (b), (c), etc.
level 2 (1), (2), (3), etc.
level 3 (i), (ii), (iii), etc.
level 4 (A), (B), (C), etc.
level 5 (*1*), (*2*), (*3*), etc.
level 6 (*i*), (*ii*), (*iii*), etc.

§ 21.12 [Amended]

8. In § 21.12 remove the word "shall" and add, in its place, the word "may".

§ 21.13 [Removed]

9. Section 21.13 is removed.

10. Section 21.14 is revised to read as follows:

§ 21.14 Deviations from standard organization of the Code of Federal Regulations.

(a) Any deviation from standard Code of Federal Regulations designations must be approved in advance by the Office of the Federal Register. Requests for approval must be submitted in writing at least five working days before the agency intends to submit the final rule document for publication and include a copy of the final rule document.

(b) The Director of the Federal Register may allow the keying of section numbers to correspond to a particular numbering system used by an agency only when the keying will benefit both that agency and the public.

§ 21.15 [Removed]

11. Section 21.15 is removed.

12. Section 21.18 is amended by revising the last sentence to read as follows:

§ 21.18 Tables of contents.

* * * It shall also list the headings for the subparts, undesignated center headings, sections in the part, and appendix headings to the part or subpart.

§ 21.22 [Removed]

13. Section 21.22 is removed.

§ 21.42 [Amended]

14. In § 21.42 remove the word "he" and add, in its place, the words "the Director".

15. Section 21.43 is amended by revising the second sentence of paragraph (b) to read as follows:

§ 21.43 Placing and amending authority citations.

* * * * *

(b) * * * The authority citation shall appear at the end of the table of contents for a part or after each subpart heading within the text of a part. * * *

§ 21.45 [Amended]

16. In § 21.45 add the word "nonstatutory" before the word "document".

17. Section 21.52 is revised to read as follows:

§ 21.52 Statutory material.

(a) *United States Code.* All citations to statutory authority shall include a United States Code citation, where available. Citations to titles of the United States Code, whether or not

enacted into positive law, may be cited without Public Law or U.S. Statutes at Large citation. For example:

Authority: 10 U.S.C. 501.

(b) *Public Laws and U.S. Statutes at Large.* Citations to Public Laws and U.S. Statutes at Large are optional when the United States Code is cited. Citations to current public laws and to the U.S. Statutes at Large shall refer to the section of the public law and the volume and page of the U.S. Statutes at Large to which they have been assigned. The page number shall refer to the page on which the section cited begins. For example:

Authority: Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654); sec. 313, Pub. L. 85-726, 72 Stat. 752 (49 U.S.C. 1354).

§ 21.53 [Amended]

18. In § 21.53 add the word "Authority:" in front of the word "Special".

PART 22—PREPARATION OF NOTICES AND PROPOSED RULES

1. The heading to Part 22 is revised to read as shown above.

2. The authority citation for Part 22 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

3. The undesignated center heading for §§ 22.1-22.2 is designated as Subpart A and revised to read as follows:

Subpart A—Notices

4. The undesignated center heading for §§ 22.5-22.7 is designated as Subpart B and revised to read as follows:

Subpart B—Proposed Rules

§ 22.5 [Amended]

5. In § 22.5, the introductory text is amended by removing the phrase "notice of proposed rule making" and adding in its place "proposed rule" and removing the word "notice" and adding in its place "document" and in paragraph (a), the words "rule making" are made one word.

§ 22.6 [Amended]

6. In § 22.6 the words "in brackets" are removed and the brackets that appear around the citation, "[1 CFR Part 22]" are also removed.

§ 22.7 [Amended]

7. In § 22.7 the words "notice of" and "making" are removed.

Don W. Wilson,
Chairman.
Joseph Jenifer,
Member.
Carol Williams,
Member.
Dick Thornburgh,
Attorney General.
Don W. Wilson,
Archivist of the United States.

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federal register

Tuesday
March 7, 1989

Part VI

Department of Education

Invitation for Applications for New Awards for Fiscal year 1989 Under the Center for International Business Education Program; Notice

DEPARTMENT OF EDUCATION

[CFDA No. 84.220]

Notice Inviting Applications for New Awards for Fiscal Year 1989 under the Centers for International Business Education Program

Note to Applicants: This notice is a complete application package. Together with the statute authorizing the program and applicable regulations governing the Program, including the Education Department General Administrative Regulations (EDGAR), the notice contains information, application forms, and instructions needed to apply for a grant under this competition.

Purpose of Program: The purpose of the Centers for International business Education Program is to provide grants to eligible institutions of higher education, or combinations of these institutions, to pay the Federal share of the cost of planning, establishing and operating Centers for International Business Education that will—

(1) Be national resources for the teaching of imporved business techniques, strategies, and methodologies that emphasize the international context in which business is transacted;

(2) Provide instruction in critical foreign languages and international fields needed to provide an understanding of the cultures and customs of United States trading partners;

(3) Provide research and training in the international aspects of trade, commerce, and other fields of study;

(4) Provide training to students enrolled in the institution, or combinations of institutions, in which a center is located; and

(5) Serve as regional resources to businesses aproximately located by offering programs and providing research designed to meet the international training needs of these businesses.

Deadline for Transmittal of Applications: May 10, 1989.

Available Funds: $741,000. The Administration has not requested funds for this program for 1990, the second year of the proposed three-year funding cycle.

Estimated Range of Awards: $100,000–$125,000.

Estimated Average Size of Awards: $110,000.

Estimated Number of Awards: 5–7.

Note: The Department is not bound by any estimates in this notice.

Project Period: 36 Months.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations), Part 75 (Direct Grant Programs); Part 77 (Definitions that Apply to Department Regulations); and Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)); (b) The Centers for International Business Education Program, authorized under Title VI, Part B, Section 612, of the Higher Education Act of 1965, as amended by section 6261 of the Omnibus Trade and Competitiveness Act of 1988, P.L. 100–418 (20 U.S.C. 1130a-b).

Eligibility: To be eligible for assistance under this program, an applicant must be an institution of higher education, or a combination of such institutions, that establishes a Center Advisory Council prior to the date that Federal assistance is received. The Center Advisory Council shall conduct extensive planning prior to the establishment of the Center for International Business Education, concerning the scope of the Center's activities and the design of its programs.

The Center Advisory Council shall include—

(1) One representative of an administrative department or office of the institution of higher education (or a combination of such institutions);

(2) One faculty representative of the business or management school or department of such an institution (or a combination of such institutions);

(3) One faculty representative of the international studies or foreign language school or department of such an institution (or a combination of such institutions);

(4) One faculty representative of another professional school or department of such an institution (or a combination of such institutions), as appropriate;

(5) One or more representatives of local or regional businesses or firms;

(6) One representative appointed by the Governor of the State in which the institution (or a combination of such institutions) is located whose normal responsibilities include official oversight or involvement in State-sponsored trade-related activities or programs; and

(7) Such other individuals as the institution of higher education (or a combination of such institutions) deems appropriate.

In addition to the initial planning activities required by the statute, the Center Advisory Council shall meet not less than once each year after the establishment of the center to assess and advise on the programs and activities conducted by the center.

Programmatic Requirements: Programs and activities to be conducted by Centers for International Business Education shall include—

(1) interdisciplinary programs that incorporate foreign language and international studies training into business, finance, management, communications systems, and other professional curricula;

(2) Interdisciplinary programs that provide business, finance, management, communications systems, and other professional training for foreign language and international studies faculty and advanced degree candidates;

(3) Evening or summer programs, including, but not limited to, intensive language programs, available to members of the business community and other professionals, that are designed to develop or enhance their international skills, awareness, and expertise;

(4) Collaborative programs, activities, or research involving other institutions of higher education, local educational agencies, professional associations, businesses, firms or combinations thereof, to promote the development of international skills, awareness, and expertise among current and prospective members of the business community and other professionals;

(5) Research designed to strengthen and improve the international aspects of business and professional education and to promote integrated curricula; and

(6) Research designed to promote the international competitiveness of American businesses and firms, including those not currently active in international trade.

Other Allowable Activities: Programs and activities to be conducted by Centers for International Business Education may also include—

(1) The establishment of overseas internship programs for students and faculty designed to provide training and experience in international business activities, except that no Federal funds provided under this program may be used to pay wages or stipends to any participant who is engaged in compensated employment as part of an internship program; and

(2) Other eligible activities consistent with the purposes and intent of the legislation.

Funding Requirements: The applicant's share of the cost of planning, establishing and operating centers under this section shall not be less than—

(1) 10 per centum for the first year in which Federal funds are furnished;

(2) 30 per centum for the second such year; and

(3) 50 per centum for the third such year and for each such year thereafter.

The non-Federal share of the cost of planning, establishing, and operating centers under this program may be provided either in cash or by in-kind assistance.

Other Requirements: The statute requires applicants to provide—

(1) An assurance that the Center Advisory Council shall meet not less than once each year after the establishment of the center to assess and advise on the programs and activities conducted by the center;

(2) A description of the extensive planning that the Center Advisory Council and the institution of higher education, or a combination of these institutions, have conducted or will conduct prior to the establishment of the Center for International Business Education, concerning the scope of the center's activities and the design of its programs;

(3) An assurance of ongoing collaboration in the establishment and operation of the center by faculty of the business, management, foreign language, international studies and other professional schools or departments, as appropriate;

(4) An assurance that the education and training programs of the center will be open to students concentrating in each of these respective areas, as appropriate; and

(5) An assurance that the institution of higher education, or combination of these institutions, will use the assistance provided under this section to supplement and not to supplant activities conducted by the institution or institutions of higher education.

Allowable Costs: Grant funds may be used to pay the Federal share of the cost of planning, establishing or operating a center, including the cost of—

(1) Faculty and staff travel in foreign areas, regions, or countries;

(2) Teaching and research materials;

(3) Curriculum planning and development;

(4) Bringing visiting scholars and faculty to the center to teach or to conduct research;

(5) Training and improvement of the staff, for the purpose of, and subject to such conditions as the Secretary finds necessary, for carrying out the objectives of this program; and

(6) Other costs consistent with planning, establishing or operating a center.

The applicant may complete a copy of Standard Form 424A, printed in the application package, for each year for which funding is requested, and may use Section F of Standard Form 424A to provide a detailed breakout of all proposed costs for each 12-month period for which funding is requested. Under 34 CFR 75.564, the Secretary accepts an indirect cost rate of 8 percent.

Selection Criteria

(a)(1) The Secretary uses the following selection criteria to evaluate applications for new grants under this competition.

(2) The maximum score for all of these criteria is 100 points.

(3) The maximum score for each criterion is indicated in parentheses.

(b) *The criteria.*—(1) *Meeting the purposes of the authorizing statute.* (30 points) The Secretary reviews each application to determine how well the project will meet the purpose of Title VI, Part B, Section 612, of the Highest Education Act of 1965, as amended by section 6261 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418 (20 U.S.C. 1130a-b), including consideration of—

(i) The objectives of the project; and

(ii) How the objectives of the project further the purposes of the authorizing statute.

(2) *Extent of need for the project.* (20 points) The Secretary reviews each application to determine the extent to which the project meets specific needs recognized in the statute that authorizes the program, including consideration of—

(i) The needs addressed by the project;

(ii) How the applicant identified those needs;

(iii) How those needs will be met by the project; and

(iv) The benefits to be gained by meeting those needs.

(3) *Plan of operation.* (25 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(i) The quality of the design of the project;

(ii) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(iii) How well the objectives of the project relate to the purpose of the program;

(iv) The quality of the applicant's plan to use its resources and personnel to achieve each objective;

(v) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapping condition; and

(vi) For grants under a program that requires the applicant to provide an opportunity for participation of students enrolled in private schools, the quality of the applicant's plan to provide that opportunity.

(4) *Quality of key personnel.* (7 points.)

(i) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(A) The qualifications of the project director (if one is to be used);

(B) The qualifications of each of the other key personnel to be used in the project;

(C) The time that each person referred to in paragraph (b)(4)(i) (A) and (B) will commit to the project; and

(D) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(ii) To determine personnel qualifications under paragraphs (b)(4)(i) (A) or (B), the Secretary considers—

(A) Experience and training in fields related to the objectives of the project; and

(B) Any other qualifications that pertain to the quality of the project.

(5) *Budget and cost effectiveness.* (10 points) The Secretary reviews each application to determine the extent to which—

(i) The budget is adequate to support the project; and

(ii) Costs are reasonable in relation to the objectives of the project.

(6) *Evaluation plan.* (5 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(i) Are appropriate to the project; and

(ii) To the extent possible, are objective and produce data that are quantifiable.

(Cross-reference: See 34 CFR 75.590 Evaluation by the grantee.)

(7) *Adequacy of resources.* (3 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(Approved under OMB Control No. 1840-0616)

Instructions for Transmittal of Applications

(a) If an applicant wants to apply for a grant, the applicant shall—

(1) Mail the original and two copies of the application on or before the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA #84.220), Washington, DC 20202-4725.

or

(2) Hand deliver the original and two copies of the application by 4:30 p.m. (Washington, DC time) on the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA #84.220), Room #3633, Regional Office Building #3, 7th and D Streets, SW., Washington, DC.

(b) An applicant must show one of the following as proof of mailing:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(c) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Notes.—(1) The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

(2) An applicant wishing to know that its application has been received by the Department must include with the application a stamped, self-addressed postcard containing the CFDA number and title of this program.

(3) The applicant *must* indicate on the envelope and—if not provided by the Department—in Item 10 of the Application for Federal Assistance (Standard Form 424) the CFDA number—and letter, if any—of the competition under which the application is being submitted.

Application Instructions and Forms

The appendix to this application is divided into three parts. These parts are organized in the same manner that the submitted application should be organized. The parts are as follows:

Part I: Application for Federal Assistance (Standard Form 424 Rev. 4-88)) and instructions.

Part II: Budget Information—Non-Construction Programs (Standard Form 424A) and instructions.

Part III: Application Narrative.

Assurances—Non-Construction Programs (Standard Form 424B).

Assurances—Centers for International Business Education Program.

Certification regarding Debarment, Suspension, and other Responsibility Matters: Primary Covered Transactions (ED Form GCS-008) and instructions.

Certification regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion: Lower Tier Covered Transactions (ED Form GCS-009) and instructions. (NOTE: ED Form GCS-009 is intended for the use of primary participants and should not be transmitted to the Department.)

One or both of the following, as appropriate:

Certification Regarding Drug-Free Workplace Requirements: Grantees Other than Individuals (ED 80-0004).

Certification Regarding Drug-Free Workplace Requirements: Grantees Who Are Individuals (ED 80-0005).

For Further Information Contact: For specific information concerning the program contact: Susanna C. Easton, Center for International Education, Office of Postsecondary Education, Department of Education, Room 3053, ROB-3, 400 Maryland Avenue, SW., Washington, DC 20202-5332. Telephone (202) 732-3302.

An applicant may submit information on a photostatic copy of the application and budget forms, the assurances, and the certification. However, the application form, the assurances, and the certification must each have an *original signature.* No grant may be awarded unless a completed application form has been received.

Program Authority: (20 U.S.C. 1130a-b)

Dated: February 2, 1989.

Kenneth D. Whitehead,

Assistant Secretary for Postsecondary Education.

BILLING CODE 4000-01-M

Appendix

OMB Approval No. 0348-0043

APPLICATION FOR FEDERAL ASSISTANCE

1. TYPE OF SUBMISSION: *Application* ☐ Construction ☐ Non-Construction; *Preapplication* ☐ Construction ☐ Non-Construction	2. DATE SUBMITTED	Applicant Identifier
	3. DATE RECEIVED BY STATE	State Application Identifier
	4. DATE RECEIVED BY FEDERAL AGENCY	Federal Identifier

5. APPLICANT INFORMATION

Legal Name:	Organizational Unit:
Address *(give city, county, state, and zip code)*:	Name and telephone number of the person to be contacted on matters involving this application *(give area code)*

6. EMPLOYER IDENTIFICATION NUMBER (EIN): ☐☐ — ☐☐☐☐☐☐☐

7. TYPE OF APPLICANT: *(enter appropriate letter in box)* ☐

A. State
B. County
C. Municipal
D. Township
E. Interstate
F. Intermunicipal
G. Special District
H. Independent School Dist.
I. State Controlled Institution of Higher Learning
J. Private University
K. Indian Tribe
L. Individual
M. Profit Organization
N. Other (Specify): _____

8. TYPE OF APPLICATION:

☐ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es): ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration Other *(specify)*: _____

9. NAME OF FEDERAL AGENCY:

Department of Education

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: 8 4 . 2 2 0

TITLE: Centers for International Business Education

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:

12. AREAS AFFECTED BY PROJECT *(cities, counties, states, etc.)*:

13. PROPOSED PROJECT:

Start Date	Ending Date

14. CONGRESSIONAL DISTRICTS OF:

a. Applicant	b. Project

15. ESTIMATED FUNDING:

a. Federal	$ .00
b. Applicant	$ .00
c. State	$ .00
d. Local	$ .00
e. Other	$ .00
f. Program Income	$ .00
g. TOTAL	$ .00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON:

DATE _____

b. NO. ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes If "Yes," attach an explanation. ☐ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a. Typed Name of Authorized Representative	b. Title	c. Telephone number
d. Signature of Authorized Representative		e. Date Signed

Previous Editions Not Usable

Standard Form 424 (REV 4-88)
Prescribed by OMB Circular A-102

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INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item: Entry:

1. Self-explanatory.
2. Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable).
3. State use only (if applicable).
4. If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.
5. Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.
6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.
7. Enter the appropriate letter in the space provided.
8. Check appropriate box and enter appropriate letter(s) in the space(s) provided:
   - "New" means a new assistance award.
   - "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.
   - "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.
9. Name of Federal agency from which assistance is being requested with this application.
10. Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.
11. Enter a brief descriptive title of the project. if more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.

Item: Entry:

12. List only the largest political entities affected (e.g., State, counties, cities).
13. Self-explanatory.
14. List the applicant's Congressional District and any District(s) affected by the program or project.
15. Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.
16. Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.
17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.
18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)

OMB Approval No. 0348-0044

BUDGET INFORMATION — Non-Construction Programs

SECTION A – BUDGET SUMMARY

Grant Program Function or Activity (a)	Catalog of Federal Domestic Assistance Number (b)	Estimated Unobligated Funds		New or Revised Budget		
		Federal (c)	Non-Federal (d)	Federal (e)	Non-Federal (f)	Total (g)
1.		$	$	$	$	$
2.						
3.						
4.						
5. TOTALS		$	$	$	$	$

SECTION B – BUDGET CATEGORIES

6 Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY				Total (5)
	(1)	(2)	(3)	(4)	
a. Personnel	$	$	$	$	$
b. Fringe Benefits					
c. Travel					
d. Equipment					
e. Supplies					
f. Contractual					
g. Construction					
h. Other					
i. Total Direct Charges (sum of 6a - 6h)					
j. Indirect Charges					
k. TOTALS (sum of 6i and 6j)	$	$	$	$	$
7 Program Income	$	$	$	$	$

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SECTION C - NON-FEDERAL RESOURCES

(a) Grant Program	(b) Applicant	(c) State	(d) Other Sources	(e) TOTALS
8.	$	$	$	$
9.				
10.				
11.				
12. TOTALS (sum of lines 8 and 11)	$	$	$	$

SECTION D - FORECASTED CASH NEEDS

	Total for 1st Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
13. Federal	$	$	$	$	$
14. NonFederal					
15. TOTAL (sum of lines 13 and 14)	$	$	$	$	$

SECTION E - BUDGET ESTIMATES OF FEDERAL FUNDS NEEDED FOR BALANCE OF THE PROJECT

(a) Grant Program	FUTURE FUNDING PERIODS (Years)			
	(b) First	(c) Second	(d) Third	(e) Fourth
16.	$	$	$	$
17.				
18.				
19.				
20. TOTALS (sum of lines 16 -19)	$	$	$	$

SECTION F - OTHER BUDGET INFORMATION

(Attach additional Sheets if Necessary)

21. Direct Charges:	22. Indirect Charges:

23. Remarks

SF 424A (4-88) Page 2
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INSTRUCTIONS FOR THE SF-424A

General Instructions

This form is designed so that application can be made for funds from one or more grant programs. In preparing the budget, adhere to any existing Federal grantor agency guidelines which prescribe how and whether budgeted amounts should be separately shown for different functions or activities within the program. For some programs, grantor agencies may require budgets to be separately shown by function or activity. For other programs, grantor agencies may require a breakdown by function or activity. Sections A,B,C, and D should include budget estimates for the whole project except when applying for assistance which requires Federal authorization in annual or other funding period increments. In the latter case, Sections A,B, C, and D should provide the budget for the first budget period (usually a year) and Section E should present the need for Federal assistance in the subsequent budget periods. All applications should contain a breakdown by the object class categories shown in Lines a-k of Section B.

Section A. Budget Summary
Lines 1-4, Columns (a) and (b)

For applications pertaining to a *single* Federal grant program (Federal Domestic Assistance Catalog number) and *not requiring* a functional or activity breakdown, enter on Line 1 under Column (a) the catalog program title and the catalog number in Column (b).

For applications pertaining to a *single* program *requiring* budget amounts by multiple functions or activities, enter the name of each activity or function on each line in Column (a), and enter the catalog number in Column (b). For applications pertaining to multiple programs where none of the programs require a breakdown by function or activity, enter the catalog program title on each line in *Column* (a) and the respective catalog number on each line in Column (b).

For applications pertaining to *multiple* programs where one or more programs *require* a breakdown by function or activity, prepare a separate sheet for each program requiring the breakdown. Additional sheets should be used when one form does not provide adequate space for all breakdown of data required. However, when more than one sheet is used, the first page should provide the summary totals by programs.

Lines 1-4, Columns (c) through (g.)

For new applications, leave Columns (c) and (d) blank. For each line entry in Columns (a) and (b), enter in Columns (e), (f), and (g) the appropriate amounts of funds needed to support the project for the first funding period (usually a year).

Lines 1-4, Columns (c) through (g.) (continued)

For continuing grant program applications, submit these forms before the end of each funding period as required by the grantor agency. Enter in Columns (c) and (d) the estimated amounts of funds which will remain unobligated at the end of the grant funding period only if the Federal grantor agency instructions provide for this. Otherwise, leave these columns blank. Enter in columns (e) and (f) the amounts of funds needed for the upcoming period. The amount(s) in Column (g) should be the sum of amounts in Columns (e) and (f).

For supplemental grants and changes to existing grants, do not use Columns (c) and (d). Enter in Column (e) the amount of the increase or decrease of Federal funds and enter in Column (f) the amount of the increase or decrease of non-Federal funds. In Column (g) enter the new total budgeted amount (Federal and non-Federal) which includes the total previous authorized budgeted amounts plus or minus, as appropriate, the amounts shown in Columns (e) and (f). The amount(s) in Column (g) should not equal the sum of amounts in Columns (e) and (f).

Line 5 — Show the totals for all columns used.

Section B Budget Categories

In the column headings (1) through (4), enter the titles of the same programs, functions, and activities shown on Lines 1-4, Column (a), Section A. When additional sheets are prepared for Section A, provide similar column headings on each sheet. For each program, function or activity, fill in the total requirements for funds (both Federal and non-Federal) by object class categories.

Lines 6a-i — Show the totals of Lines 6a to 6h in each column.

Line 6j - Show the amount of indirect cost.

Line 6k - Enter the total of amounts on Lines 6i and 6j. For all applications for new grants and continuation grants the total amount in column (5), Line 6k, should be the same as the total amount shown in Section A, Column (g), Line 5. For supplemental grants and changes to grants, the total amount of the increase or decrease as shown in Columns (1)-(4), Line 6k should be the same as the sum of the amounts in Section A, Columns (e) and (f) on Line 5.

INSTRUCTIONS FOR THE SF-424A *(continued)*

Line 7 – Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount. Show under the program narrative statement the nature and source of income. The estimated amount of program income may be considered by the federal grantor agency in determining the total amount of the grant.

Section C. Non-Federal-Resources

Lines 8-11 – Enter amounts of non-Federal resources that will be used on the grant. If in-kind contributions are included, provide a brief explanation on a separate sheet.

Column (a) – Enter the program titles identical to Column (a), Section A. A breakdown by function or activity is not necessary.

Column (b) – Enter the contribution to be made by the applicant.

Column (c) – Enter the amount of the State's cash and in-kind contribution if the applicant is not a State or State agency. Applicants which are a State or State agencies should leave this column blank.

Column (d) – Enter the amount of cash and in-kind contributions to be made from all other sources.

Column (e) – Enter totals of Columns (b), (c), and (d).

Line 12 — Enter the total for each of Columns (b)-(e). The amount in Column (e) should be equal to the amount on Line 5, Column (f), Section A.

Section D. Forecasted Cash Needs

Line 13 – Enter the amount of cash needed by quarter from the grantor agency during the first year.

Line 14 – Enter the amount of cash from all other sources needed by quarter during the first year.

Line 15 – Enter the totals of amounts on Lines 13 and 14.

Section E. Budget Estimates of Federal Funds Needed for Balance of the Project

Lines 16 - 19 – Enter in Column (a) the same grant program titles shown in Column (a), Section A. A breakdown by function or activity is not necessary. For new applications and continuation grant applications, enter in the proper columns amounts of Federal funds which will be needed to complete the program or project over the succeeding funding periods (usually in years). This section need not be completed for revisions (amendments, changes, or supplements) to funds for the current year of existing grants.

If more than four lines are needed to list the program titles, submit additional schedules as necessary.

Line 20 – Enter the total for each of the Columns (b)-(e). When additional schedules are prepared for this Section, annotate accordingly and show the overall totals on this line.

Section F. Other Budget Information

Line 21 – Use this space to explain amounts for individual direct object-class cost categories that may appear to be out of the ordinary or to explain the details as required by the Federal grantor agency.

Line 22 – Enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period, the estimated amount of the base to which the rate is applied, and the total indirect expense.

Line 23 – Provide any other explanations or comments deemed necessary.

INSTRUCTIONS FOR PART III--APPLICATION NARRATIVE

Before preparing the Application Narrative, an applicant should read carefully all the information included in this notice. The Secretary recommends that you carefully consider the sections of this notice pertaining to the Purpose of the Program and the Programmatic Requirements as you address the selection criteria the Secretary uses to evaluate applications.

The narrative should--

1. Begin with an Abstract; that is, a summary of the proposed project;

2. Include the following information in order to establish eligibility under this program:

(a) The date the Center Advisory Council was or will be established. Note: The Advisory Council shall be established prior to the date that Federal assistance is received;

(b) A list of the members of the Advisory Council and a description of their academic or other affiliations; and

(c) A description of the extensive planning which was or will be conducted by the Advisory Council prior to the establishment of the Center for International Business Education, concerning the scope of the center's activities and the design of its programs.

3. Describe the proposed Center for International Business Education in light of each of the selection criteria in the order in which the criteria are listed in this notice. Describe the activities proposed to be carried out in each year of the 3-year funding cycle under the "Plan of Operation" section of the application.

4. Include any other pertinent information that might assist the Secretary in reviewing the application.

Please limit the Application Narrative to 55 double-spaced, typed pages (on one side only). Please do not use reduced size type script. Supporting materials may be appended.

NOTE: Public reporting burden for this collection of information is estimated to average 35 hours per response in the first year, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the U.S. Department of Education, Information Management and Compliance Division, 400 Maryland Avenue, S.W., Washington, D.C. 20202-4651, and to the Office of Management and Budget, Paperwork Reduction Project (1840-0616) Washington, D.C. 20503.

OMB Approval No. 0348-0040

ASSURANCES — NON-CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C.§§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.

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10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program andto purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).

14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

SF 424B (4-88) Back

ASSURANCES

INSTRUCTIONS: Applicants are required to provide the following assurances: This assurance form must be signed by authorized representatives of the legal applicants.

ASSURANCES -- CENTERS FOR INTERNATIONAL BUSINESS EDUCATION

The applicant hereby assures and certifies that:

1. In addition to conducting the extensive planning activities required under the eligibility section of the statute, the center advisory council shall meet not less than once a year after the establishment of the center to assess and advise on the programs and activities conducted by the center;

2. There shall be ongoing collaboration in the establishment and operation of the center by faculty of the business, management, foreign language, international studies and other professional schools or departments, as appropriate;

3. The education and training programs of the center will be open to students concentrating in each of these respective areas, as appropriate; and

4. The applicant will use the assistance provided under this program to supplement and not to supplant activities already being conducted by the applicant.

_____

Name And Title Of Authorized Representative

_____

Signature Date

Certification Regarding Debarment, Suspension, and Other Responsibility Matters Primary Covered Transactions

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, Section 85.510, Participants' responsibilities. The regulations were published as Part VII of the May 26, 1988 Federal Register (pages 19160-19211). Copies of the regulations may be obtained by contacting the U.S. Department of Education, Grants and Contracts Service, 400 Maryland Avenue, S.W. (Room 3633 GSA Regional Office Building No. 3), Washington, D.C. 20202-4725, telephone (202) 732-2505.

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Organization Name | PR/Award Number or Project Name

Name and Title of Authorized Representative

Signature | Date

ED Form GCS-008, (REV.12/88)

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transactions," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

ED Form GCS-008, (REV. 12/88)

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion Lower Tier Covered Transactions

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, Section 85.510, Participants' responsibilities. The regulations were published as Part VII of the May 26, 1988 Federal Register (pages 19160-19211). Copies of the regulations may be obtained by contacting the person to which this proposal is submitted.

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Organization Name | PR/Award Number or Project Name

Name and Title of Authorized Representative

Signature | Date

ED Form GCS-009, (REV. 12/88)

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

ED Form GCS-009, (REV. 12/88)

Certification Regarding Drug-Free Workplace Requirements Grantees Other Than Individuals

This certification is required by the regulations implementing the Drug-Free Workplace Act of 1988, 34 CFR Part 85, Subpart F. The regulations, published in the January 31, 1989 Federal Register, require certification by grantees, prior to award, that they will maintain a drug-free workplace. The certification set out below is a material representation of fact upon which reliance will be placed when the agency determines to award the grant. False certification or violation of the certification shall be grounds for suspension of payments, suspension or termination of grants, or governmentwide suspension or debarment (see 34 CFR Part 85, Sections 85.615 and 85.620).

The grantee certifies that it will provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing a drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;
(2) The grantee's policy of maintaining a drug-free workplace;
(3) Any available drug counseling, rehabilitation, and employee assistance programs; and
(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and
(2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(e) Notifying the agency within ten days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction;

(f) Taking one of the following actions, within 30 days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination; or
(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

Organization Name PR/Award Number or Project Name

Name and Title of Authorized Representative

Signature Date

ED 80-0004

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Part VII

Department of Housing and Urban Development

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 219

Flexible Subsidy Program-Capital Improvement Loans; Interim Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 219

[Docket No. R-89-1437; FR-2541]

Flexible Subsidy Program—Capital Improvement Loans

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Interim rule.

SUMMARY: In response to amendments made to section 201 of the Housing and Community Development Amendments of 1978 in 1983, 1987, and 1988, this interim rule completely revises Part 219, reorganizing it into three subparts to cover the current program of Flexible Subsidy operating assistance, the new program of capital improvement loans, and general provisions applicable to both types of assistance.

Section 201 created the Flexible Subsidy program to provide operating assistance for projects experiencing extreme financial difficulty. Operating assistance is generally provided in the form of a deferred loan and, in conjunction with other resources, is designed to restore or maintain the physical and financial soundness of eligible projects so as to maintain their low- and moderate-income character. Assistance can be used to fund operating deficits, such as delinquent tax escrows or inadequate reserve accounts, and to correct past deficiencies in maintenance, repairs, and capital replacements.

The 1983 amendments expanded the scope of HUD-assisted projects that were eligible for operating assistance under the program. The 1987 amendments again added new types of projects that are eligible for Flexible Subsidy, and they added a loan program for projects assisted by HUD that have a need for capital improvements that cannot be financed from their reserve funds. These loans (as well as the operating assistance loans) are to be funded from a Flexible Subsidy Fund established in the U.S. Treasury. This Fund is comprised of excess receipts paid to HUD from owners of projects assisted under section 236 of the National Housing Act, any appropriations made for this purpose, and repayments of operating assistance or loans made under the Flexible Subsidy program. Repayment of capital improvement loans will commence after completion of the work covered by the loan and will continue throughout the loan term—usually until the end of the original project mortgage.

Section 1011 of the McKinney Homeless Assistance Amendments Act of 1988 (Pub. L. No. 100-628, approved November 7, 1988) now requires that HUD implement the capital improvement loan component of the program, at a stated minimum annual funding level, by issuing "regulations that become effective not later than February 5, 1989." Consequently, this rule is being issued to implement the current section 201, including the 1983, 1987 and 1988 changes.

DATES: *Effective date:* March 7, 1989. *Comment date:* May 8, 1989.

ADDRESS: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: James J. Tahash, Director, Planning and Procedures Division, Office of Multifamily Housing Management, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 426-3944. A telecommunications device for hearing or speech-impaired persons is available at (202) 755-6490. These are not toll-free telephone numbers.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act Statement

The information collection requirements contained in §§ 219.210, 219.220, and 219.310 of this rule have been submitted to the Office of Management and Budget (OMB) for emergency review under the Paperwork Reduction Act of 1980, seeking temporary approval for a 90-day period, to be followed by a submission for standard approval. The temporary approval numbers for these information collections will be published separately in a Notice in the **Federal Register**. Until that time no person may be subjected to a penalty for failure to comply with these information collection requirements.

Since the request for standard approval will be submitted within the next month or so, this preamble provides sufficient information for public comment on the information collections. The annual public reporting burden of these requirements, including the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, is stated in the chart included under the heading of Findings and Certifications. Send comments regarding burden estimates or any other aspect of these sets of collections of information, including suggestions for reducing the burden, to the Department of Housing and Urban Development Rules Docket Clerk, at the address stated above and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for HUD. At the end of the public comment period on this rule, the Department may amend the information collection requirements set out in this rule to reflect public comments or OMB comments received concerning the information collections.

II. Statutory Background

The 1983 amendments to section 201 (made by section 217 of the Housing and Urban-Rural Recovery Act of 1983) expanded the Flexible Subsidy program to include projects assisted under section 8 of the United States Housing Act of 1937 that had been converted from assistance under section 236 of the National Housing Act or section 101 of the Housing and Urban and Development Act of 1965, and clarified that a project need not have an FHA-insured mortgage to be eligible.

The 1987 changes (made by sections 185 and 186 of the Housing and Community Development Act of 1987) again expanded the category of eligible projects. Projects assisted under section 23 of the United States Housing Act of 1937 as it existed before January 1, 1975, and projects that received a loan under section 202 of the Housing Act of 1959 more than 15 years before the date on which assistance is to be made available under this program, were made eligible.

The principal thrust of the 1987 amendments, however, was to create a new category of assistance to be provided under the Flexible Subsidy program for projects that need capital improvements to achieve physical soundness that cannot be funded from project reserve funds without jeopardizing other major repairs or replacements that are reasonably expected to be required in the near future. This program of capital improvement loans is to be funded at an annual minimum of $30 million or 40 percent of the amount available

(whichever is less), to the extent of approvable applications.

The 1987 amendments contemplate a contribution from the project owner toward the capital improvements of at least 20 percent of the total estimated cost. HUD may require the contribution to be as much as 30 percent of the cost, if that action is necessary to keep the rent burden required to service the loan down to a reasonable level. The cost for capital improvements to be made under this loan program is limited to the amount HUD determines to be necessary to repair or replace capital items that have failed or are likely to fail in the near future, to improve those items and associated items to meet HUD's cost-effective energy efficiency standards, and to satisfy requirements under section 504 of the Rehabilitation Act of 1973 for access by mobility-impaired persons.

The 1987 amendments specify priorities to be given in awarding capital improvement loans. Top priority is given to projects where the owner is seeking to prepay the mortgage and the project is eligible for incentives to continue operating for the benefit of low- and moderate-income tenants under section 224(b) of the Emergency Low Income Housing Preservation Act of 1987. Other projects are to be given priority to the extent (1) the capital improvements are immediately required; (2) the project serves lower income families and other suitable housing is unavailable in the area; (3) the capital improvements involve life, safety, or health of the project residents; and (4) the project demonstrates the greatest financial distress but can be rendered physically sound. In any case, the owner must agree to maintain the low- and moderate-income character of the project at least until the expiration of the project mortgage.

The 1987 amendments also specify that the interest rate on the loan is to be established by the Secretary of HUD. It is to be not less than 3 percent nor more than 6 percent (unless a rate of as low as 1 percent is needed to sustain acceptable rents), and is to be based on a point spread below the Treasury rate, plus an allowance established by the Secretary to cover administrative costs and probable losses. The term of the loan may not exceed the remaining term of the original mortgage. The Secretary is also authorized to impose additional conditions determined to be appropriate.

Recognizing that a project may need considerable assistance, the 1987 amendments provide that a project may receive more than one loan or other assistance under the Flexible Subsidy program. Those amendments also provide that if the debt service on a capital improvement loan would otherwise force the rents too high, the owner contribution can be required to be higher or the rate of interest on the loan can be lower, as discussed above. Other ways stated in the statute to resolve the high rent burden problem are to provide Section 8 Existing Housing assistance or to increase the length of the loan term.

III. Changes to Regulation

Part 219 is reorganized and revised in this rulemaking. Three subparts have been created to group the provisions in a logical order. General provisions that apply both to the existing Flexible Subsidy program of operating assistance and the new Flexible Subsidy program of capital improvement loans have been placed in Subpart A. Provisions that apply only to the operating assistance component have been placed in Subpart B, and provisions dealing principally with the capital improvement loan component have been placed in Subpart C.

A. Subpart A

The sections now placed in Subpart A include § 219.101, Purpose; § 219.105, Types of projects; § 219.110, General eligibility; § 219.120, Local government consultation; and § 219.130, Waivers. These sections correspond to existing sections with the same numbers, except for Local government consultation and Waivers, which used to be §§ 219.115 and 219.135, respectively.

The purpose section, based on section 201(a) of the Housing and Community Development Amendments of 1978 (HCD Amendments of 1978 or "section 201"), has been revised by deleting the reference to use of assistance under this part for supplemental funding for Rent Supplement contracts, since section 201(h) prohibits such use after October 1, 1981. It also adds reference to the capital improvement loan component of the Flexible Subsidy program, a 1987 Act change.

Both the purpose section and the following section on types of eligible projects have been revised to reflect the addition of several categories of projects: certain Section 8 projects, Section 23 (precursor to Section 8) projects, certain Section 202 projects, and all of the eligible categories without regard to whether they have FHA-insured mortgages.

The section that described conditions for approval has been renamed general eligibility. The paragraph on supplemental funding for Rent Supplement contracts has been deleted from this section, as it was from the purpose section. The paragraph on funding priorities has been moved to a section in Subpart B. The remaining paragraph, based on section 201(d) of the HCD Amendments of 1978, has been revised to reflect the 1987 amendments that added physical soundness to financial soundness as a goal to be supported by the Flexible Subsidy program. As modified, the eligibility criteria apply to both operating assistance loans and capital improvement loans, and therefore this section is left in the general subpart. It should be noted that one of the eligibility criteria is that this type of assistance is less costly than other methods of preserving the project as a housing resource for low- to moderate-income tenants. This criterion is interpreted to include consideration of the Department's possible future costs if the project were to fail, the owner default under the mortgage, and the mortgage be assigned to the Secretary for payment of a mortgage insurance claim.

The section on contact with local government, based on section 201(e), has been renamed Local Government Consultation rather than Local Government Assurances, to emphasize the process instead of the result. Again, the reference to supplemental funding for Rent Supplement contracts has been removed. The section is otherwise unchanged.

A section has been added to discuss the source of funds for the Flexible Subsidy program, consistent with the authorization of the Flexible Subsidy Fund by section 201(j), as added by the 1987 amendments. This section of the rule provides that available funds are allocated annually for two categories of projects: (1) State agency financed non-insured projects, and (2) all others, including projects with FHA-insured and HUD-held mortgages. The allocations are made based on the number of units in potentially eligible projects of the category as a percentage of the total number of units in all potentially eligible projects. This allocation is made because HUD generally allocates money separately for State agency-administered HUD programs that do not involve FHA mortgage insurance, and making this allocation at the beginning of each year allows them to plan the use of the money. Once these two funding categories are established, each must comply with the statutory requirements to spend its proportion of $30,000,000 or 40 percent of its allocation, whichever is less, for the capital improvement loan program, to the extent of approvable applications.

Funding decisions on project applications are made on a quarterly basis using the applicable priorities enumerated in Subparts B and C. As the end of each fiscal year approaches, HUD will determine to what extent there are funds to be used for capital improvement loans that are allocated for each of the major categories that are likely to be unused. In the last quarter, to the extent there is to be an excess in either of the categories for capital improvement loans that could be used for such loans to eligible applicants of the other category, the funds will be reallocated to that category.

Another new section has been added to cover HUD's environmental responsibilities when a capital improvement is involved, whether funded under Subpart B or Subpart C. The type of repair and replacements anticipated to be approved under this rule will be sufficiently limited in scope and expense so that evaluation of each proposal will not be required under the National Environmental Policy Act of 1969. (See the categorical exclusion for limited rehabilitation stated in 24 CFR 50.20(c).) However, some applications for funding may involve either a project location or a type of improvement that will trigger HUD review under another environmental protection statutes.

Improvements to major mechanical systems will trigger HUD review to determine whether the project is located in a floodplain and if so, whether special action should be taken to minimize damage to the systems from possible flooding. If the project is listed on the National Register of Historic Places, the proposal will be reviewed for compliance with the National Historic Preservation Act of 1966. Exterior alterations that are not virtually identical replacements ("in-kind") will trigger review under the Act for unlisted projects located in an historic district.

Strict adherence with the National Historic Preservation Act of 1966 would require that inquiry be made to the State Historic Preservation Officer (SHPO) concerning every property for which funds are requested to cover captial improvements to determine whether the property is "eligible for" inclusion on National Register. This process might involve submission of documentation concerning the project to the SHPO and awaiting a formal determination of eligibility, under the then-prevailing standards of what is historic. The Department has concluded that following such a procedure in every case would interfere with its duty to administer the capital improvement loan program in accordance with its purposes, because of the emergency nature of the program and the concern that these projects not be allowed to deteriorate irretrievably. Consequently, the Department is consulting with the Advisory Council on Historic Preservation to pursue the possibility of recognizing an exemption from the requirement to discover whether every property that is to be funded for capital improvements is "eligible for" listing on the National Register. In the meantime, the rule provides for inquiry to determine whether each property actually is listed and for review of the proposed improvements to any listed property to assure compliance with the Act.

The emergency nature of the capital improvement loan program operated under Subpart C is evident in the statutory listing of the priorities to be used in making funding decisions. Top priority is to be given for major repairs or replacements of capital items in projects that are eligible for incentives not to prepay their mortgates, as described in section 224(b) of the Emergency Low Income Housing Preservation Act of 1987, to retain these projects in the inventory of housing stock available for low- or moderate-income families. Otherwise priority is to be given to projects with immediate need of repairs, where the repairs are needed to preserve the health and safety of their tenants, to save the housing where other low rent housing is unavailable for the tenants. (See section 201(k)(4).) Therefore, the rule's procedure provides for assuring that funding decisions can be made in a manner consistent with the loan program's purposes while satisfying the primary purposes of the National Historic Preservation Act of 1966.

B. Subpart B

The changes made in the sections placed in Subpart B are principally to delete references to use of operating assistance to provide supplemental funding for Rent Supplement contracts, as discussed above. The new §§ 219.205, 219.215, 219.220, and 219.230 correspond to current §§ 219.120, Use and amount of assistance; 219.130, Payment schedule; 219.125, Estimating project revenue and operating expenses; and 219.110(c), Conditions of approval (funding priorities).

Although the current regulation section dealing with eligibility (which has now been moved to Subpart A) refers to an amount of assistance furnished by the owner as determined by the Secretary, the current section on use and amount of assistance does not mention an owner contribution. The new section on this topic does mention the owner contribution (in § 219.205(b)) and provides that non-profit owners may be allowed to contribute in the form of services if neither the mortgagor nor the sponsor has the financial capacity to make a cash contribution. This minimal fleshing out of the statutory requirement that the owner provide assistance follows the procedure now specified in HUD administrative instructions, although it is far less specific than those instructions. Since this is an interim rule being published for immediate effect, the Department is reluctant to include any significant changes to the content of the regulations governing the existing Flexible Subsidy program of operating assistance.

In the final rule that follows this interim rule, however, the Department is considering making the requirement more specific, requiring a 30 percent contribution by owners (but preserving the more lenient treatment for non-profit owners). Such a change in the rule would require HUD to use this percentage, an amount that is similar to the percentage now found in the existing HUD administrative instructions. Of course, the 30 percent contribution regulation requirement could still be waived by the Assistant Secretary for Housing-Federal Housing Commissioner in appropriate circumstances, in accordance with § 219.125. The Department invites the public to comment on this possible change.

The current section on payment schedule focuses solely on HUD payments to the project owner. Its counterpart in this rule adds a paragraph to discuss repayment of the loan at the earlier of the expiration of the term of the mortgage, the termination of mortgage insurance, or prepayment of the mortgage. In the final rule, the Department is considering requiring repayment to begin earlier if a project becomes solvent and would be able to sustain a rent increase to cover repayments of the operating assistance. Comments are invited on this proposal.

The section on estimating project revenue currently tracks the statutory language (section 201(f)(2)) permitting the Secretary to estimate "at least 25 percent * * * of the income of each * * * tenant." The Secretary has determined to use 30 percent of income as the minimum in the corresponding section of this rule, since the programs involved generally require that level of rent.

One totally new section is added to describe briefly the application process, based on HUD's general administrative authority and section 201(g). Another

new section has been added, based on section 201(i), to refer to HUD's authority to consider an owner's attempts to control utility costs as part of the rent increase approval process, which is governed by Part 245.

The regulatory provisions concerning funding priorities for operating assistance are left unchanged in this rule—again, because of this rule's status as an interim rule for effect. However, the Department is contemplating making some changes in priorities in the final rule and invites comment on the following. With respect to the funds for projects that are not State Agency financed, non-insured projects, first priority would be given to prevent defaults on insured mortgages; second priority would be given to projects with Secretary-held mortgages; and third priority would be given to other projects. Within each of these three categories, projects experiencing most immediate needs while being able to be stabilized would be funded before those whose needs are less immediate. (This immediacy of need factor is basically equivalent to the language found in the funding priorities section of this interim rule (and in the current rule).) The principal reason for this change would be to preserve HUD's resources for preserving housing serving low- and moderate-income families by preventing defaults and payments of insurance claims, followed by disposition efforts involving commitment of HUD subsidy funds. The Department invites public comments on the possibility of making this change.

C. Subpart C

Most of the sections contained in Subpart C are based directly on section 201 of the Housing and Community Development Amendments of 1978, as amended: Eligibility (§ 219.305), based on section 201(k)(1) through (k)(3); Amount of assistance (§ 219.315), based on section 201(l)(1); Loan terms and conditions (§ 219.320), based on section 201(l)(2); Effect on rental payments (§ 219.325), based on section 201(m); and Funding priorities (§ 219.330), based on section 201(k)(4). In addition, there are sections describing the application process (§ 219.310), which is similar to the provision in Subpart B, and the treatment of overruns (§ 219.335).

A project is eligible for a capital improvement loan if, in addition to meeting the criteria stated in Subpart A, the reserve for replacements—although funded in accordance with HUD requirements—is insufficient to cover the needed repair or replacement of a particular capital item as well as to cover other capital improvements that are reasonably expected to be required in the near future. (In this rule, "near future" is interpreted to mean the next 24 months.) If the reserve for replacements exceeds $1,000 per unit, the owner may be required to use funds from that source to cover capital improvements—to the extent that use of the reserve would not deplete it by more than 50 percent of its value above $1,000 per unit.

The eligibility section of this subpart also prescribes the amount of the owner contribution. It provides that the contribution must be made in cash and that it may not be taken from project income but may be taken from surplus cash from the project.

Section 201(k)(2) requires that the contribution be at least 20 percent of the total estimated cost of the improvements. Section 201(m)(2) authorizes the Secretary to require the contribution to be increased to an amount not to exceed 30 percent. Given the history of requiring up to one-third contributions in the operating assistance component, the Secretary has determined that the usual amount of owner contribution in the capital improvement loan component of the program should be higher than 20 percent. Since the ceiling is 30 percent, the intermediate rate of 25 percent has been selected and is stated as the general requirement in § 219.305(c). In accordance with section 201(k)(2) of the Act, an owner's contribution required under § 219.305(c) may be waived or reduced under the waiver authority of § 219.125 if sufficient justification is provided to the Secretary for a finding of good cause to do so.

In accordance with section 201(l)(1), the rule provides that the amount of the loan can cover the cost of repairing or replacing capital items that have failed or are likely to fail in the "near future", upgrading these items and related items to satisfy energy efficiency strandards, and complying with Federal requirements for accessibility to persons with handicaps. However, an administrative cap has been placed on loans that would otherwise be greater than the remaining balance of the mortgage: 80 percent of the value of the property as repaired, less the remaining mortgage.

The loan term and interest rate are to be determined on an individual basis, in accordance with section 201(l)(2). HUD will attempt to tailor each loan to the condition of the property and the ability of the rent structure to support the debt service necessary to amortize the loan. In the case of a project with an FHA-insured mortgage, the term generally will be the remaining term of the original mortgage, and it may never exceed that length. In the case of other projects, the loan term generally will be the remaining period for which the owner is committed to provide lower income housing.

The Secretary is authorized to charge an interest rate as low as 3 percent below the "applicable Federal rate" (as determined by the Secretary of the Treasury) at the end of the preceding Federal fiscal year, plus an allowance to cover HUD administrative costs and probable losses. The interest rate, including allowance, is to be no less than 3 percent nor more than 6 percent.

The Secretary of the Treasury will certify to HUD on an annual basis the "applicable Federal rate" determined in accordance with this statutory prescription. HUD has determined that the allowance for administrative costs plus probable losses will be one-half of 1 percent. This 0.5 percent will be taken into consideration in the following way: 3 percentage points will be subtracted from the applicable Federal rate, and then 0.5 percent will be added, to determine the minimum rate. Effecetively, the minimum will be 2½ percent below the rate determined by the Treasury as long as the HUD-determined allowance remains at one-half of 1 percent. As long as the "applicable Federal rate" is 8.5 percent or above, the minimum rate would be 6 percent or more. Since the statute provides that the rate used may not exceed 6 percent, any mimimum exceeding 6 percent may be ignored. Therefore, to the extent that the applicable Federal rate remains at 8.5 percent or above, the standard rate used by HUD will be 6 percent (representing both the minimum and maximum rate). If the applicable Federal rate determined by the Treasury in a particular year falls below 8.5 percent, HUD will publish the rate so that the public will have notice of a minimum rate lower than 6 percent. Of course, in a case of extreme rent burden (as discussed below), a rate lower than this standard minimum rate may be authorized.

A project may receive more than one type of assistance under the Flexible Subsidy program. However, the rule provides that different forms of assistance may not be provided within a five-year period to remedy the same deficiency. In addition, the rule provides that a capital improvement will not be financed partly by operating assistance under Subpart A and partly by a capital improvement loan under Subpart B.

The rule follows the statute in providing that if the rents to be charged lower income residents of the project would be in excess of those generally charged tenants of section 8 projects, HUD may consider decreasing the impact on tenants by making housing assistance payments under the section 8 Loan Mangement Set-aside program or the section 8 Certificate program, increasing the length of the term or reducing the interest rate (to not less than 1 percent), or by increasing the owner contribution (thereby reducing the amount of the capital improvement loan to be amortized and decreasing the rents needed to support the loan).

Since the 1987 amendments make it clear that the top priority for funding capital improvement loans is to provide incentives to owners who might otherwise prepay their mortgages and terminate their project's availability to low- and moderate-income tenants, the rule provides a set-aside for this category of projects. At the beginning of each fiscal year, HUD will estimate the amount of the capital improvement part of the Flexible Subsidy Fund that is necessary for handling the prepayment priority, and the remainder will be made available for other eligible projects. With respect to these other eligible projects, the rule follows the statute's requirement that priority be given based on four other factors: immediacy of need, lack of availability of other suitable housing for low- and moderate-income tenants, degree to which the deficiencies involve life, safety or health of the residents or major capital improvements, and the degree of financial distress. No one of these priorities is necessarily to be given higher value than the others.

IV. Justification for Interim Rule

Section 1011(b) of the McKinney Homeless Assistance Amendments Act of 1988 (Pub. L. 100-628, approved November 7, 1988) requires that, "the Secretary of Housing and Urban Development shall issue regulations that become effective not later than February 5, 1989." Although the Department has been unable to meet this precise deadline for publication, every effort is being made to comply with the deadline by making the rule effective upon publication.

We note that there are two procedural requirements that would have been obstacles to publication of a rule for effect by the statutory deadline. First, the general requirement for advance publication and solicitation of public participation in rulemaking would have required delays of several months after a rule was developed before it could have taken effect. Second, the provision requiring that effectiveness of HUD rules be delayed after publication until the expiration of 30 continuous days of the session of Congress would have delayed this rule's effectiveness until mid-April, based on its publication in mid-February. (See sec. 7(o)(3), Department of Housing and Urban Development Act, 42 U.S.C. 3535(o)(3).)

Although the Administrative Procedure Act ("the APA") (5 U.S.C. 553) requirements for advance publication and solicitation of public participation before issuing a rule for effect do not apply to this rulemaking because the program affected is covered by an exemption for public grants and contracts, HUD's own rule on rulemaking, 24 CFR Part 10, adopting these principles, does apply. Generally, HUD publishes a proposed rule and invites public comment before developing a rule to be published for effect, and when a rule is published for effect it is to be published at least 30 days before its effective date.

Part 10 does provide for exceptions from the general rule for advance notice and public participation and for publication in advance of effectiveness (as does the APA) where the agency finds good cause to omit them and states the basis in the rule. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest." 24 CFR 10.1.

In this case, the Department has not had sufficient time between November 7, 1988 and the date of publication to develop and publish both a proposed rule for comment and a final rule for effect. Therefore, the Department finds that with the statutory deadline of publishing a rule for effect by February 5, 1989, and a statutory requirement to spend a stated minimum amount of money on the new program that is the subject of this rule, prior public procedure is impracticable, and there is good cause for publication of this rule for effect. In an attempt to provide maximum public participation, however, the Department is inviting public comment on this rule and will consider comments received in the development of a final rule.

With respect to the statutory requirement for a delayed effective date dependent on the Congressional schedule, satisfaction of both the delayed effectiveness requirement of the Department of HUD Act *and* the statutory deadline for effectiveness imposed by section 1011 of the McKinney Homeless Assistance Amendments Act of 1988, would have required publishing this rule by September 22, 1988, more than a month before the McKinney Act was signed into law. Since the Congress knew, at the time the Amendments Act was adopted, that legislative review requirements under section 7(o)(3) of the Department of HUD Act could not be met by February 5, 1989, the Department finds that section 7(o)(3) (42 U.S.C. 3535(o)(3)) is in conflict with section 1011 of the McKinney Act, and that the McKinney Act provision renders section 7(o)(3) inapplicable in this case, permitting the rule to become effective upon publication.

V. Findings and Certifications

Environment. A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50 that implement section 101(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street SW., Washington, DC 20410.

Executive Order 12291. This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 issued by the President on February 17, 1981. Analysis of this rule indicates that it will not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect 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.

Regulatory Flexibility Act. Under the Regulatory Flexibility Act (5 U.S.C. 601), the Undersigned hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities. The rule will provide financial assistance to remedy the disrepair of necessary capital items at HUD-assisted projects without regard to the size of the project.

Executive Order 12612, Federalism. The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this rule would not have federalism implications and, thus, are not subject to review under the Order. The rule will

provide for additional financial assistance to HUD-assisted multifamily housing projects but will not interfere with State or local government functions.

Executive Order 12606, The Family. The General Counsel, as the Designated Official under Executive Order 12606, *the Family,* has determined that this rule does not have potential significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule involves the source of funding for capital improvements to multifamily projects.

Regulatory Agenda. This rule is listed as sequence number 944 under the Office of Housing in the Department's semiannual agenda of regulations published on October 24, 1988 (53 FR 41974, 41986), under Executive Order 12291 and the Regulatory Flexibility Act. The regulatory changes that are discussed under sequence numbers 942 and 989 (41986 and 41996) are to be included in this rulemaking.

Catalog. The Catalog of Domestic Assistance number for the program affected by this rule is 14.164.

Information collection requirements. The information collection requirements contained in this rule have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980. Information on the public reporting burden of the sections in this rule that the Department has determined contain information collection requirements is provided as follows:

ANNUAL REPORTING BURDEN OF INTERIM RULE—FLEXIBLE SUBSIDY PROGRAM

Description of information collection	Section of 24 CFR affected	No. of respondents	No. of responses per respondent	Total annual responses	Hours per response	Total hours
MIO plan (action)	219.210	40	1	40	8	320
MIO plan (funding)	219.210	40	1	40	1	40
Req. for payment/req. for trans	219.220	40	12	480	½	240
Quart. perf. rep	219.220	40	4	160	1	160
MIO plan (action)/short form	219.310	57	1	57	2	114
MIO plan (action)/long form	219.310	6	1	6	4	24
MIO plan (funding)	219.310	60	1	60	1	60
Total burden hours						958

List of Subjects in 24 CFR Part 219

Grant programs—housing and community development, Loan programs—housing and community development, Low- and moderate-income housing, Rent subsidies.

Accordingly, Title 24, Part 219 of the Code of Federal Regulations is revised to read as follows:

PART 219—FLEXIBLE SUBSIDY PROGRAM FOR TROUBLED PROJECTS

Subpart A—General Provisions

Sec.
219.101 Purpose.
219.105 Types of projects.
219.110 General eligibility.
219.115 Flexible subsidy fund.
219.120 Local government consultation.
219.125 Environmental requirements.
219.130 Waivers.

Subpart B—Operating Assistance

219.205 Amount of operating assistance.
219.210 Application.
219.215 Estimating project revenue and operating expenses.
219.220 Payment and repayment of operating assistance.
219.225 Effect of assistance on rent increase approvals.
219.230 Priorities for funding.

Subpart C—Capital Improvement Loans

219.305 Eligibility.
219.310 Application.
219.315 Amount of assistance.
219.320 Loan terms and conditions.
219.325 Effect on rental payments.
219.330 Priorities for funding.
219.335 Operations.

Authority: Sec. 201, Housing and Community Development Amendments of 1978, 12 U.S.C. 1715z-1a; sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—General Provisions

§ 219.101 Purpose.

The purposes of the Flexible Subsidy program are to provide assistance to restore or maintain the financial soundness; to assist in the improvement of the management; to permit capital improvements to be made to maintain certain projects as decent, safe, and sanitary housing; and to maintain the low- to moderate-income character of certain projects assisted or approved for assistance under the National Housing Act, the United States Housing Act of 1937, the Housing Act of 1959, or the Housing and Urban Development Act of 1965, without regard to whether such projects are subject to insured financing under the National Housing Act.

§ 219.105 Types of projects.

The types of rental or cooperative housing projects that may be eligible for assistance under this part include only the following types of projects:

(a) A project assisted under the section 236 Interest Reduction program, the section 221(d)(5) program (commonly known as the 221(d)(3) Below Market Interest Rate program), or the Rent Supplement program;

(b) A project that was constructed more than 15 years before assistance is to be provided under this part with a loan under the section 202 program for Housing for the Elderly or Handicapped;

(c) A project assisted under section 23 of the United States Housing Act of 1937 (1937 Act), as in effect immediately before January 1, 1975, that is ineligible for assistance under the modernization program operated under the 1937 Act;

(d) A project assisted under the Section 8 Housing Assistance Payments program after conversion from assistance under the Section 236 Rental Assistance Payments program or the Rent Supplement program; or

(e) A project that met the criteria in paragraph (a) or (b) before acquisition by the Secretary and that has been sold by the Secretary subject to a mortgage insured or held by the Secretary and subject to an agreement (in effect during the period of assistance under this part) that provides that the low- and moderate-income character of the project will be maintained; except that with respect to any project sold after October 1, 1978, operating assistance under Subpart B shall be available for a period not to exceed three years.

§ 219.110 General eligibility.

Assistance under this subpart may not be made available unless the Secretary has determined that:

(a) This assistance, when considered with other resources available to the project, is necessary, will restore or maintain the financial or physical soundness of the project and maintain the low- and moderate-income character of the project. "Other resources" include but are not limited to mortgage modification agreements, owner contributions, and assistance from State or local programs;

(b) The owner has agreed to maintain the low- and moderate-income character of the project for a period at least equal to the remaining term of the project mortgage;

(c) This assistance will be less costly to the Federal Government over the useful life of the project than other reasonable alternatives by which the Secretary could maintain the low- and moderate-income character of the project;

(d) The project owner, together with the mortgagee in the case of projects not insured under the National Housing Act, has provided or agreed to provide assistance to the project in a manner as determined by the Secretary in accordance with §§ 219.205(b) and 219.305(c);

(e) The project is, or can reasonably be made, structurally sound, as determined from information resulting from an on-site inspection of the project;

(f) Project management is being conducted by persons who meet satisfactory levels of competency and experience as determined by the Secretary in the management review process; and

(g) The project is being operated and managed in accordance with a management improvement and operating (MIO) plan that is designed to reduce the operating costs of the project and that has been approved by the Secretary—except for a project for which the only assistance provided under this part is for capital improvements under Subpart C. (See § 219.310(b).)

§ 219.115 Flexible subsidy fund.

(a) The Flexible Subsidy Fund is a revolving fund established in the Treasury of the United States that is available to the Secretary, to the extent approved in appropriation Acts, to provide assistance under this part.

(b) The Fund consists of the following:

(1) Any amount appropriated to carry out the purposes of this part;

(2) Any amount repaid on any assistance provided under this part;

(3) Any amounts credited to the Section 236 program excess rental receipts fund; and

(4) Any amount received by the Secretary under this program, including any interest on investment of funds as described in paragraph (c) of this section.

(c) Any amounts in the Fund determined by the Secretary to be in excess of the amounts currently required to carry out the provisions of this part shall be invested by the Secretary in obligations of, or obligations guaranteed as to both principal and interest by, the United States or any agency of the United States.

(d) At the beginning of each fiscal year, funds are allocated for two categories of projects: State agency financed non-insured projects; and all others, including projects with FHA-insured and HUD-held mortgages. Each category is allocated an amount based on the number of units in potentially eligible projects of that category as a percentage of the total number of units in all potentially eligible projects. Once these two funding categories are established, each category will be administered to comply with the statutory requirement concerning spending for the capital improvement loan program enumerated in paragraph (e) of this section, by spending 40 percent of its allocation, or its share of the stated dollar amount (whichever is less), to the extent of approvable applications.

(e) The Secretary will use not less than $30 million, or 40 percent of the amounts available in the Fund (subject to paragraph (a) of this section) in any fiscal year (whichever is less), for purposes of providing capital improvement loans under Subpart C of this part, to the extent of approvable applications. If any of the amounts reserved for capital improvement loans remains unused 60 days before the end of a fiscal year, it will become available for operating assistance under Subpart B.

(f) Funding decisions are made on a quarterly basis using the applicable priorities enumerated in Subparts B and C. As the end of each fiscal year approaches, HUD will determine to what extent there are funds required to be used for capital improvement loans (under paragraph (e) of this section) that are allocated for one of the two major categories (described in paragraph (d) of this section) but are unlikely to be used by projects of that category. In the last quarter, to the extent there is to be an excess in either of the categories for capital improvement loans that could be used for such loans to eligible applicants of the other category, the funds will be reallocated.

§ 219.120 Local government consultation.

The Secretary, before making assistance available to a project, will consult with the appropriate officials of the unit of local government in which the project is located and seek the following assurances:

(a) The community in which the project is located is providing, or will provide, essential services to the project in keeping with the community's general level of these services;

(b) The real estate taxes on the project are or will be no greater than would be the case if the property were assessed in a manner consistent with normal property assessment procedures for the community; and

(c) Assistance to the project under this part would not be inconsistent with local plans and priorities. § 219.125 Environmental requirements.

§ 219.125 Environmental requirements.

In order to be approved for funding under this part, an application for assistance to cover a capital improvement, as defined in § 219.305, will be reviewed for compliance with applicable environmental requirements, as follows.

(a) If the proposed capital improvements involve major mechanical systems, HUD will determine whether the project is located in a 100-year floodplain and if so, will take all feasible actions to minimize the impact of flooding on the mechanical systems.

(b) If a project is listed on the National Register of Historic Places, the proposed use of funds will be reviewed for compliance with the National Historic Preservation Act of 1966. As a general rule, in-kind replacements will not trigger review under the Act. If the project is not listed on the National Register but is located in a historic district, review under the Act will only be required where there are proposed alterations to the exterior that are not in-kind.

§ 219.130 Waivers.

Upon a determination of good cause, the Secretary of Housing and Urban Development may, subject to statutory limitations, waive any provision of this part. Each such waiver will be in writing and will be supported by documentation of the pertinent facts and grounds.

Subpart B—Operating Assistance

§ 219.205 Amount of operating assistance.

(a) The Secretary will provide the initial and subsequent operating

assistance to permit the project to attain and maintain financial soundness, in an amount that is consistent with the project's MIO plan, subject to the availability of funds, as described in § 219.115, but the amount provided will not exceed the sum of the following:

(1) An amount determined by the Secretary to be necessary to correct project deficiencies existing at the beginning of the first year of assistance that were caused by the deferral of regularly scheduled maintenance and repairs or the failure to make necessary and timely replacements of equipment and other components of the project. A repair or replacement item is only eligible under this program if no previous payment of HUD-related assistance (such as assistance under this part, Housing Development Grant, or Community Development Block Grant) has been made. A capital improvement (as described in § 219.305(a)) is eligible for funding as part of operating assistance only if it is necessary to meet local building codes or to maintain the project in a decent, safe and sanitary condition and the Secretary determines that this method of funding the improvement is the most efficient;

(2) An amount determined by the Secretary to be necessary to maintain the low- and moderate-income character of the project by reducing deficiencies (which exist at the beginning of the first year of assistance and for which payment has not previously been made) in the reserve fund established by the project owner for the purpose of replacing capital items;

(3) An amount not greater than the amount by which the estimated operating expenses for the year for which assistance is made available exceeds the estimated revenues to be received by the project during that year, as determined in accordance with § 219.210; and

(4) An amount determined by the Secretary to be necessary to carry out a plan to upgrade the project to meet cost-effective energy efficiency standards approved by the Secretary.

(b) The owner must provide assistance to the project.

(1) Generally, an owner must make a cash contribution toward the amount needed to render the project financially sound. Cash that has already been agreed to be contributed to the project as a condition for approval of purchase of the project (TPA) will not be considered for this purpose. Cash contributions by the owner within the 24 months before application for operating assistance under this Subpart from sources other than project income may be considered.

(2) A non-profit owner may be permitted to contribute to the project in the form of services, if HUD determines that neither the mortgagor nor the sponsor has the financial capacity to make a cash contribution.

§ 219.210 Application.

(a) The project owner must submit an application on a form approved by the Secretary.

(b) The application will include a MIO plan that includes the following:

(1) A detailed maintenance schedule;

(2) A schedule for correcting past deficiencies in maintenance, repairs and replacements;

(3) A plan to upgrade the project to meet cost-effective energy efficiency standards approved by HUD;

(4) A plan to improve financial and management control systems;

(5) An updated annual operating budget, if the last budget was submitted more than 90 days before the application is submitted; and

(6) A plan setting forth the specific controls and procedures that will result in a reduction in operating costs, if possible, together with an estimate of the cost saving.

(c) The application will include documentation of eligibility, as described in § 219.110.

§ 219.215 Estimating project revenue and operating expenses.

(a) *Computing estimated project revenue.* The estimated revenue for a project with respect to any year is equal to the sum of the following:

(1) The estimated amount of rent that is to be paid by the tenants of the project during the year (without regard, in the section 236 Interest Reduction program, to whether the owner has established and is collecting a "basic rent", as defined in § 236.2), in accordance with the following:

(i) The rent being paid or projected to be paid at the time project revenue is estimated; but at least 30 percent of the adjusted income of each tenant, or, in the case of a tenant paying his or her own utilities, a percentage of income that is less than 30 percent and that takes into account the reasonable costs of utilities. Percentages of adjusted income, as defined in 24 CFR Part 813, can be based on the most recent tenant income certification. In no case will the amount used for this estimate exceed the HUD-approved rent for the project.

(ii) A vacancy allowance may be used in developing the estimated revenue for non-insured projects and HUD-held projects. This allowance may not exceed 6 percent of the rental payments otherwise to be anticipated, unless the Secretary permits a higher allowance for the first three years in which assistance is to be provided to a project under this subpart because the higher allowance is necessary to carry out the purposes of this subpart.

(2) The estimated amount of assistance payments to be made on behalf of the tenants during the year other than assistance made under this subpart; and

(3) Other income attributable to the project as determined by the Secretary, such as, commercial rental income, tax rebates or refunds, condemnation or insurance award proceeds.

(b) *Computing estimated project operating expenses.* The estimated operating expenses of any project with respect to any year shall include all estimated operating costs that the Secretary determines to be necessary and consistent with the MIO plan for the project for the year. Such costs include, but are not limited to, taxes, utilities, maintenance and repairs (except for maintenance and repairs that should have been performed in previous years), management, insurance, debt service, and payments made by the owner for the purpose of establishing or maintaining a reserve fund for replacement costs. The estimated operating expenses may not include any return on the equity investment of the owner.

§ 219.220 Payment and repayment of operating assistance.

(a) *Basic for payment.* Assistance payments will be computed on an annual basis in accordance with § 219.205, payable at least quarterly, after the amount payable from the reserve for replacements (if any) and the owner contribution payable as part of the approved plan have been exhausted. At the time of each payment, the operations of the project will be reviewed by the Secretary to determine that they are consistent with the MIO plan. Continued payments will be contingent upon satisfactory performance.

(b) *Basis for repayment of assistance.* Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of mortgage insurance, or prepayment of the mortgage.

§ 219.225 Effect of assistance on rent increase approvals.

To assure that projects eligible for assistance under this part restrain costs

in every way possible, including by using assistance under this part to upgrade capital items to meet cost-effective energy efficiency standards, the Secretary will consider, as part of the rent increase approval process under Part 245, whether the project owner could control increases in utility costs by securing more favorable utility rates, by undertaking energy conservation measures that are financially feasible and cost effective, or by taking other financially feasible and cost-effective actions to increase energy efficiency or to reduce energy consumption. Where the Secretary determines that the owner could exercise such control, the amount of a proposed rent increase may be adjusted to reflect the estimated savings that could be attained.

§ 219.230 Priorities for funding.

HUD will give funding priority to projects presently experiencing financial and management problems where conditions can be stabilized by the provision of assistance under this subpart. To the extent that funds remain available, assistance may be provided to projects that, on the basis of a financial and management analysis, appear to have a high probability of having financial and management problems within approximately the next five years, and that satisfy the eligibility requirements of § 219.110.

Subpart C—Capital Improvement Loans

§ 219.305 Eligibility.

(a) Assistance is available under this subpart for capital improvements. For purposes of this subpart, "capital improvements" include any major repair or replacement of building components: *i.e.*, roof structures, ceiling, wall or floor structures, foundations, plumbing, heating, cooling, electrical systems and major equipment, including any major repair or replacement of any short-lived building component or equipment before the expiration of its useful life. Capital improvements also may include limited supplements or enhancements to mechanical equipment needed for health and safety of the residents, such as air conditioning, heating equipment, or water softeners, where they do not exist. Capital improvements do not include maintenance of any such item.

(b) Assistance under this subpart will be in the form of a loan. The Secretary will provide this assistance only if the Secretary determines that the owner's reserve for replacements (including any surplus cash, residual receipts or other funds from the project account or escrow outside the project account that could be used to fund the reserve) is insufficient to finance both the capital improvements for which assistance is being requested and other capital improvements that are reasonably expected to be required within the next 24 months, as described in the owner's work write-up (submitted as part of the application), and that the owner has funded the reserve fund in accordance with HUD requirements. An owner's reserve for replacements may only be tapped to cover needed capital improvements if the reserve exceeds $1,000 per unit, and then only to the extent of depleting it by up to 50 percent of the amount over $1,000 per unit on the date the capital improvement loan is made.

(c) An owner must contribute 25 percent of the total estimated cost of the capital improvements involved, unless the owner is a nonprofit corporation (other than a cooperative association), in which case it is exempt from this contribution requirement. The total estimated cost of the capital improvements includes the cost of the estimate of work, the cost of materials, and the cost of labor. This estimate must be approved by HUD as cost effective.

(1) The contribution must be made in cash. It must not be taken from project income, but may be taken from surplus cash (as defined in the Regulatory Agreement) from the project.

(2) Cash that has already been agreed to be contributed to the project as a condition for receiving operating assistance or approval of purchase of the project (TPA) will not be considered for purposes of meeting this contribution requirement.

(3) When an owner has spent its own money (as from surplus cash) to attempt to repair capital items within the 24 months before the application, and the repair was unsuccessful and has resulted in a need for a replacement (to be funded by a capital improvement loan), that expenditure will be considered for credit for purposes of meeting this contribution requirement.

§ 219.310 Application.

(a) A project owner must submit an application on a form approved by the Secretary, which will include a work write-up to describe the capital improvements to be covered by the requested loan (see § 219.315), and other documentation of eligibility, as described in §§ 219.110 and 219.305.

(b) The application must be accompanied by a MIO plan only in the following cases:

(1) A default under the mortgage;

(2) A violation of the fiscal requirements or property maintenance requirements of the regulatory agreement (for other than willful or fraudulent reasons);

(3) An unsatisfactory or marginally satisfactory management review in the past 24 months (unless the owner has corrected the problems through a substitution of management agent, management personnel, or otherwise, in a manner satisfactory to HUD); and

(4) A situation that HUD Headquarters has determined requires submission of a MIO plan.

§ 219.315 Amount of assistance.

(a) The amount of assistance will not exceed the sum of the following, minus the owner contribution made in accordance with § 219.305:

(1) The amount the Secretary determines is necessary to cover capital improvements at the project with respect to capital items that have failed, or are likely to fail or deteriorate seriously within 24 months;

(2) The amount the Secretary determines is necessary to upgrade the capital items and related capital items to meet cost-effective energy efficiency standards approved by HUD; and

(3) The amount the Secretary determines is necessary to comply with the Department's standards in 24 CFR Part 8 for accessibility to individuals with handicaps.

(b) Notwithstanding paragraph (a) of this section, if the requested loan is greater than the remaining balance of the mortgage, the loan will not exceed 80 percent of the appraised value of the property as repaired, less the balance of the first mortgage.

§ 219.320 Loan terms and conditions.

(a) The length of the loan term will be determined based on various factors, including the useful life of the improvement, the amount financed, and the impact on tenant rents. The term generally will be for the remaining period of the original mortgage, and the term may not exceed that period. With respect to a non-insured project, the loan term will generally be for the remaining period during which the owner is under an obligation to provide housing for lower income families, and the term may not exceed that period.

(b) In determining the interest rate on the loan, the Secretary will consider factors such as the length of the loan term and the effect of the required debt service on tenant rents.

(1) The minimum rate is the applicable Federal rate determined by the Secretary of the Treasury at the end of the Federal fiscal year before the loan is to be made, minus 3 percentage points,

plus an allowance established by the Secretary of HUD to cover administrative costs and probable losses under the program.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, the rate to be charged may not be less than 3 percent nor more than 6 percent.

(3) The rate that represents both the minimum and the maximum rate is 6 percent, unless the applicable Federal rate determined by the Secretary of the Treasury for a fiscal year is less than 8.5 percent or HUD changes the allowance from its initial amount of .5 percent, thereby producing a minimum rate other than 6 percent. In that event, HUD will publish in the **Federal Register** the following: the rate determined by the Secretary of the Treasury, the allowance established by HUD, and the minimum rate.

(4) Notwithstanding the minimum rate limitations specified in paragraphs (b)(1) and (b)(2) of this section, the Secretary may charge a lesser rate if the Secretary determines that the lower rate is necesary to maintain reasonable rental rates. (See § 219.325.)

(c) Each loan for capital improvements is a liability of the project and cannot be discharged in any bankruptcy proceeding under section 727, 1141, or 1328(b) of title 11, United States Code. The project owner will be required to execute a note evidencing the capital improvement loan, which generally must be secured.

(d)(1) A capital improvement loan may be made under this subpart to a project owner who already has received assistance under this part, so long as the capital items that are the subject of the loan application have reached the end of their useful life and the project meets all of the applicable eligibility criteria for the capital improvement loan (see §§ 219.110 and 219.305).

(2) A capital improvement may not be financed partly by operating assistance under Subpart A and partly by a capital improvement loan under Subpart B. However, a project owner may apply for assistance to cover deferred liabilities under Subpart B and, simultaneously, apply for a loan to cover capital improvements under Subpart C.

§ 219.325 Effect on rental rates.

(a) Rent increases resulting from the debt service and other expenses of a loan for capital improvements under this part for an owner whose project rents are not approved by HUD and that is subject to a plan of action approved under Part 248 are governed by the rent agreements entered into as part of that plan of action.

(b) If rent increases that would result from the debt service and other expenses of a capital improvement loan under this subpart for a project other than one described in § 219.330(a) would cause the rents of lower income residents of the project to be higher than the amount that would be allowed for eligible families under 24 CFR 813.107, the Secretary may consider taking any or all of the following actions;

(1) Increase the amount of the owner's contribution under § 219.305 to an amount not to exceed 30 percent of the total estimated cost of the capital improvements involved.

(2) Increase the term of the loan determined under § 219.305(a) to a term that does not exceed the remaining term of the mortgage on the project.

(3) Reduce the rate of interest determined under § 219.320(b) on the capital improvement loan to a rate not lower than one percent.

(4) Provide assistance under the Section 8 Existing Housing program (including project-base Certificates or Loan Management Set-aside), to the extent amounts are available for such assistance, and without regard to the limitation contained in 24 CFR 813.105 on the number of non-very low income families that may be admitted to the program.

§ 219.330 Priorities for funding.

(a) The Secretary will establish an annual set-aside for projects that are eligible for incentives to continue to operate as low- to moderate-income housing under a plan of action in accordance with Part 248, to assure that top priority for funding capital improvement loans is given to this category of projects. This set-aside may be increased or decreased during the year if it is determined to be appropriate.

(b) To the extent that funds are available for projects other than those described in paragraph (a) of the section, priority will be given to projects based on the extent to which—

(1) The capital improvements for which the loan is requested are immediately required;

(2) The project serves as the residence of lower income families, and the extent to which other suitable housing is unavailable for such families in the areas in which the project is located;

(3) The capital improvements for which the loan is requested involve the life, safety, or health of the residents of the project, or involve major capital improvements in the project; and

(4) The project demonstrates the greatest financial distress, while continuing to meet the requirements of § 219.110.

§ 219.335 Operations.

(a) Interest on the capital improvement loan starts to accure and the loan amortization period begins when the loan proceeds have been spent.

(b) If, after the work is completed, the estimated cost proves to be less than originally estimated, the excess will be returned to the Flexible Subsidy Fund, described in § 219.115, unless HUD has approved the excess for additional items or improvements. Any anticipated cost overruns must be reported to HUD immediately. The principal balance of the capital improvement loan may be increased at the sole discretion of HUD and subject to the availability of funds. Until the project owner receives a written commitment for an increase in the principal balance of the loan, the project owner will be solely responsible for any excess costs of performing the capital improvements. In the case of an identity of interest firm, no increases in the principal balance of the capital improvement loan to cover cost overruns will be considered.

Date: March 1, 1989.

James E. Schoenberger,

General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner.

[FR Doc. 89-5188 Filed 3-6-89; 8:45 am]

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Tuesday
March 7, 1989

Part VIII

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 5, 17, and 35
Federal Acquisition Regulation (FAR); Federally Funded Research and Development Centers; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 17, and 35

Federal Acquisition Regulation (FAR); Federally Funded Research and Development Centers

AGENCIES: Department of Defense (DoD) General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to the Federal Acquisition Regulation (FAR) Parts 5, 17, and 35 to implement Office of Federal Procurement Policy (OFPP) Policy Letter 84-1 on Federally Funded Research and Development Centers, and the requirements of Pub. L. 99-500.

DATE: Comments should be submitted to the FAR Secretariat at the address shown below on or before May 8, 1989 to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to:

General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4041, Washington, DC 20405

Please cite FAR Case 84-45 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755.

SUPPLEMENTARY INFORMATION:

A. Background

OFPP Policy Letter 84-1 established Governmentwide policies for the establishment, use, periodic review, and termination of the sponsorship of Federally Funded Research and Development Centers (FFRDC's). The Policy Letter was issued at the recommendation of the Commission on Government Procurement, which recommended that the Federal Government keep open the option to organize and use FFRDCs to satisfy needs that cannot be satisfied by other organizational resources. The proposed changes to the FAR are based on the Policy Letter.

Section 912 of Pub. L. 99-500, added Section 2367 to Chapter 139 of Title 10 of the United States Code. This section places specific restrictions on certain civilian agencies and the DoD regarding the creation of new FFRDC's, and on DoD regarding the use of FFRDC's. The proposed regulatory changes also implement 10 U.S.C. 2367.

B. Regulatory Flexibility Act

The proposed rule will not have a significant effect beyond the internal operating procedures of procuring agencies or a significant cost or economic impact on contractors or offerors, since the scope and mission of FFRDC's is generally very limited, and they are not permitted to compete with any non-FFRDC concern in response to a Federal agency formal request for proposal. Therefore, Section 19 of the OFPP Act does not require publicizing the rule for public comment. Consequently, the Regulatory Flexibility Act (Pub. L. 96-354) does not apply to the current proposal. However, since time permits, comments from small businesses and other interested parties are invited and will be considered in the preparation of a final rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because the proposed rule does not impose any reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 5, 17, and 35

Government procurements.

Dated: March 1, 1989.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, 48 CFR Parts 5, 17, and 35 are amended as set forth below:

1. The authority citation for 48 CFR Parts 5, 17, and 35 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 5—PUBLICIZING CONTRACT ACTIONS

2. Section 5.205 is amended by redesignating the existing paragraphs (b) through (d) as (c) through (e) and by adding a new paragraph (b) to read as follows:

5.205 Special situations.

* * * * *

(b) *Federally Funded Research and Development Centers.* Before establishing a Federally Funded Research and Development Center (FFRDC) (see Part 35) or before changing its basic purpose or mission, the sponsor shall place at least three notices over a 90-day period in the Commerce Business Daily, and in the **Federal Register**, indicating the agency's intention to sponsor an FFRDC or change the basic purpose or mission of an FFRDC. The notice shall indicate the scope and nature of the effort to be performed. Notice is not required where action is required by law.

* * * * *

PART 17—SPECIAL CONTRACTING METHODS

3. Section 17.504 is amended by adding paragraph (e) to read as follows:

17.504 Ordering procedures.

* * * * *

(e) Nonsponsoring Federal agencies may use a Federally Funded Research and Development Center (FFRDC) only if the terms of the FFRDC's sponsoring agreement permit work from other than a sponsoring agency. Work placed with the FFRDC is subject to the acceptance by the sponsor and must fall within the purpose, mission, general scope of effort, or special competency of the FFRDC. (See 35.017; see also 6.302 for procedures to follow where using less than full and open competition.)

PART 35—RESEARCH AND DEVELOPMENT CONTRACTING

4. Section 35.000 is amended by adding paragraph (c) to read as follows:

35.000 Scope of part.

* * * * *

(c) This part also implements OFPP Policy Letter 84-1, Federally Funded Research and Development Centers, by prescribing the procedures for initiation, use, and renewal of Federally Funded Research and Development Centers.

5. Section 35.001 is amended by alphabetically adding a definition to read as follows:

35.001 Definitions.

* * * * *

"Federally Funded Research and Development Centers (FFRDC's)," means activities that are sponsored under a broad charter by a Government agency (or agencies) for the purpose of performing, analyzing, integrating, supporting, and/or managing basic or applied research and/or development, and which receive more than 70 percent of their financial support from the Government. A long-term relationship is contemplated; most or all of the

facilities are owned or funded by the Government; and the FFRDC has access to Government and supplier data, employees, and facilities beyond that which is common in a normal contractual relationship. The National Science Foundation maintains the master list of FFRDC's.

* * * * *

6. Part 35 is amended by adding section 35.017, consisting of sections 35.017-1 through 35.017-7, to read as follows:

35.017 Federally Funded Research and Development Centers.

(a) *Policy.* (1) Federal policy regarding the establishment, use and termination of Federally Funded Research and Development Centers (FFRDC's) and related sponsoring agreements is set forth in OFPP Policy Letter 84-1, Federally Funded Research and Development Centers, dated April 4, 1984.

(2) An FFRDC is brought into existence to meet some special long-term research or development need which at the time cannot be met as effectively by existing in-house or contractor resources. FFRDC's enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency. An FFRDC, in order to discharge its responsibilities to the sponsoring agency, has access, beyond that which is common to the normal contractual relationship, to Government and supplier data including sensitive and proprietary data, and to employees and facilities. The FFRDC is required to conduct its business in a manner befitting its special relationship with the Government, to operate in the public interest, free from organizational conflicts of interest, with full disclosure of its affairs to the sponsoring agency. It is not the Government's intent that an FFRDC use its privileged information or access to facilities to compete with the private sector. However, an FFRDC may perform work for other than the sponsoring agency under the Economy Act, or other applicable legislation, either when the work is not otherwise available from the private sector, or is not of interest to the private sector.

(3) FFRDC's are operated, managed, and/or administered by either a university or consortium of universities, other not-for-profit or nonprofit organizations, autonomous industrial organizations, or identifiably separate operating unit of a parent industrial organization.

(4) Long-term relationships between the Government and FFRDC's are encouraged in order to provide the continuity that will attract high-quality personnel to the FFRDC. This relationship should be of a type to encourage the FFRDC to maintain currency in its field(s) of expertise, maintain its objectivity and independence, preserve its familiarity with the needs of its sponsor(s), and provide a quick response capability.

(b) *Definitions.*

"Nonsponsor," as used in this section, means any other organization, in or outside of the Federal Government, which funds specific work to be performed by the FFRDC and is not a party to the sponsoring agreement.

"Primary sponsor,"as used in this section, means the lead agency responsible for managing, administering or monitoring overall use of the FFRDC under a multiple sponsorship agreement.

"Special competency," as used in this section, means a special or unique capability, including qualitative aspects, developed incidental to the primary functions of the FFRDC to meet some special need.

"Sponsor" means the executive agency which manages, administers, monitors, funds, and is responsible for the overall use of a FFRDC. Multiple agency sponsorship is possible as long as one agency agrees to act as the "primary sponsor." In the event of multiple sponsors, "sponsor" refers to the primary sponsor.

35.017-1 Sponsoring agreements.

(a) In order to facilitate a long-term relationship between the Government and an FFRDC, a written agreement of sponsorship between the Government and the FFRDC shall be prepared when the FFRDC is established. The sponsoring agreement may take various forms; it may be included in a contract between the Government and the FFRDC, or in another legal instrument under which an FFRDC accomplishes effort, or it may be in a separate written agreement.

(b) While the specific content of any sponsoring agreement will vary depending on the situation, the agreement shall contain, as a minimum, the requirements of paragraph (c) of this section. The requirements for, and the contents of, sponsoring agreements may be as further specified in agency supplements or other regulations or policies.

(c) The sponsoring agreement shall contain, as a minimum:

(1) A statement of the purpose for which the FFRDC is being brought into being.

(2) Provisions for the orderly termination or nonrenewal of the agreement, disposal of assets, and settlement of liabilities. The responsibility for capitalization of an FFRDC must be defined in such a manner that ownership of assets may be readily and equitably determined upon termination of the FFRDC's relationship with its sponsor(s).

(3) A provision for the identification of retained earnings (reserves) and the development of a plan for their use and disposition.

(4) A prohibition against the FFRDC competing with any non-FFRDC concern in response to a Federal agency request for proposal for other than the operation of an FFRDC. This prohibition is not required to be applied to any parent organization or other subsidiary of the parent organization in its non-FFRDC operations. Requests for information, qualifications or capabilities can be answered unless otherwise restricted by the sponsor.

(5) A delineation of whether or not the FFRDC may accept work from other than the sponsor(s). If nonsponsor work can be accepted, a delineation of the procedures to be followed, along with any limitations as to the clients (other Federal agencies, State or local governments, nonprofit or profit organizations, etc.).

(d) The sponsoring agreement may also contain, as appropriate, other provisions, such as identification of:

(1) Any cost elements which will require advance agreement if cost-type contracts are used; and

(2) Considerations which will affect negotiation of fees where payment of fees is determined by the sponsor(s) to be appropriate.

(e) The term of the agreement will not exceed five years, but can be renewed, as a result of periodic review, in increments not to exceed five years.

35.017-2 Establishing or changing an FFRDC.

To establish an FFRDC, or change its basic purpose or mission, the sponsor shall ensure the following:

(a) Existing alternative sources for satisfying agency requirements cannot effectively meet the special research or development needs.

(b) The notices required for publication (see 5.205(b)) are placed as required.

(c) There is sufficient Government expertise available to adequately and objectively evaluate the work to be performed by the FFRDC.

(d) The Executive Office of the President, Office of Science and Technology Policy, Washington, DC 20506, is notified.

(e) Controls are established to ensure that the costs of the services being provided to the Government are reasonable.

(f) The basic purpose and mission of the FFRDC is stated clearly enough to enable differentiation between work which should be performed by the FFRDC and that which should be performed by others.

(g) A reasonable continuity in the level of support to the FFRDC is maintained, consistent with the agency's need for the FFRDC and the terms of the sponsoring agreement.

(h) The activity is operated, managed, or administered by an autonomous organization or as an identifiably separate operating unit of a parent organization, and is required to operate in the public interest, free from organizational conflict of interest, and to disclose its affairs (as an FFRDC) to the primary sponsor.

(i) OMB Circular A-120 is complied with when applicable, and quantity production or manufacturing is not performed unless authorized by legislation.

(j) Approval is received from the head of the sponsoring agency.

35.017-3 Using an FFRDC.

(a) All work placed with the FFRDC must be within the purpose, mission, general scope of effort or special competency of the FFRDC.

(b) Where the use of the FFRDC by a nonsponsor is permitted by the sponsor, the sponsor shall be responsible for compliance with paragraph (a) of this subsection (see 17.504). When permitted by the sponsor, a Federal agency may contract directly with the FFRDC. The nonsponsoring agency is responsible for making the determination required by 17.502, unless the agency is contracting directly with the FFRDC, in which case the agency is responsible for compliance with Part 6. Work from other than a Federal agency may be accepted only to the extent permitted by the sponsor.

35.017-4 Reviewing FFRDC's.

(a) The sponsoring agency, prior to extending the contract or agreement with an FFRDC, shall conduct a comprehensive review of the use and need for each FFRDC. The review will be coordinated with any co-sponsors and may be performed in conjunction with the budget process. If the sponsoring agency determined that its sponsorship is no longer appropriate, it shall apprise other agencies who use the FFRDC of the determination and afford them an opportunity to assume sponsorship.

(b) Approval to continue or terminate the sponsorship shall rest with the head of the sponsoring agency. This determination shall be based upon the result of the review conducted in accordance with paragraph (c) of this subsection.

(c) An FFRDC review should include the following:

(1) An examination of the agency's special technical needs and mission requirements to determine if and at what level they continue to exist.

(2) Consideration of alternative sources to meet the agency's needs.

(3) An assessment of the efficiency and effectiveness of the FFRDC in meeting the agency's needs, including the FFRDC's ability to maintain its objectivity, independence, quick response capability, currency in its field(s) of expertise, and familiarity with the needs of its sponsor.

(4) An assessment of the adequacy of the FFRDC management in ensuring a cost-effective operation.

(5) A determination that the criteria for establishing the FFRDC continue to be satisfied, and that the sponsoring agreement is in compliance with 35.017-1.

35.017-5 Terminating an FFRDC.

When a sponsor's need for the FFRDC no longer exists, the sponsorship may be transferred to one or more Government agencies, if appropriately justified. If the FFRDC is not transferred to another Government agency, it shall be phased out.

35.017-6 Master list of FFRDC's.

The National Science Foundation (NSF) maintains a master Government list of FFRDC's. Primary sponsors will provide information on each FFRDC, including sponsoring agreements, funding data, and type of R&D being performed, to the NSF upon its request for such information.

35.017-7 Limitation on the creation of new FFRDC's.

Pursuant to 10 U.S.C. 2367, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Transportation, and the Administrator of the National Aeronautics and Space Administration may not obligate or expend amounts appropriated to the Department of Defense for purposes of operating an FFRDC that was not in existence before June 2, 1986, until (i) the head of the agency submits to Congress a report with respect to such center that describes the purpose, mission, and general scope of effort of the center; and (ii) a period of 60 days, beginning on the date such report is received by Congress, has elapsed.

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Part IX

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701 and 785

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Requirements for Permits for Special Categories of Mining; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701 and 785

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Requirements for Permits for Special Categories of Mining

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) is establishing separate definitions for the terms "agricultural activities" and "farming" to replace the suspended definition of "agricultural activities or farming." Related changes to existing regulations governing mining on alluvial valley floors (AVFs) will conform these existing regulations with the new definitions for "farming" and "agricultural activities." Also, OSMRE is amending its regulations to specify the essential hydrologic functions of AVFs for which information must be provided in a permit application. These actions are necessary to respond to court decisions arising from legal challenges to rules promulgated in 1983. The effect of these actions will be to remove the mining prohibition from those AVFs used for agricultural activities other than farming and to provide guidance to operators and regulatory authorities as to what type of information must be included in a permit application.

EFFECTIVE DATE: April 6, 1989.

FOR FURTHER INFORMATION CONTACT: Patrick W. Boyd, OSMRE, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-4561.

SUPPLEMENTARY INFORMATION:

I. Background.
II. Discussion of Final Rule and Response to Comments.
III. Procedural Matters.

I. Background

Statutory Background

In addition to the general environmental protection performance standards applicable to all lands, the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. 1201 *et seq.*, provides specific protection for alluvial valley floors (AVFs). Section 701(1) of the Act, 30 U.S.C. 1291(1), defines "alluvial valley floors" as "unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation of flood irrigation agricultural activities * * *." As discussed in more detail below, the nature of the protection afforded to AVFs is two-fold. The performance standards of section 515 of the Act protect all AVFs by requiring the preservation throughout the mining and reclamation process of the essential hydrologic functions of AVFs. In addition, the permitting requirements of section 510 of the Act prohibit surface coal mining operations for interrupting, discontinuing or precluding farming on certain AVFs. Thus, certain "farmed" AVFs have an absolute safeguard, while other AVFs are protected without precluding mining.

Subject to a number of exceptions, section 510(b)(5) of the Act, 30 U.S.C. 1260(b)(5), requires a surface coal mining operation permit application to demonstrate affirmatively, and the regulatory authority to find in writing, that a number of requirements unique to AVFs would be satisfied by the proposed operation. Section 510(b)(5)(A) requires that the application demonstrate that the surface coal mining operation would "not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated * * *." In addition, section 510(b)(5)(B) requires a demonstration that the operation would not materially damage the quantity or quality of water in surface or underground water systems that supply the AVFs referred to in paragraph (5)(A).

As provided in section 510(b)(5) these requirements do not apply to:

(1) Surface coal mining operations located east of the 100th meridian west longitude;

(2) Undeveloped range lands which are not significant to farming on the AVFs;

(3) Lands for which the regulatory authority finds that the mining operation will only interrupt, discontinue or preclude farming of "such small acreage as to be of negligible impact on the farm's agricultural production[;]" and

(4) Those surface coal mining operations which in the year preceding the enactment of the Act (August 3, 1977) produced coal in commercial quantities, and were located within or adjacent to AVFs or had specific permit approval from the State regulatory authority to conduct surface coal mining operations on AVFs.

Another exemption from the section 510(b)(5) requirements is provided by section 506(d)(2) of the Act, 30 U.S.C. 1256(d)(2), for new operations proposed in an application for renewal or revision of a permit issued under the Act where the new operations extend to land beyond the boundaries authorized in the original permit. This exemption applies only if (1) the new land previously was identified in the reclamation plan submitted under section 508 of the Act, and (2) the original operations were exempt from the requirements of section 510(b)(5) of the Act under the section 510(b)(5) proviso for operations which produced coal in commercial quantities in the year preceding enactment of the Act.

However, even where mining of AVFs is allowed under section 510(b)(5) of the Act, the hydrologic protection requirements of section 515(b)(10)(F) of the Act, 30 U.S.C. 1265(b)(10), will apply. Section 515(b)(10)(F) requires surface mining operations to minimize disturbances to the prevailing hydrologic balance at the mine site and in associated off site areas, and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations by preserving throughout the mining and reclamation process the essential hydrologic functions of AVFs in the arid and semiarid areas of the country.

Regulatory History and Court Decisions—Section 701.5 Definition of "agricultural activities or farming"

The definition of AVFs in section 701 of the Act uses the term "agricultural activities," and its definition is thus relevant to determining what is and what is not an AVF subject to the protection of sections 510(b)(5) and 515(b)(10)(F) of the Act. The term "farming" is used in section 510(b)(5) of the Act and is relevant to determining the scope of the additional protection provided by that section. The term "agricultural activities" was first defined in a final rule published on March 13, 1979 (44 FR 15317). The rule did not define the term "farming." On June 28, 1983 (48 FR 29820), the substance of the definition was revised somewhat, and its scope was expanded to cover either "agricultural activities *or* farming." Under the revised definition the term "agricultural activities or farming" meant:

> [W]ith respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, pasturing or grazing of livestock, and the cropping, cultivation, or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

The preamble to the June 28, 1983 rule (48 FR 29803) stated that although the Act and OSMRE's regulations use both the terms "agricultural activities" and "farming," their meaning with respect to AVFs is the same.

Coal industry plaintiffs in *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. October 1, 1984), hereafter *In Re: Permanent II*, challenged the combined definition of "agricultural activities or farming" arguing that the term "agricultural activities" is more general than the term "farming," and thus encompasses more land uses.

Reasoning that the use of two different terms in the Act indicated a congressional intent to prescribe a different meaning to each, the district court in *In Re: Permanent II* remanded the definition of "agricultural activities or farming." Slip op. at 30-31. The court held that the Secretary must reconsider the definition and any additional regulations necessary to conform them to Congressional intent. On February 21, 1985, OSMRE suspended the definition (50 FR 7274). OSMRE since has reconsidered the definition and has proposed separate definitions for "agricultural activities" and "farming." OSMRE has also proposed other rule changes needed for conformity with the proposed definitions.

At the same time, the coal industry plaintiffs argued that the reach of the protection provided by § 515(b)(10) should be the same as that of § 510(b)(5). They were unsuccessful both with the district court and, upon appeal, with the United States Court of Appeals for the District of Columbia Circuit. See *NWF v. Hodel*, 839 F.2d 694, (D.C. Cir. 1988), hereafter *NWF v. Hodel*. The appeals court held that it is appropriate for the Secretary to consider that § 515(b)(10)(F) reaches to AVFs not protected by § 510(b)(5). (*Id.* at 746.)

Section 785.19(d)(2)(i) Information on the essential hydrologic functions of alluvial valley floors.

The March 13, 1979, permanent program rules at 30 CFR 785.19(d)(3) (44 FR 15375) described specific information, surveys and analyses that a surface coal mining and reclamation permit application was required to include concerning the geologic, hydrologic and biologic characteristics that support the essential hydrologic functions of AVFs. These rules were revised by OSMRE on June 28, 1983 (48 FR 29821) as part of a major revision of the AVF rules. The revised regulation at 30 CFR 785.19(d)(2)(i) required that the permit application include detailed surveys and baseline data required by the regulatory authority for a determination of the characteristics of AVFs which are necessary to preserve their essential hydrologic functions throughout the mining and reclamation process. However, the details formerly contained in § 785.19(d)(3) of precisely what such surveys and baseline data should consist of had been deleted.

The citizen and environmental plaintiffs in *In Re: Permanent II* challenged the deletion of the specific requirements from the rule on the grounds that the preamble to the rule contained inadequate justification for the revision. The court remanded 30 CFR 785.19(d)(2)(i) for OSMRE to provide guidance to operators and regulatory authorities as to what type of information was required or explain why such guidance is no longer needed. Slip op. at 39-40. The appeals court affirmed the district court remand, concluding the Secretary did not adequately explain why such guidance was deleted (*NWF v. Hodel*, at 729-31). Accordingly, OSMRE is amending § 785.19.

The proposed rule, incorporating changes to the definitions and to the information requirements to the essential hydrologic functions of AVFs, was published in the **Federal Register** on August 3, 1988 (53 FR 29310). Public hearings were scheduled for August 31, 1988 in Washington, DC and Denver, CO. Since no one requested to testify at these hearings, none were held. The comment period closed on September 19, 1988. OSMRE received comments from 15 sources: the State regulatory authorities of Utah and Wyoming, the Bureau of Land Management, five public interest groups, four individuals representing consulting firms, two individual landowners and a mining industry association. One commenter requested an additional 30 days for comment. OSMRE did not accede to the request; however, OSMRE did give full consideration to all comments received regardless of whether the comments were timely or late.

The rules adopted today replace the definition suspended in 1985 and respond to the court decisions described above. The minor changes from the proposed rule are identified in the following detailed discussion of the final rule. Based on an analysis of the issues involved, the legislative history of the Act, applicable court decisions, and the administrative record of this rulemaking, inlcuding comments received, this final rule is a proper and reasonable interpretation of the provisions of sections 701(1), 510(b)(5) and 510(b)(10) of the Act.

II. Discussion of Final Rule and Response to Comments

General. The final rule removes the definition of the term "agricultural activities *or* farming" from 30 CFR 701.5 and replaces it with separate definitions of the terms "agricultural activities" and "farming." To conform related AVF rules with these proposed definitions OSMRE also has revised the definition of "materially damage the quantity or quality of water" and has revised 30 CFR 785.19(b)(2)(ii) and (b)(3). OSMRE also has revised 30 CFR 785.19(d)(2)(i) in response to the court order to provide guidance to operators and regulatory authorities as to what type of information about potentially affected AVFs must be placed in a permit application.

Each of these changes and the public comments received concerning them are discussed in detail below.

A. Section 701.5 Definitions of "agricultural activities" and "farming"

The final rule at 30 CFR 701.5 removes the suspended definition of the term "agricultural activities *or* farming" and replaces it with separate definitions of the terms "agricultural activities" and "farming." OSMRE has made this change following reexamination of both the language and legislative history of the Act in response to the remand order issued by the district court.

1. Court Decision

The district court in *In Re: Permanent II* stated: "Congress used the term 'agricultural activities' in its definition of AVFs, 30 U.S.C. 1291(1), and 'farming' in describing permit requirements. *Id.* at section 1260(5)(A). This court will not presume to define these terms, but the use of different words does connote an intent to prescribe a different meaning." (*In Re: Permanent II*, Slip op. at 31.) Thus, separate definitions of these two terms are required by the court's decision if they are needed to conform the OSMRE regulations with Congressional intent.

2. Legislative History

To determine Congressional intent OSMRE reexamined the legislative history of the Act as it relates to AVFs. Based on the statutory language and on the legislative history of section 510(b)(5) of the Act, OSMRE has concluded that separate definitions are appropriate.

Congress used the term "agricultural activities" in section 701(1) of the Act in defining "alluvial valley floors." The term "farming" was used in section 510(b)(5)(A) of the Act in the AVF permit finding provision, which provides a higher standard of protection to a more limited number of AVFs than provided in the performance standards of section 515(b)(10) of the Act. In an attempt to strike a balance between the need to preserve the productive use of AVFs and the need to recover coal beneath them, Congress intended sections 510(b)(5) of the Act to protect only those AVFs which support farming, but not those which support other

agricultural activities and are protected by section 515(b)(10)(F) of the Act.

Early versions of section 510(b)(5)(A) of the Act would have applied to ranching as well as farming on AVFs. Both the House and Senate bills at one time prohibited the regulatory authority from approving a permit unless it found that the proposed surface coal mining operation, if located west of the 100th meridian west longitude, would "not have a substantial adverse effect on valley floors * * * where farming can be practiced * * * (excluding undeveloped range lands), where such valley floors are significant to * * * *farming and ranching operations* * * *." H.R. Rep No. 45, 94th Cong., 1st Sess. 22 (1975) (Reporting accompanying H.R. 25); S. Rep. No. 128, 95th Cong., 1st Sess. 20 (1977) (Report accompanying S. 7) (Emphasis added.) Additionally, both bills extended this prohibition to potential as well as present farming and ranching.

The language extending the coverage to "ranching operations" was deleted by the House in 1976 and by the Senate in 1977. After H.R. 25 was reported out in 1975, a controversy arose concerning the scope of section 510(b)(5). In the next session the House adopted language very similar to the provision that was finally enacted on August 3, 1977. It provided that the regulatory authority could not approve the permit unless it found that the operation would not "interrupt, discontinue, or prevent *farming* on alluvial valley floors, * * * but, excluding undeveloped range lands * * * and those lands as to which the regulatory authority finds that if the *farming* that will be interrupted * * * is of such small acreage as to be of negligible impact on the *farm's agricultural production* * * *." Section 510(b)(5) of the 1976 House bill also contained a provision grandfathering certain operations which existed prior to the enactment of the Act. See H.R. Rep. No. 896, 94th Cong., 2nd Sess. 2 (1976) (Report accompanying H.R. 9725).

Although the deletion of the term "ranching" was not specifically discussed, the debates on the floor indicated that the Congress amended the AVF permit finding provision largely in response to the Administration's concern that the provision in the 1975 House bill could be read to "close some existing mines and * * * lock up significant coal reserves." 121 Cong. Rec. 12958, 62–64 (May 5, 1975); H.R. Rep. No. 896, 94th Cong., 2nd Sess. 3 (1976). The effect of the amendment was to increase the recoverability of coal underlying AVFs by deleting the limitations on mining both for present and potential ranching provided by section 510(b)(5) of the Act, and by adding the grandfather provisions and the small acreage exception.

The Senate did not delete the ranching protection from the AVF permit finding provision of its bill until May of 1977 when it passed a compromise amendment introduced by Senator Melcher. Senator Johnston first introduced an amendment which required a finding that the operation would not interrupt, discontinue or prevent farming on AVFs unless, among other matters, "the total value of the coal mined * * * would exceed, by a ratio of 100 to 1, the total value of the *farming or ranching* products that would be produced from said acreage * * *." (123 Cong. Rec. S 8030, May 19, 1977) (Emphasis added.) Senator Hart then offered an amendment which would have banned all mining on AVFs irrespective of the agricultural use of the land, with a limited grandfather provision. (123 Cong. Rec. 15691, May 20, 1977) These two amendments were defeated.

A third amendment, introduced by Senator Melcher and ultimately adopted by the Senate, contained the identical language of the 1976 House bill, including the deletion of the protection for ranching, and the addition of the grandfather provision and the small acreage exemption. The Senator emphasized that this language was designed to protect lands where there was farming that depended on irrigation. He further stated that in 1976 this language had been carefully reviewed and represented a compromise among environmental and labor groups, coal companies, individual landowners and government agencies. (123 Cong. Rec. 15751, May 20, 1977) The Senator characterized his amendment as a "middle ground [between the Hart and the Johnston amendments] * * * because it does retain the restrictions on keeping the alluvial valley floor *farming* operations intact. But it allows enough discretion through the regulatory authority to allow [mining] in those instances where the mining operation would not violently disturb a *farming operation* on a valley floor * * *." (123 Cong. Rec. 15752) (Emphasis added.)

The legislative history of section 510(b)(5), therefore, indicated that the Congress twice rejected language which would have broadened the scope of the AVF permit finding provision to encompass ranching as well as farming activities. OSMRE's 1983 combined definition of "agricultural activities *or* farming" therefore was inconsistent with Congressional intent. Accordingly, OSMRE has defined "farming" as a subset of "agricultural activities" distinct from ranching.

3. Definitions

As described above, it appears from the debates leading to adoption of the Melcher amendment that the Congress intended to protect only those AVFs being farmed and not those being ranched. Therefore, in promulgating separate definitions of "agricultural activities" and "farming" consistent with the legislative history it was necessary to distinguish farming from ranching. The most practical way to make the distinction is to consider "pasturing or grazing of livestock" in the arid and semi-arid areas west of the 100th meridian as ranching, and to limit farming to activities which involve raising plants. That concept is embodied in the final definitions described below.

"Agricultural activities". The definition promulgated for "agricultural activities" is similar to the remanded definition of "agricultural activities *or* farming." However, the specific terms "cultivation," "cropping," and "harvesting" found in the definition of "agricultural activities or farming" are replaced in this final rule definition by the generic term "farming." Therefore, the definition of "agricultural activities" reads as follows:

Agricultural activities means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, farming and the pasturing or grazing of livestock. These uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

"Farming." For consistency with the definition of "agricultural activities" described above, OSMRE has defined "farming" in terms of the "cultivation," "cropping" or "harvesting" of plants as follows:

Farming means, with respect to alluvial valley floors, the primary use of those areas for the cultivation, cropping or harvesting of plants which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors. For purposes of this definition harvesting does not include the grazing of livestock.

The final definition of "farming" differs from the proposal by substituting the word "or" for the word "and" in the proposed phrase "cultivation, cropping and harvesting." OSMRE made this change in response to comments that indicated requiring all three activities to be performed to establish that an AVF is farmed is too restrictive One commenter pointed out that farming operations employing "no-till" practices, where little if any cultivation occurs, could be excluded by the definition. Other commenters argued that the definition would exclude native hay meadows that are mechanically harvested for use as winter feed, but may not be cultivated. Thus, under the final rule, all three activities need not occur for farming to exist. For the purposes of the final rule,

OSMRE intends that cultivation means the preparation of the land for planting, cropping means planting and tending, and harvesting means the gathering in of the crop. OSMRE also intends, for purposes of the final rule, that "pasturing or grazing of livestock" is not a method of harvesting. The production of forage is only considered a farming activity when the forage crop is cultivated, cropped or mechanically harvested (i.e., cut and either stacked or baled).

Farming as the "primary use" of an AVF. The phrase "primary use" in the definition of "farming" is intended to cover those AVFs which are farmed in most years but not in others due to an unsatisfactory yield, excess production, or some other factor. The use of an AVF for the "pasturing or grazing of livestock" in some years does not preclude the AVF from being classified as farmed and thereby subject to the mining prohibition under sections 510(b)(5) of the Act. However, the "cultivation, cropping or harvesting" of plants constitute "farming" only where such activities are actually the primary use of an AVF. The suspended definition placed all "cultivation, cropping or harvesting" within the scope of "agricultural activities or farming." This final rule differs since occasional farming activities on AVFs not primarily used for "cultivation, cropping or harvesting," and not capable of producing crops on a regular basis, are not considered farming. As discussed below in connection with the legislative history of the word "preclude" in section 510(b)(5)(A) of the Act, a change in primary use, from farming to some other use, will not eliminate the protection provided by section 510(b)(5).

Plants not benefitting from irrigation or subirrigation. "Farming," under the definition promulgated herein, is limited to those "plants * * * which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors." Therefore, although an AVF is used for the cultivation, cropping or harvesting of plants, it would not qualify as "farmed" if the plants being cultivated, cropped or harvested do not benefit from the irrigation or subirrigation described above.

4. *Effect of final rule.* The chief consequence of defining "farming" separately from "agricultural activities" is that whenever 30 CFR 785.19 or 822.12 refer to "farming," they no longer will apply to all "agricultural activities," but only to those activities which involve the "cultivation, cropping or harvesting" of plants. The "farmed" AVF areas being affected so as to invoke the § 822.12(a) prohibition can include areas which were not being mined but would have their "farming" interrupted, discontinued, or precluded by a mining operation located on a nearby portion of the same AVF or outside the AVF. The net effect of these final rule definitions would be to remove the prohibitions of section 510(b)(5) of the Act from those AVFs used for agricultural activities other than "farming." However, it should be emphasized that while the scope of the mining prohibition of section 510(b)(5) of the Act may be somewhat reduced under this final rule, that provision of the Act and implementing regulations were never intended to cover undeveloped rangelands not significant to farming, which characterize much of the grazing land on AVFs west of the 100th meridian. Moreover, the performance standards of 30 CFR Part 822, which implement section 515(b)(10)(F) of the Act, still apply to all AVFs allowed to be surface minded.

One commenter was confused about the effect of the rule and indicated support for "the proposal to make farming a prerequisite to AVF designation."

The process and criteria for AVF determination in 30 CFR 785.19(a) are not the subject of nor are they affected by this final rule. The presence of geologic and hydrologic characteristics determines whether an area is to be considered an AVF. All AVFs are protected by the performance standard established by section 515(b)(10)(F) of the Act. Whether "farming" may be interrupted, discontinued or precluded on a particular AVF is only a concern when applying the mining prohibition pursuant to section 510(b)(5) of the Act.

Two commenters were concerned about the affect the rule would have on a specific area. One stated "OSMRE's proposed rule would substantially limit or eliminate protection for AVFs in the Alton coalfield in Utah, currently the subject of a permitting dispute over a mine proposed by Utah International." The second stated the proposal "would serve to alleviate almost all the problems that BHP-Utah Intl., Inc. is having in convincing the Utah [regulatory authority] to deem complete its application for a permit to strip mine coal at Alton, Utah."

OSMRE agrees that the final rule does narrow the scope of the mining prohibition established by section 510(b)(5) of the Act; however the rule does not eliminate the protection afforded AVFs pursuant to section 515(b)(10)(F) of the Act. The Alton mine permit application and any subsequent mining activity must comply with the approved Utah regulatory program. Under primacy, the effect on the Alton application of any changes that may be made in the Utah program pursuant to these changes in OSMRE's permanent regulatory program would be evaluated by Utah, not by OSMRE. Under section 505 of the Act, any State program may be more stringent than the Secretary's regulations.

The proposed rule interpreted the pasturing and grazing of livestock as a non-farming (ranching) agricultural activity and would have limited "farming" to those situations where cultivation, cropping and harvesting practices are employed. Comments were solicited on whether any other meaningful or practical distinctions, consistent with the court order and the legislative history, could be made between "agricultural activities" and "farming."

Of the 15 commenters, 12 opposed OSMRE's exclusion of grazing activities from the definition of "farming" and three favored it. Many of the opposing comments focused on different interpretations of the legislative history of the Act. Several commenters argued that the focus of Congressional debate was water and its importance to Western agriculture, not agricultural production techniques. In relation to AVFs, they felt it is the non-AVF dependent and other non-water dependent agricultural activities that are not protected from mining even if they occur on an AVF. For example, a poultry operation on an AVF would not preclude mining since its production is not enhanced by irrigation. AVFs are important due to their greater productivity, which is a function of soils, topography and water, not a function of planted versus native crops or mechanical versus natural harvesting (grazing). Other commenters asserted that since the bulk of Western agriculture is beef production, not row crops, it does not make since for Congress to try to protect agricultural production without including livestock production. Many commenters attacked OSMRE's interpretation of the discussion of Senator Melcher's amendment and argued that he was concerned about irrigation and subirrigation in protected areas versus dry creeks, not farming versus ranching. In the commenters' view, Melcher opposed a total ban on mining on AVFs because it would protect dry creeks, not because it would protect irrigated or subirrigated grazed AVFs. Thus, the commenters held the opinion that the real issue behind the Melcher amendment was developed versus undeveloped AVF lands.

OSMRE believes that this final rule is a proper and reasonable interpretation of the intent of Congress, consistent with the language of the Act and the legislative history. Congress wanted to balance the needs of two competing interests, agriculture and coal mining. Congress achieved that balance by allowing mining to take place, albeit with strict performance standards, in most areas of the West. In areas important to the agricultural economy,

AVFs, two levels of protection were provided: first, the preservation during and after mining of the essential hydrologic functions of all AVFs where water sufficient for irrigation or subirrigation is available, and second, a prohibition of mining that would interrupt, discontinue or preclude farming on AVFs. Congress did not forsake livestock production. On the contrary, Congress attempted to ensure the continued viability of Western livestock producers by preserving the areas that are crucial to any Western livestock operation, the areas where storable winter forage is produced. Livestock operations require hay and grain crops to sustain the animals during times when grazing and pasturing are ineffective, e.g. in winter or periods of drought. Congress protected the areas where crops can be produced that are essential to the overall viability of such operations. The "farmed" AVFs, as OSMRE has defined them, are the essential winter feed production areas that, together with the surrounding grazing land, make a livestock operation capable of sustaining itself.

Congress was aware of the differences between ranching and farming. Where it intended a provision to apply to both farming and ranching, it used both terms. Where it intended a provision to apply only to farming, it used the term "farming" alone. Thus, in section 714 of the Act, surface owner consent is needed from persons conducting farming or ranching operations. In section 510(b), however, only farming is covered. Therefore, the express protection provided for ranching is limited to where that term is used, section 714, and requires surface owner consent, but unlike section 510(b) does not prohibit mining.

One commenter, responding to OSMRE's request for comments on meaningful and practical distinctions between "agricultural activities" and "farming," indicated that "agricultural activities" and "farming" have distinct purposes in the Act. The commenter asserted that they do not depend on one term being a subset of the other. In the commenter's view, "agricultural activities" restricts AVFs to those with a certain amount of water. "Farming" limits the full protection of the Act to AVFs where agricultural production takes place, i.e., where AVF rangeland is developed or significant to agricultural production and where the agricultural production dependent on the AVF is significant to the farm's production. The commenter concluded that the difference is that one term addresses water availability, while the other is concerned with agricultural production.

OSMRE agrees in part. The terms are used for different purposes in the Act. However, the definition of "farming" adopted today is consistent with the statutory language, the legislative history and common usage.

In reference to the use of the term "undeveloped range lands" in section 510(b)(5)(A) of the Act, one commenter argued that if Congress had defined farming as OSMRE proposed, the phrase "undeveloped rangelands which are not significant to farming" would be unnecessary.

OSMRE disagrees. While Congress specifically excluded undeveloped range lands, they are not necessarily the only lands excluded from the protection of section 510(b)(5) of the Act. Moreover, OSMRE's definition of farming, which does not include ranching, is consistent with the usage employed by Congress in another part of the Act. In section 714(e)(2), Congress defined the term "surface owner," in part, as a person or persons who conduct farming or ranching operations upon a farm or ranch unit. Clearly, Congress considered farming and ranching to be separate activities.

As discussed in more detail below, the House discussion of April 29, 1977, makes clear that the House felt that a broader amendment was needed to extend the protection of section 510(b)(5) to areas grazed by cattle and sheep. Without further amendment, H.R. 2 would only prohibit mining those areas currently being "cultivated" and not those with potential for cultivation. While such an amendment was passed by the House on that day, it did not become law. Instead, the language of H.R. 2 being criticized that day as providing inadequate protection is what was ultimately passed into law.

Further evidence exists to refute the commenter's assertion that the undeveloped rangeland exception in section 510(b)(5) of the Act is inconsistent with OSMRE's proposed definition of "farming." In a February 1977 prepared statement submitted in a House subcommittee hearing, then-Congressman Baucus of Montana suggested that the undeveloped rangeland exception in section 510(b)(5) of H.R. 2 be eliminated. In his view, the use of land as undeveloped rangeland did not qualify as agriculture. His statement was as follows:

"It seems to me that the current use of land, such as 'undeveloped rangeland,' is not nearly so important as the potential use of the land—we should not render unproductive land which offers potential for agriculture." (*Hearings Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs on H.R. 2*, Serial No. 95–1, Part III, 95th Cong., 1st Sess., 161 (February 24, 1977)). Thus the commenter is wrong to suggest that inclusion of the exception for undeveloped rangeland requires OSMRE to conclude that farming must include a land use that at least one member of the House did not even consider to be agriculture. Nothing in the definition of "farming" is inconsistent with the language of section 510(b)(5) of the Act. Likewise, the language of the Act does not preclude a definition such as the one adopted today, which is consistent with the legislative history.

One commenter, who felt that Congress wanted to protect developed AVFs as distinct from undeveloped range lands rather than farming as distinct from ranching, suggested that undeveloped range lands be defined as grazing land which is not irrigated or naturally subirrigated and has not been developed to enhance or facilitate agricultural production.

The definition of "undeveloped range lands" in 30 CFR 701.5 was not a part of proposed rulemaking. Currently, "undeveloped range lands" are defined, for the purposes of AVFs, as lands where the use is not specifically controlled and managed. OSMRE does not agree with the commenter's interpretation of the legislative history. The suggested change would define "undeveloped range lands" in an inappropriately narrow manner in relation to irrigation or subirrigation and would inject ambiguity into the definition due to the lack of any clear meaning for the word "developed."

One commenter highlighted the following excerpts from a discussion between Representatives Udall and Johnson (of Colorado) concerning an amendment to H.R. 2 offered by Representative Baucus as evidence that Congress wanted to prohibit mining on grazing areas in AVFs (123 Cong. Rec. 12866, April 29, 1977):

"*Mr. Udall:* We do not protect the whole valley; we protect the valley floor. In most cases, this comprises a hundred yards. This is the subterranean stream, or this is where the alfalfa and forage crops are raised.

"*Mr. Johnson:* [T]here will not be any farming operations which are interrupted except for that one narrow exception that I pointed out earlier. This would essentially stop mining in areas that are presently being grazed by cattle and sheep . . . is that not correct?

"*Mr. Udall:* [I]f it is in the valley floor itself, then there would be a ban in the valley floor."

The commenter indicated that the second sentence of Mr. Johnson's remarks referred to H.R. 2, which was the House version of the bill that was sent to the conference committee that produced the final legislation. At that time, H.R. 2 contained an AVF provision similar to section 510(b)(5) of the Act.

Careful scrutiny of the entire context of the quoted remarks, however, reveals that Mr. Johnson was actually referring to the Baucus amendment as the instrument by which mining would be prohibited in grazing lands. Earlier in the same discussion, Mr. Johnson had stated, "Why do we want to prevent mining in areas where there is only grazing for cattle or sheep? That makes no sense to me whatever. I think the extension of the [Baucus] amendment goes too far and is not warranted." (123 Cong. Rec. 12865.) In support of this view is the fact that immediately following the Udall-Johnson discussion, Representative Jeffords of Vermont in voicing his support for the Baucus amendment stated that "I am aware that *much of the land in question is used for cattle grazing,* and is not presently under cultivation. But the underground water systems which would be endangered by strip mining present a long-term potential for crop cultivation." (Emphasis added.) (123 Cong. Rec. 12867) It is clear that the Baucus amendment was intended to extend the mining prohibition beyond lands under cultivation to grazing lands, lands that were not so protected under H.R. 2. While this amendment passed the House following the above cited discussion, it did not become a part of the Act. Since the conferees subsequently rejected the Baucus amendment and adopted language similar to the earlier House language, the Act does not extend the mining prohibition to grazing lands.

One commenter argued that OSMRE's statement in the proposal that deletion of the term "ranching" was not discussed in the legislative history lends support to the theory that it was an inconsequential change, not an attempt to exclude a major agricultural activity from protection. The commenter asserted that such an exclusion would not be done without explanation. In the commenter's opinion, the deletion of "ranching" from "farming and ranching operations" was not to distinguish them, but to avoid redundancy. Similarly, a commenter said that brevity was the purpose of removing the reference to ranching because the term "farming" is used three times in section 510(b)(5)(A) of the Act.

In cases where a change was made to statutory language without an explanation, OSMRE is guided by the principle expounded by the Supreme Court and referenced in *NWF v. Hodel,* at 764, in circumstances relating to the authority to grant variance from approximate original contour requirements. That is, that the plain language of the statute should be relied upon unless the legislative history contains a clearly expressed contrary intention. In this case, the words "and ranching" were deleted while, as noted above, other portions of the legislative history indicate that section 510(b)(5) as it became law was not intended to extend to grazing areas. The commenter's assertion that reference to ranching was deleted solely for brevity is belied by Congress' use of both farming and ranching three times in section 714(e)(2) of the Act. Thus, when Congress wished to include ranching, it did so expressly. Therefore, OSMRE may conclude properly that ranching was deleted to reduce the scope of the protection rather than to eliminate redundancy or to be brief.

One commenter who opposed OSMRE's proposal suggested that any distinction between farming and ranching as the terms are used in the West is cultural. For example, a large operation involving wheat production can be referred to as a wheat ranch. The commenter argued that lacking a statutory definition of ranching, it is logical to consult a dictionary, e.g. Webster's, which defines a ranch as a Western term meaning a large farm for the raising of cattle, horses or sheep or any large farm devoted to the raising of a particular crop or livestock.

While Webster's may define ranching as a Western U.S. subset of its global definition of farming, the two terms do have distinctly different meanings to farmers and ranchers of the arid and semiarid West. Farming is generally thought of as crop production associated with supplemental irrigation. Grain production without supplemental irrigation is as apt to be called dry farming as wheat ranching, depending on locality. The definition of "farming" adopted today is consistent with these practices and protects the irrigated areas used for stored forage production associated with cattle ranches.

Other commenters opposed the proposed definition of "farming" for reasons unrelated to the legislative history of the Act. Many commenters opposed the proposed change to the definition of "farming" because they believed it would remove from protection much of the AVF acreage in the West, was a rollback of protection for AVFs, ignored regional agricultural practices, would not protect grazed AVFs that are significant to farming, and would result in an illogical granting and denying of permits. In contrast, another commenter indicated that "using the [proposed] definitions, * * * there would be almost no changes in the AVF determinations already made in Wyoming. [T]he impact of the proposed definitions would be relatively minimal in our State."

OSMRE does not agree with the opposing commenters. Pursuant to section 515(b)(10)(F) of the Act, surface coal mining operations are required to preserve the essential hydrologic functions of *all* Western AVFs as defined in the Act. This rule in no way affects or diminishes that protection. This rule does affect the scope of the prohibition on mining "farmed" AVFs pursuant to secton 510(b)(5) of the Act to the extent that it will be incorporated into State programs. As noted, in the case of Wyoming, it may have relatively little impact. Although opposed by some commenters, the final definition of "farming" adopted today is consistent with the intent of Congress and the statutory language, as discussed above.

One commenter argued that the definition would have ludicrous consequences in practice: If hay planted on an AVF is baled and fed to cattle in the field, the AVF would be protected, yet if the same cattle ate the same hay in the same field before it was baled, the AVF would not be protected.

While the commenter is partially correct in his representation of the effect of this rule, he misstates the issue. Contrary to the commenter's assertion, all AVFs are protected by the performance standards of 30 CFR Part 822. The issue is not whether protection exists, but rather is for what AVFs the prohibition on mining will apply. Because of the more limited areas available for producing storable forage necessary for a successful livestock operation, the higher level of protection of such areas afforded by a mining prohibition is far more critical to the overall production of a given agricultural unit than affording such protection to areas merely being grazed in season.

In the opinion of several commenters, applying the special protection to AVFs based on past or current agricultural practices does not address the statutory requirement in section 510(b)(5)(A) of the Act that mining not preclude (future) farming. Another commenter wanted to

add to the definition of "farming" a statement to the effect that to be considered "farmed" an area would have to have been "historically used for cropland." In the commenter's opinion, this would eliminate the need for the "primary use" concept in the definition, a concept that "could be subject to different interpretations."

OSMRE does not agree with these commenters. Under the Act, the special protection of section 510(b)(5) is only applied to AVFs significant to farming. That provision requires that the primary use of the land, either currently or in the past, be farming. Inclusion of the word "preclude" supports this interpretation and was discussed in the final House-Senate conference report on H.R. 2. The conferees stated, "[t]he phrase 'not interrupt, discontinue or prevent farming' was modified to 'not interrupt, discontinue or preclude farming' in order to assure coverage of those lands which may be taken out of agricultural production in order to qualify for a new mine start on an alluvial valley floor. The conferees did not want this type of change in land-use to qualify an alluvial floor for mining." H.R. 95–493, 95th Cong., 1st Sess. 104 (July 12, 1977). This statement indicates that there had to have been pre-existing farm use. The Jeffords discussion cited earlier lends additional support to this position. The phrase "primary use" in the definition of "farming" is intended to cover those AVFs which are farmed in most years, but not in others due to an unsatisfactory yield, excess production or some other factor. The concepts of "primary use" and "historical use" mesh in that the regulatory authority should examine the facts and determine whether the primary use of the land in the past had been farming.

The response to the commenter's concern that a regualtory authority determination of primary use may be subject to varying interpretations is that the potential for varying interpretations exists in any discretionary determination by the regulatory authority. The safeguard is that the permitting process requires public participation to assist the regulatory authority in making the decision and, under section 514 of the Act, any adversely affected person may petition for administrative review.

One commenter, a landowner, argued that in his case some meadows are hayed in high rainfall years (rare) and grazed in years of low rainfall (frequent). He asserted that the proposal makes application of the special protection dependent on a factor beyond the control of the farm or ranch operator.

OSMRE intends that the determination of which AVFs are covered by the mining prohibition will be made by the regulatory authority on a case-by-case basis based, in part, on whether the primary use of the area is farming.

The same landowner also argued that to obtain the special protection, a crop would have to be harvested instead of grazed. Such a forced change could affect the profitability of agricultural operations.

This rule does not require landowners to engage in any practice, profitable or not. The final rule was changed from the proposal so that the prohibition will apply if the land is cropped or cultivated, regardless of whether harvesting occurs. If the landowner chooses not to engage in cropping, cultivation or harvesting, the protection of section 515(b)(10) of the Act will still apply.

One commenter argued that AVFs should be defined by geological and hydrological parameters, not according to the changing practices of man.

OSMRE agrees in part. Under the Act and the permanent program regulations, AVF identification and protection is related to geological and hydrological parameters, including the availability of water. Such availability may be enhanced by irrigation. However, the applicability of the prohibition on mining is applied consistent with the intent of Congress that AVFs significant to farming not be mined.

Two landowners were concerned about the impact of mining on downstream unmined AVFs. One asserted that if a grazed AVF is mined, downstream farmed AVFs would be damaged.

OSMRE shares the landowners' concern about potential damage to "farmed" AVFs as a result of mining operations on non-"farmed" AVFs and other areas. In such circumstances the mining prohibition would apply. The protection provided by the performance standard at 30 CFR 822.12(a), which prohibits mining operations from interrupting, discontinuing or precluding farming on AVFs or causing material damage to the quality or quantity of water in surface or underground water systems that supply AVFs, is not limited by distance from or spatial relationship to the mining operation. Downstream effects of mining operations will be considered by the regulatory authority in the permitting process.

In addition to the comments on the definition of "farming" discussed above, OSMRE received a large number of comments suggesting specific language to be used in the definitions of both "agricultural activities" and "farming." Many of these suggestions would have had the effect of including grazing in the definition of "farming." Such a definition of the word "farming" would not be consistent with the statutory language and the intent of Congress, for the reasons discussed above, and the comments were not accepted.

One commenter suggested deleting the phrase "where the use is enhanced or facilitated by subirrigation or flood irrigation" and the entire last sentence from the proposed definition of "agricultural activities." The same commenter wanted to delete the phrase "which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors" from the proposed definition of "farming." The commenter felt that these changes were desirable because the relationship between agricultural activities and irrigation is covered in the Act.

OSMRE did not accept these comments. Because the relationship between agricultural activities and irrigation or natural subirrigation is specified in the Act, it is important and appropriate to carry the relationship over into the regulatory definitions for clarity and consistency.

One commenter opined that there was no support in the record for harvesting being limited to mechanical harvesting, nor for mechanical harvesting meaning not just "swathing," but also either stacking or baling.

As discussed above, OSMRE believes that the legislative history supports excluding grazing from the definition of "farming." Therefore, direct harvesting by animals, that is, pasturing and grazing, is not considered harvesting under the rule. Since Congress intended to prohibit mining in areas where storable winter forage is produced, harvesting must consist of cutting ("swathing") *and* preparing the crop for storage by stacking or baling, or for grain production, placing the grain in storage.

B. Section 701.5 Definition of "materially damage the quantity or quality of water."

As required by the district court in *In Re: Permanent II,* slip op. at 31, and for conformity with the amended definitions of "agricultural activities" and "farming," OSMRE has also amended the definition of "Materially damage the quantity or quality of water" by substituting the term "farming" for the

term "agricultural activities." The revised definition reads as follows:

Materially damage the quantity or quality of water means, with respect to alluvial valley floors, to degrade or reduce by surface coal mining and reclamation operations the water quantity or quality supplied to the alluvial valley floor to the extent that resulting changes would significantly decrease the capability of the alluvial valley floor to support farming.

The final definition is unchanged from the proposed rule. Based on OSMRE's previously discussed review of the statutory language and legislative history of the Act to include only farming and not ranching, and the decision of the district court in *In Re: Permanent II,* the material damage finding required by section 510(b)(5)(B) of the Act applies only to AVFs which support "farming." Therefore, the definition of material damage should be, and is, limited to decreases in the capability of those AVFs to support "farming" instead of all "agricultural activities." The result of this change is to eliminate the mining prohibition, but not the protection under section 515(b)(10)(F) of the Act, for AVFs primarily used for non-farming agricultural activities such as grazing which were covered under the previous rule.

One commenter suggested that the definition of material damage should relate to the premining condition of the land, which can be documented and compared, and recommended defining material damage in terms of adverse impacts on pre-existing vegetation or changes limiting the adequacy of water for irrigation.

OSMRE did not accept this comment because it is not tied to the protection provided by section 510(b)(5) of the Act. The material damage finding required by section 510(b)(5)(B) of the Act applies only to AVFs which support "farming." The definition of material damage should be, and is, limited to decreases in the capability of those AVFs to support "farming" instead of all "agricultural activities" or pre-existing vegetation. To the extent that mining would limit the adequacy of water for for irrigation, the capability of the AVF to support farming would most likely be decreased.

One commenter was concerned that use of the term "alluvial valley floors" in 30 CFR 785.19(e)(2)(ii) and 822.12(a)(2) could give the erroneous impression that *all* AVFs, not just those significant to farming, are subject to the regulatory requirements of section 510(b)(5) of the Act. The commenter suggested that OSMRE preclude any possible confusion by providing a clear statement in the final rule to the effect that the use of the term "alluvial valley floors" in the cited regulations refers only to "farmed" AVFs.

The protection provided by the definition of "materially damage the quantity or quality of water" is clearly limited to those areas whose primary uses are or have been farming. Therefore, no further clarification in the regulations is necessary.

C. Section 785.19(b) Applicability of statutory exclusions

Revisions also were needed to conform existing 30 CFR 785.19(b) to the proposed definition of "agricultural activities" and "farming." Section 785.19(b)(2) is unchanged from the proposed rule and provides for mining on AVFs under two of the section 510(b)(5) statutory exclusions described above. The first exclusion applies to undeveloped rangelands which are not significant to farming; the second exclusion applies to mining when the regulatory authority finds that mining activities would affect farming of "such small acreage as to be of negligible impact on the farm's agricultural production." Final § 785.19(b)(2)(ii) requires the regulatory authority to base its determination of whether an impact was "negligible" on the relationship between the loss of production from the affected farmland areas to the farm's total agricultural production over the life of the mine.

This final provision includes several changes, but remains very similar to the 1983 final rule. Because this paragraph deals with the impact of surface coal mining on "farming" and the final definition of "farming" does not include the use of AVFs for grazing, OSMRE has deleted the reference to grazing in § 785.19(b)(2)(ii). Further, because the use of AVFs for hay production falls within the final definition of "farming" as previously discussed, this paragraph has been reorganized and the term "hayed AVF area" deleted.

Two other editorial changes also have been made for clarity and consistency with the final definition of "farming." First, the word "total" has been added as a modifier to the term "agricultural production" to emphasize that the basis by which any impact is measured is a farm's total agricultural production. Second, the phrase "vegetation and water of the developed grazed or hayed alluvial valley floor area" has been changed to "farmland areas" because the former could be construed to be related to areas which are not farmed under the final definition of "farming." The use of "farmland areas" is consistent with terms found in existing § 785.19(b)(3).

One commenter suggested that §785.19(b)(2)(i) should begin "Any farming on the irrigated or naturally subirrigated AVF * * *" rather than just "Any farming on the AVF * * *."

This comment was not accepted. It is not necessary to insert "irrigated or naturally subirrigated" in the subparagraph since the words are already present in the definition of AVF.

One commenter was concerned about the use of the term "agricultural production" in two places in § 785.19(b)(2)(ii). The commenter believed that the term is intended to mean "farming" production and suggested that OSMRE clearly state this in the final rule. A second commenter also opposed comparing impact on "farmed" AVFs to total agricultural production because to do so would allow inclusion of thousands of acres of non-AVF land, diluting the relative impact of mining on the AVFs. This commenter urged that the determination of impact should compare "farmed" AVFs to "the production of only the AVF portion of the farm or ranch." In contrast, one commenter found "considerable support" in the legislative history for the position that the impact of mining should be based on total agricultural production, not on the impact to areas solely used for farming. Another commentor objected to the insertion of the word "total" as an unwarranted deviation from the statutory language.

In applying the statutory exclusion of section 510(b)(5)(A) of the Act, which also uses the term "agricultural production," OSMRE has consistently interpreted the comparison to consist of the relative importance of the affected "farmed" AVF on the entire farming operation. For this reason, OSMRE added the clarifying adjective "total" to "agricultural production" in this paragraph. The need for clarity in this instance is demonstrated by the above comments. Because the farmed AVF may contribute a very critical element (stored forage) from a small portion of the total acreage, the comparison must be to the agricultural unit as a whole including non-AVF areas.

Several commenters argued that the phrase "vegetation and water of the developed, grazed or hayed AVF area" should not be changed to "farmland areas" because to do so would ignore the importance of water to production and restrict the measurement of importance of the mined AVF area to the farm's production to the acreage disturbed. One commenter objected to "farmland areas" because he believed the resources, i.e., water and vegetation,

rather than the land area are the important elements of AVFs.

OSMRE does not agree. The exception in the Act forcuses on the impact on agricultural production of the interruption of farming on the AVF. It is not necessary to specify the interrupted elements, such as water or vegetation. Reference to water and vegetation was deleted because it could be construed as applying to areas not "farmed." Because this paragraph deals with the impact of surface coal mining on "farming," and the final definition of "farming" does not include the use of AVFs for grazing, the reference to grazing was deleted from the paragraph. Also, since the use of AVFs for hay production falls within the definition of "farming," the term "hayed AVF area" is not necessary and has been deleted.

One commenter was concerned about the impact of the proposed definitions in terms of reclamation requirements. In the commenter's opinion, it may not be sufficient to require that a previously grazed or hayed AVF simply be reclaimed to a suitable postmining land use; it may be more appropriate to require restoration of the essential hydrologic functions of the AVF.

OSMRE agrees. The reclamation performance standards found in 30 CFR 822.11 require the re-establishment of the essential hydrologic functions of an AVF within the permit area, as well as the preservation of those functions outside the permit area. This performance standard is unchanged by the adoption of this final rule.

Four commenters were concerned about how the determination of negligible impact is to be made. All opposed measuring the impact of mining over the life of the mine. They believed that the use of a long period of time, such as the life of a mine (which may exceed 40 years), as opposed to the bond liability period (a minimum of ten years) or annual measurement, would result in more "farmed" AVFs being mined with the possible concomitant elimination of farms.

OSMRE believes that a time frame needs to be defined to measure the impact and that the expected life of mine is the most reasonable and accurate one. Consideration of impacts over such an extended period will reduce errors in measurement associated with normal expected fluctuations in a farm's annual output. The foregoing notwithstanding, OSMRE intends that a primary criterion to be applied by the regulatory authority in determining the impact of mining on farming operations on AVFs is preservation of the viability of the farming operation. This position is consistent with the intent of Congress. Therefore, the determination should be made on a case-by-case basis. The regulatory authority does have the flexibility to adopt a shorter time frame if, based on local conditions, imposition of such a provision is no less effective than this rule or if the regulatory authority wishes to establish more stringent protections.

Final § 785.19(b)(3) is unchanged from the proposed rule and defines a farm as a land unit on which farming is conducted. The requirements of this section are the same as those in the suspended rule except that the term "farming" has been substituted for the term "agricultural activities." This revision has been made to conform this paragraph with section 510(b)(5) of the Act, as well as with the final definition of "farming."

D. Section 785.19(d)(2)(i) Information on the essential hydrologic functions of alluvial valley floors

The district court in *In Re: Permanent II*, slip op. at 38–40, remanded 30 CFR 785.19(d)(2)(i) to the Secretary to provide guidance to operators and regulatory authorities as to what type of information was required. Section 785.19(d) (2) and (3) of the 1979 rules had included specific information requirements to describe the characteristics which support the essential hydrologic functions of alluvial valley floors. Those specific information requirements has been deleted from § 785.19(d) when it was revised in 1983. The appeals court "affirm[ed] the remand so that the Secretary may provide appropriate, official guidance to the operators and regulatory authorities, or conversely, explain why such guidance is not needed. *NWF v. Hodel*, at 731.

The special protections afforded to AVFs by the Act are described in two sections: Section 510(b)(5) prohibits a regulatory authority from approving a permit unless the applicant submits information which affirmatively demonstrates that certain protections to farming on AVFs are provided. Section 515(b)(10)(F) requires the preservation throughout mining and reclamation of the "essential hydrologic functions" of AVFs. In section 515(b)(10)(F) the Congress identified special protections to be afforded all AVFs independent of the protections for farming on alluvial valley floors provided by section 510(b)(5).

The court of appeals upheld the Secretary's view that the protection of essential hydrologic functions extended to all alluvial valley floors rather than just those significant to farming. The court stated that "it seems entirely plausible * * * that Congress intended * * * to protect all alluvial valley floors in arid and semi-arid areas with a performance standard while also providing special protection at the permit stage for those alluvial valley floors significant to farming." *NWF v. Hodel* at 747. The court went on to say that "[a]lthough the legislative history cited by Industry clearly supports the notion that Congress intended special protection for farms dependent on alluvial valley floors, it does nothing to refute the notion that other alluvial valley floors are also subject to protection, *albeit not at the permitting stage.*" (Emphasis added.) This is consistent with the fact that the Act requires no permitting information on the essential hydrologic functions of AVFs.

Although the Act does not require any permit information on essential hydrologic functions, and does not require the Secretary to further elaborate or "flesh out" this performance standard, it remains within the Secretary's discretion to add corresponding permit information requirements. *NWF v. Hodel*, at 734–5. Therefore, OSMRE has decided to continue to require permit information relative to preserving and reestablishing the essential hydrologic functions of all AVFs. The information requirement found in this final rule, which differs from that required under the 1979 and 1983 rules, is described below.

In the 1979 rules OSMRE regulated the protection of essential hydrologic functions in three ways: First, by promulgating at 30 CFR 701.5 an extensive definition of "essential hydrologic functions" which read as follows:

"*Essential hydrologic functions* means the role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

(a) The role of the valley floor in collecting water includes accumulating runoff and discharge from aquifers in sufficient amounts to make the water available at the alluvial valley floor greater than the amount available from direct precipitation.

(b) The role of the alluvial valley floor in storing water involves limiting the rate of discharge of surface water, holding moisture in soils, and holding ground water in porous materials.

(c)(1) The role of the alluvial valley floor in regulating the natural flow of surface water

results from the characteristic configuration of the channel flood plain and adjacent low terraces.

(2) The role of the alluvial valley floor in regulating the natural flow of ground water results from the properties of the aquifers which control inflow and outflow.

(d) The role of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of flood plains and terraces where surface and ground water can be provided in sufficient quantities to support the growth of agriculturally useful plants, from the presence of earth materials suitable for the growth of agriculturally useful plants, from the temporal and physical distribution of water making it accessible to plants throughout the critical phases of the growth cycle either by flood irrigation or by subirrigation, from the natural control of alluvial valley floors in limiting destructive extremes of stream discharge, and from the erosional stability of earth materials suitable for the growth of agriculturally useful plants." (44 FR 15314, March 13, 1979)

Second, by promulgating a performance standard at 30 CFR 822.11 requiring the preservation or reestablishment of the geologic, hydrologic, and biologic characteristics that support those functions. In the pertinent part, that standard read as follows:

"(a) Surface coal mining and reclamation operations shall be conducted to preserve * * * the essential hydrologic functions of alluvial valley floors not within an affected area * * * by maintaining those geologic, hydrologic and biologic characteristics that support those functions.

(b) Surface coal mining and reclamation operations shall be conducted to reestablish * * * the essential hydrologic functions of alluvial valley floors within an affected area * * * by reconstructing those geologic, hydrologic and biologic characteristics that support those functions.

(c) The characteristics that support the essential hydrologic functions of alluvial valley floors are those in 30 CFR 785.19(d)(3) * * *." (44 FR 15450, Mach 13, 1979).

And third, by promulgating, at 30 CFR 785.19(d), permit information requirements to describe those characteristics. (44 FR 15375–6, March 13, 1979).

In 1983, OSMRE revised the AVF rules with respect to essential hydrologic functions in four ways: First, the definition of "essential hydrologic functions" was shortened and simplified to read as follows:

"*Essential hydrologic functions* means the role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape, and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation."

Second, the § 822.11 performance standards were rewritten to relate *directly to protection of the essential hydrologic functions*, rather than to the "geologic, hydrologic, and biologic characteristics that support those functions." In pertinent part, § 822.11 was revised to read as follows:

(a) The operator * * * shall minimize disturbances to the hydrologic balance by preserving * * * the essential hydrologic functions of an alluvial valley floor not within the permit area.

(b) The operator * * * shall minimize disturbances to the hydrologic balance within the permit area by reestablishing * * * the essential hydrologic functions of alluvial valley floors.

Third, former paragraph § 822.11(c) containing the cross reference to § 785.19(d)(3), which specified the detailed information requirements to describe those "geologic, hydrologic, and biologic" characteristics, was removed. (48 FR 29820, June 28, 1983)

And fourth, the § 785.19(d) permitting requirements were revised. That revision removed (1) the detailed information requirements previously contained in § 785.19(d)(2), which primarily related to the use of an alluvial valley floor for farming; and (2) § 785.19(d)(3), which required detailed information describing those geologic, hydrologic, and biologic characteristics necessary to support the essential hydrologic functions. See 48 FR 29820 (June 28, 1983). The 1983 revision of § 785.19(d)(2)(i) did retain, however, the requirement for detailed survey and baseline data to determine those characteristics of alluvial valley floors necessary to preserve the essential hydrologic functions, but did not specify what those surveys and baseline data should address.

In its October 1, 1984, decision, the district court in *In Re: Permanent II* remanded § 785.19(d)(2)(i) to the Secretary to provide guidance as to what type of information would satisfy this requirement in the absence of previous § 785.19(d)(3). Slip op. at 39–40. Although the court of appeals noted the deletions of both § 785.19(d)(2) and § 785.19(d)(3) (*NWF v. Hodel*, at 729, note 51), only the deletion of previous § 785.19(d)(3), which specified permit information requirements to describe those characteristics which support the essential hydrologic functions, was the subject to the district court remand. Therefore, the scope of this rulemaking is limited to providing the necessary degree of guidance as to what information must be submitted on the permit application to describe the essential hydrologic functions of alluvial valley floors, and to explaining the deviation from the requirements of § 785.19(d)(3) of the 1979 rules. Since the 1983 changes to the information requirements contained in § 785.19(d)(2) of the 1979 rules were not related to the characteristics supporting essential hydrologic functions, and were not covered by the district court remand, this rule does not address them.

In light of the court of appeals decision upholding the district court remand of § 785.19(d)(2)(i) to the Secretary the further guidance, OSMRE has reconsidered the requirements of that section and has made a substantial revision. Since this rule addresses those permit application information requirements necessary for a regulatory authority to determine projected compliance with the performance standards, the information requirement is structured to support the definition of essential hydrologic functions at 30 CFR 701.5 and the performance standard requiring their protection at 30 CFR 822.11, as they exist today. Since the performance standard no longer is written in terms of the characteristics which support the essential hydrologic functions, it is inappropriate to return to the information requirements previously contained in § 785.19(d)(3), which was written in terms of those "characteristics." Instead, final § 785.19(d)(2)(i) is structured to reflect the revised definition of essential hydrologic functions and the performance standard requiring direct protection or restoration of those functions.

Final § 785.19(d)(2)(i) expands upon the 1983 rule and identifies those specific requirements for AVF information that must be included in a permit application. It requires the applicant to include in the application specified information on essential hydrologic functions of the AVF. An editorial change has been made to the final rule in response to a comment. The word "evaluate" has been substituted for the word "identify" in the proposed sentence that began, "The information required by this subparagraph shall *identify* those factors which contribute . . ." Use of the word "evaluate" more accurately conveys the nature of the information to be submitted. The applicant shall not just identify the factors involved, but shall also evaluate their effects and interactions.

OSMRE believes that the detailed language added to final § 785.19(d)(2)(i)(A) through (D), although different from the information required under § 785.19(d)(3) of the March 13,

1979 rule, provides the necessary guidance to operators and regulatory authorities, consistent with the revised definition and performance standards. This final rule has an emphasis different from the 1983 rule, which contained requirements to provide information on those characteristics of AVFs necessary to support their essential hydrologic functions. OSMRE has made this change since the performance standard is no longer structured around those characteristics, but is now built around the essential hydrologic functions themselves, and those factors related to the AVF that contribute to them. Therefore, OSMRE has revised 30 CFR 785.19(d)(2)(i)(A) through (D) as described below to specify those functions of AVFs for which information is required in a permit application.

Paragraph A is identical to the proposed rule and requires a description of those factors contributing to the collection of water within the AVF, such as the amount, rate and frequency of rainfall and runoff, surface roughness, slope and vegetative cover, infiltration and evapotranspiration, relief, and slope and density of drainage channels.

Paragraph B is identical to the proposed rule and requires a description of those factors contributing to storing of water within the AVF, such as permeability, infiltration, depth and direction of ground water flow, porosity, and water holding capacity.

Paragraph C is identical to the proposed rule and requires a description of those factors contributing to regulation of the flow of surface and ground water within the AVF, such as longitudinal profile and slope of the valley and channels, the sinuosity and cross sections of the channels, interchange of water between streams and associated alluvial and bedrock aquifers, and rates and amount of water supplied by the aquifers.

Paragraph D is identical to the proposed rule and requires a description of those factors contributing to the availability of water in the AVF, such as the presence of floodplains and terraces suitable for agricultural activities.

One commenter objected to OSMRE's decision to continue to require permit information relative to preserving *and re-establishing* the essential hydrologic functions of AVFs. The commenter felt that the decision represents an unwarranted broadening of 30 CFR 785.19(d)(2)(i), which seeks only information required to determine what is necessary to "preserve" the essential hydrologic functions. In the commenter's view, section 515(b)(10)(F) of the Act speaks only in terms of "preserving" essential hydrologic functions; therefore, to speak of "preserving and re-establishing" goes beyond the intent of Congress.

OSMRE has not changed the final rule preamble to respond to the commenter's concern. The words "and re-establishing" are intended to convey the idea that disruption of the essential hydrologic functions of the AVFs being mined is not precluded by the final rule. This usage parallels the existing performance standards in 30 CFR 822.11, which address the preservation of the essential hydrologic functions of AVFs outside the permit area and the re-establishment of those functions within the permit area. This final rule is supported by the legislative history of the Act which recognizes that the essential hydrologic functions of the actual operating area of a mine will be dewatered during mining (H. Rept. 95-218, 95th Cong., 1st Sess. 110 (1977)).

One commenter was dissatisfied with the proposal and indicated that the preamble spent a great deal of time explaining its change of the term "characteristics" to "factors," without remedying the problem which the district court identified with the previous rule, namely, that the detailed requirements of the 1980 rules of 30 CFR 785.19(d)(3) and 822.11(c) were dropped without adequate explanation. In the commenter's opinion, the proposed rule and preamble fail to explain why OSMRE's new list of "factors" is better than the more detailed previous list of characteristics. The commenter noted that the 1983 rule was remanded in part because the Secretary did not explain why the previously needed information was no longer necessary. This commenter and two others urged a reinstatement of the 1979 rule.

In contrast, another commenter argued that OSMRE had gone too far. The commenter believed that the specification of information to be included in permit applications is an unwarranted intrusion into the role of the regulatory authorities and an unwise limitation on their flexibility. The commenter recommended that the final rule leave the decision on what information is to be submitted to the discretion of the regulatory authority.

OSMRE did not accept these comments. First of all, the performance standard is no longer what it was in 1979 and, therefore, it would be inappropriate to build permit information requirements around characteristics that are not necessarily part of the performance standard. On the other hand, while it is true that the Act requires no permit information on essential hydrologic functions, and the appeals court noted that essential hydrologic functions are not provided the same level of protection at the permitting stage as farmed AVFs (*NWF v. Hodel* at 746-7), OSMRE believes it is necessary that an evaluation of the essential hydrologic functions for all AVFs be contained in the permit application so that the impact of mining and the effectiveness or reclamation can be evaluated. Thus, the rule is not an unwarranted intrusion into State authority. The word "factor" is used rather than the word "characteristic" to be more consistent with the revised performance standard and make clear that it is the essential hydrologic functions themselves that are to be described rather than the characteristics of the valley that supports those functions.

One commenter argued that the specific permit information requirements in 30 CFR 785.19(d)(2)(i) should include information on the quality of water in the AVF because water quality is an integral part of essential hydrologic functions. The commenter suggested adding a subparagraph (E) to describe factors contributing to the quality of water in the AVF, including descriptions of premining quality of surface water and of contributing groundwater aquifers.

OSMRE considered, but did not adopt, the suggestion to include water quality information requirements in this rule. Because water quality information for surface water and groundwater is required for both surface and underground mine permits in other parts of the permanent regulatory program (30 CFR 780.21 and 784.14 respectively), adoption of the suggestion would be unnecessarily duplicative.

Effects in Federal Program States and on Indian Lands

The final rules are applicable through cross-referencing in those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The rule will also apply through cross-referencing in 30 CFR Part 750 to surface mining and reclamation operations on Indian lands. In the proposal, OSMRE specifically requested comment as to whether unique conditions exist in any of these Federal program States or on Indian lands which should be reflected either as changes to the national rules or as State-specific amendments to any or all of the Federal

programs or the Indian lands program. No comments were received in response to this request.

Effects of the Rule on State Programs

Following promulgation of this rule, OSMRE will evaluate State programs to determine whether any changes in these programs will be necessary. If the Director determines that any State program provisions should be amended to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

III. Procedural Matters

Executive Order 12291 and Regulatory Flexibility Act

The DOI has examined these final rules according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that these are not major rules within the standards established by the Executive Order and, therefore, no regulatory impact analysis is required. The DOI has also determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the final rule will not have a significant economic impact on a substantial number of small entities. The rule does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor and no incremental economic effects are anticipated as a result of the rule.

Federal Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029-0040. Public reporting burden for this information is estimated to average 120 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 the burden, to Information Collection Clearance Officer, OSMRE, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project (1029-0040) Washington, DC 20503.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) on the impacts on the human environment of this rulemaking and has made a finding that the final rule would not significantly affect the quality of the human environment under section 102(C) of the National Environmental Policy Act of 1969(NEPA), 42 U.S.C. 4332(2)(C). The EA is on file at the OSMRE Administrative Record, Room 5131, 1100 L Street, NW, Washington, DC.

Author

The author of this rule is Patrick W. Boyd, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW, Washington, DC 20240; Telephone: 202-343-4561.

List of Subjects

30 CFR Part 701

Law Enforcement, Surface mining, Underground mining.

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Parts 701 and 785 are amended as follows:

Date: November 21, 1988.

James E. Cason,

Deputy Assistant Secretary—Land and Minerals Management.

PART 701—PERMANENT REGULATORY PROGRAM

1. The authority citation for Part 701 is revised to read as follows:

Authority: Pub. L. 95-87 (30 U.S.C. 1201 *et seq.*), and Pub. L. 100-34.

2. In § 701.5 the definition of "agricultural activities *or* farming" is removed, definitions of "agricultural activities" and "farming" are added in alphabetical order, and the definition of "materially damage the quantity or quality of water" is revised to read as follows:

§ 701.5 Definitions.

Agricultural activities means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, farming and the pasturing or grazing of livestock. These uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

* * * * *

Farming means, with respect to alluvial valley floors, the primary use of those areas for the cultivation, cropping or harvesting of plants which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors. For purposes of this definition, harvesting does not include the grazing of livestock.

* * * * *

Materially damage the quantity or quality of water means, with respect to alluvial valley floors, to degrade or reduce by surface coal mining and reclamation operations the water quantity or quality supplied to the alluvial valley floor to the extent that resulting changes would signficantly decrease the capability of the alluvial valley floor to support farming.

* * * * *

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

3. The authority citation for Part 785 is revised to read as follows:

Authority: Pub. L. 95-87 (30 U.S.C. 1201 *et seq.*), and Pub. L. 100-34.

4. Section 785.19 is amended by revising paragraphs (b)(2)(ii), (b)(3) and (d)(2)(i) to read as follows:

§ 785.19 Surface coal mining and reclamation operations on areas or adjacent to areas including alluvial valley floors in the arid and semiarid areas west of the 100th meridian.

* * * * *

(b) * * *

(2) * * *

(ii) Any farming on the alluvial valley floor that would be affected by the surface coal mining operation is of such small acreage as to be of negligible impact on the farm's agricultural production. Negligible impact of the proposed operation on farming will be based on the relative importance of the affected farmland areas of the alluvial valley floor area to the farm's total agricultural production over the life of the mine; or

* * * * *

(3) For the purpose of this section, a farm is one or more land units on which farming is conducted. A farm is generally considered to be the combination of land units with acreage and boundaries in existence prior to August 3, 1977, or if established after August 3, 1977, with those boundaries based on enhancement of the farm's agricultural productivity and not related to surface coal operations.

* * * * *

(d) * * *

(2) * * *

(i) The essential hydrologic functions of the alluvial valley floor which might

be affected by the mining and reclamation process. The information required by this subparagraph shall evaluate those factors which contribute to the collecting, storing, regulating and making the natural flow of water available for agricultural activities on the alluvial valley floor and shall include, but are not limited to:

(A) Factors contributing to the function of collecting water, such as amount, rate and frequency of rainfall and runoff, surface roughness, slope and vegetative cover, infiltration, and evapotranspiration, relief, slope and density of drainage channels;

(B) Factors contributing to the function of storing water, such as permeability, infiltration, porosity, depth and direction of ground water flow, and water holding capacity;

(C) Factors contributing to the function of regulating the flow of surface and ground water, such as the longitudinal profile and slope of the valley and channels, the sinuosity and cross-sections of the channels, interchange of water between streams and associated alluvial and bedrock aquifers, and rates and amount of water supplied by these aquifers; and

(D) Factors contributing to water availability, such as the presence of flood plains and terraces suitable for agricultural activities.

* * * * *

[FR Doc. 89-5187 Filed 3-6-89; 8:45 am]

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federal register

Tuesday
March 7, 1989

Part X

Department of Transportation

Federal Aviation Administration

14 CFR Parts 21, 36, 43, 91, 141, and 147

Primary Category Aircraft; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[14 CFR Parts 21, 36, 43, 91, 141, and 147]

[Docket No. 23345; Notice No. 89-7]

RIN 2120-AB53

Primary Category Aircraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to establish a new category of aircraft, and new simplified procedures for type, production, and airworthiness certification, and associated maintenance procedures. These aircraft would be of simple design intended for pleasure and personal use only, and would be designated as primary category aircraft. These aircraft (airplanes, gliders, rotorcraft, manned free balloons, etc.) may be unpowered or powered by a single, naturally aspirated engine having a certificated takeoff rating of 200 shaft horsepower or less. The aircraft would have a maximum occupant capacity of four or less, a maximum gross weight of 2,500 pounds or less, and would have unpressurized cabins. The notice also proposes to suspend or revoke any certificate, approval, or delegation issued under the FAA's certification procedures for products and parts, if an applicant makes a fraudulent or intentionally false statement on any FAA-required application, report, or record.

This proposal *does not* require type or airworthiness certification of ultralight vehicles (as defined in the Federal Aviation Regulations). However, it would afford an option for aircraft, now thought of as powered ultralight vehicles and other aircraft (e.g., growth versions of ultralights) having a maximum certificated gross weight of 1,000 pounds or less, to be type certificated and issued airworthiness certificates as "primary category-light" aircraft.

This notice emanates from a petition for rulemaking filed jointly by the Aircraft Owners and Pilots Association (AOPA) and the Experimental Aircraft Association (EAA).

The intended effect of this proposal is to—(1) Provide a category for aircraft that are less costly to certificate, produce, purchase, and maintain than current standard category aircraft; (2) stimulate the introduction of new, less costly airplane designs; (3) enable kit manufacturers to fill demand for low-cost aircraft; and (4) improve the safety of kit-built aircraft presently being certificated as experimental-amateur built.

DATES: Comments must be submitted on or before September 7, 1989.

ADDRESS: Comments on this notice should be mailed in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Docket No. 23345, 800 Independence Avenue SW., Washington, DC 20591. Comments delivered must be marked Docket No. 23345. Comments may be examined in Room 915G weekdays between 8:30 a.m. and 5 p.m., except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lyle C. Davis, Aircraft Engineering Division, AIR-110, Aircraft Certification Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, Telephone (202) 267-9583.

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. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are also invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the closing date for comments specified will be considered by the Administrator before taking action on this proposed rulemaking. The proposals contained in this notice may be changed in light of comments received. All comments received 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 substantive public contact with Federal Aviation Administration (FAA) personnel concerned with this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 23345." The postcard will be date stamped and mailed to the commenter.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center (APA-230), 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM.

Persons interested in being placed on the mailing list for future NPRM's should request from the above office a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

History

This proposal for a primary category aircraft certification system is based on a joint petition from AOPA and EAA, modified in consideration of approximately 1,000 public comments received on that petition, and FAA's views of the concept. The FAA is particularly impressed by the high level of interest expressed by private pilots and potential operators in the joint AOPA and EAA proposal.

For some time, AOPA, EAA, and others have voiced a need for a new category of aircraft which are less costly to certificate, produce, purchase, and maintain than standard category aircarft. The proponents of "low cost" aircraft believe that it is becoming financially more difficult for the average aircraft owner to purchase and maintain an aircraft for personal use. They contend that, if an aircraft is limited to personal use and simple design, the detailed type certification rules could be simplified. In addition, they contend that the procedures for type, production, and airworthiness certification, and some maintenance requirements, should be simplified and related costs reduced commensurate with aircraft of simple design, low horsepower and limited occupant capacity. The FAA envisions that the kinds of aircraft eligible for primary category certification would range from powered ultralight vehicles (to be designated "primary category-light") to aircraft similar to, and including, popular four-place aircraft typified by the Cessna Model 172 "Skyhawk," Piper Model PA-28 "Warrior," and Beech Model C-23 "Sundowner" series aircraft.

The petitioners cite the economic downturn of the aviation industry as the impetus for the change. The FAA envisions the primary category aircraft proposal as a means to simplify type

certification, production, maintenance and operation of general aviation aircraft while maintaining the current level of safety.

Approximately 4 years ago the FAA promulgated Part 103 of the Federal Aviation Regulations entitled Ultralight Vehicles. Such vehicles are limited in weight, horsepower, fuel capacity, speed, and occupancy. Under Part 103, ultralight vehicles are allowed to operate without an airworthiness certificate. This proposal would *not* change the current provisions of Part 103 and would not require vehicles meeting the ultralight vehicle definition of Part 103 to be certificated. Since Part 103 was issued, many light (e.g., two-place) aircraft designs have been developed using basic ultralight vehicle design. These aircraft currently must be certificated as experimental (amateur-built) or be certificated as standard category aircraft because they do not meet the ultralight vehicle definition. This proposal would provide another option for these ultralight vehicles: certification as primary category-light aircraft (1,000 lb. or less certificated gross weight). The type certification process would utlizie design standards (airworthiness standards) proposed by the aviation community at large and approved by the FAA through the public comment process. All primary category aircraft, having a certificated gross weight of 1,000 pounds or less, would carry the designation "primary category-light" on their special airworthiness certificates. Such aircraft would be subject to airspace operating limitations similar to those of Part 103 and would be limited in their use for flight training under Part 91.

The proposed type, production, and airworthiness certification for primary category aircraft would be heavily dependent upon the truthfulness of information and supporting reports provided with applications, and retained in the design, production quality control, airworthiness certification, and maintenance records. Since this is true for all certificates, approvals, and delegations granted under Part 21, a new provision proposed for Part 21 would establish sanctions for fraudulent or intentionally false statements made on any FAA-required application, report, or record submitted to the FAA or retained under Part 21. The proposed sanctions for fraudulent or intentionally false statements are modeled after similar provisions found in Parts 43, 61, 63, 65, and 143 for certificates, authorizations, and ratings issued under those parts.

Discussion

The AOPA and EAA jointly petitioned the FAA for rulemaking to establish a new category of aircraft together with simplified and less costly type, production, airworthiness certification procedures, and maintenance practices.

The petitioners believe that there is a need to stimulate the introduction of new airplanes to fill the void created by discontinued production of many simpler airplanes. The petitioners also state that a major deterrent to the introduction of new private-use airplanes is the cost associated with FAA type certification. Many potential entrants to the aircraft manufacturing industry, deterred by this cost, have turned to production of aircraft component kits for amateur builders to construct and certificate as experimental aircraft. Some potential entrants have abandoned their projects altogether when it became apparent that type certification costs would raise the aircraft price to unacceptable levels.

The petitioners contend that the evolutionary increases in cost to certificate and maintain small personal use aircraft can be directly attributed to the regulations and certification procedures necessary to ensure the safety of small (i.e., 12,000 pounds or less certificated gross weight) "general aviation aircraft" used in commercial service, and associated advances in technology over the past 50-plus years. The FAA acknowledges that, because of the growth in air taxi and commuter operations and their use of aircraft certificated under Part 23, numerous government and industry committees, through periodic airworthiness reviews, have worked to amend Part 23 to reflect the state of the art that supported the development of a new generation of more sophisticated general aviation aircraft for commercial and business use. Part 23 has been amended more than 30 times since it was codified from Civil Air Regulations (CAR) Part 3 in February 1965. These amendments established type certification standards for such things as high performance characteristics of multi-turbine powered airplanes designed to operate at altitudes up to 50,000 feet; speed control devices; unsymmetrical loads for multiple wheel landing gear; fatigue evaluation for pressurized cabins; and minimum flight crew requirements. While such amendments to Part 23 were warranted to ensure an appropriate level of safety for sophisticated general aviation aircraft operated under the more demanding conditions of commercial operations, the Part 23 design standards, applicable to all small airplanes, have become unnecessarily complicated and restrictive for simpler, less sophisticated personal-use airplanes. The petitioners state that, in many instances, the current airworthiness regulations for certification and maintenance have become unnessarily burdensome for simple small, personal-use aircraft. The petitioners' views appear to be borne out by the continued satisfactory safety experience of the many thousands of small aircraft which were certificated under the less complex airworthiness standards of CAR Part 3, and which are still in service. Nothing in this proposal would funtion to reduce the current level of safety.

In summary, the joint AOPA and EAA petition proposes the following:

"1. Define *Primary Aircraft* to mean an aircraft with a single engine of not more than 200 horsepower and a seating capacity of not more than four persons.

2. Permit the Administrator to accept airworthiness standards and establish certification procedures appropriate for such *primary aircraft*, including engines and propellers, based upon complexity of the design, and issue type certificates for these aircraft, engines, and propellers.

3. Prohibit the carriage of passengers or property for compensation or hire in such *primary aircraft*.

4. Permit owners of *primary aircraft* to perform specified special maintenance and inspections (in addition to preventive maintenance) on their aircraft.

5. Provide a means for the purchaser of a kit of prefabricated parts from the holder of a type certificate and a production certificate for a *primary category aircraft* to complete the project and obtain a *personal use* experimental airworthiness certificate.

6. Provide for the conversion of standard category aircraft which have been certificated for operation in the normal, utility, or acrobatic category to be operated as a *primary category aircraft*."

The joint AOPA and EAA petition was published in the **Federal Register** on October 5, 1984 (49 FR 39336). The FAA received approximately 1,000 letters commenting on the petition. About 10 percent of these letters provide alternative views on the issues of the petition. The remainder of the commenters support the petition. After review of the petition and the submitted comments, the FAA has concluded that the petition has considerable merit. Accordingly, this NPRM is based on the joint AOPA and EAA petition; however, the substance has been further

developed and influenced by public comments and the FAA's views on the concept. For example, the FAA has added the following three factors to the description of a primary category aircraft contained in the joint AOPA and EAA proposal: (1) The aircraft is limited to a maximum certificated gross weight of 2,500 pounds or less; (2) the cabin may not be pressurized, and (3) the engines for powered primary category aircraft are limited to naturally aspirated engines.

While the joint AOPA and EAA petition proposed a 200 horsepower limit and an occupant capacity limit of four, several commenters indicated a preference for a limit of 100 to 150 horsepower, and only two seats. They reasoned that this would keep the aircraft simple and less costly. The FAA reviewed the range of general aviation aircraft typically used for personal use and found a "break-point" in airframe, systems, and engine design complexity at the 2,500-pound maximum certificated gross weight, 200 horsepower, four-seat, unpressurized cabin criteria. For example, there is very little difference in the design complexity of the Cessna Model 152 (two place) and the Cessna Model 172 (four place) airplane with regard to type, production, or airworthiness certification procedures, on in-service maintenance practices. The lower limits suggested by these commenters would eliminate many present simple aircraft types, that have excellent safety records, from conversion to primary category. This would reduce the number of pilot-owners who might otherwise benefit from the maintenance aspects of this proposal. The lower limits would also preclude a number of manufacturers currently producing kits for certification as experimental aircraft from obtaining a primary category type certificate, a production certificate, and a special airworthiness certificate for their products. The FAA finds no safety-related reason to restrict the category eligibility to less than that proposed by the petitioners. Accordingly, the petitioners' proposal has been retained with respect to horsepower and seating capacity limits. The FAA is particularly interested in further comments regarding the scope of the proposed category and requests that commenters provide detailed opinions. The proposed regulatory language may be changed as a result of public comment on the proposed limitations.

The joint AOPA/EAA position regarding development of airworthiness standards and type certification procedures for primary category aircraft was supported by the majority of commenters. The FAA recognizes that existing airworthiness standards and present type certification procedures are directed toward aircraft that are used for both personal and commercial operations, including the carriage of passengers and cargo for compensation and hire. The current type certification process is the same for small, two-place, general aviation airplanes as it is for transport category airplanes, e.g., the Boeing Model 747 series airplanes. Therefore, the petitioners have a valid argument for review and revision of both airworthiness standards and certification procedures for small, simple, personal-use aircraft. If certification standards and procedures for these aircraft can be simplified and streamlined without compromising safety, the certification process would be less costly for both the government and the applicants. The FAA's 40 years of satisfactory safety experience with the Technical Standard Order (TSO) program for the approval of major aeronautical appliances (auxiliary power units, aircraft instruments, etc.), have clearly demonstrated that airworthiness standards appropriate to specific kinds of products, e.g., primary category aircraft, can be developed by the private sector, and approved by the FAA, without degrading safety.

Some commenters indicated a desire to conduct aerial spraying operations with primary category aircraft. Aerial spraying, or any other operations for compensation or hire, would not be within the scope or objectives of the primary category aircraft concept, under which aircraft are limited to personal use. However, the primary category concept would not preclude an aircraft, converted to or originally certificated as a primary category aircraft from being used in aerial spraying, provided the operation would be conducted under the authority of a private agricultural certificate issued under Part 137. For this purpose, aircraft certificated in the primary category would be "certificated aircraft" within the meaning of § 137.19(d).

Other commenters suggested that the FAA allow primary category aircraft to be used for flight instruction. They contend that primary category aircraft owners-pilots should be able to receive flight instruction from a properly certificated flight instructor in such aircraft, provided they are equipped with fully functional dual controls, and to reimburse the instructor. The FAA finds it appropriate to use primary category aircraft, having a maximum certificated gross weight of more than 1,000 pounds, for flight instruction in meeting pilot certification requirements under Part 61 and that flight instructor compensation should be permitted. However, instruction in a "primary category-light" aircraft should be limited to flight training in that type aircraft (provided the aircraft has dual controls and no other persons are carried aboard the aircraft), and exclude flight instruction to meet pilot certification requirements under Part 61. Public comments with substantive arguments are particularly sought in these areas.

A number of commenters indicated that pilot-owners should not be permitted to perform maintenance and inspection functions normally accomplished by certificated mechanics because it would lower safety levels. The FAA does not concur because a pilot-owner would be required to satisfactorily complete an FAA-approved maintenance training program and obtain a certificate of competence, for a particular aircraft involved, before being allowed to perform the specified inspection and maintenance. Further, private pilots are currently permitted to perform specific preventive maintenance tasks, provided records are kept and made available for review during required inspections by certificated maintenance airmen, agencies, and FAA inspectors. Similar procedures would be used by pilots when performing the expanded maintenance and inspection functions. The FAA's experience with the preventive maintenance provisions of Part 43, which permit pilots to perform tasks without the special training provisions of the primary category concept, shows that additional inspection and servicing functions could be accomplished by pilot-owners who have had special training. The maintenance provisions of this proposal could advance safety by encouraging pilot-owners to undergo maintenance training and adopt the special inspection program. This would result in more frequent inspections. Pilot-owners would be encouraged to acquire training in order to benefit from the privilege of performing more of their inspections and maintenance, and to extend from annual to biennial inspections. Under such a program, safety-related maintenance would be less likely to be deferred until an annual inspection because it could be accomplished by the specially trained pilot-owner. There could also be a cost saving compared to having those tasks performed by a certificated mechanic or maintenance facility. More complicated inspections, maintenance tasks, repairs, and modifications and the biennial

inspection would still require an appropriately rated and certificated mechanic or agency.

The FAA accepts the petitioners' concept of issuing special airworthiness certificates for primary category aircraft which are either completely assembled by the manufacturer, or, for aircraft completed from kits, by the pilot-owner when assembly is accomplished under the direct supervision and quality control of the manufacturer holding a production certificate for the aircraft or aircraft kits. Allowing the owner to participate in production of the aircraft could further reduce the purchase price of such aircraft. Further, persons who have assembled their own aircraft, under the supervision and quality control of the production certificate holder, will be more qualified to maintain their aircraft once it is certificated. Production certificate holders for kit-built primary category aircraft could integrate a maintenance training program for the pilot-owner into the supervision program for kit assembly.

The proposed rules would also provide for purchasers of kits to obtain experimental airworthiness certificates for their aircraft if they elect to further reduce costs by assembling the aircraft without the supervision of the primary category aircraft production certificate holder. These aircraft would not be eligible for a primary category airworthiness certificate. Those who select this option would have to abide by the more restrictive operational limits prescribed in § 91.42 for experimental aircraft. The proposed primary category operating privileges would encourage more persons to assemble their kits under the supervision of the kit manufacturer, and would serve to improve the quality of kit-built aircraft that would otherwise be certificated as experimental aircraft.

Owners of antique and vintage aircraft object to the conversion of existing aircraft to the primary category in order to permit pilot-owners to perform more of their own maintenance. They are concerned that older aircraft, of historical significance, would not remain in their original vintage configuration. Under this NPRM, conversion to primary category is voluntary. The maintenance provisions for primary category aircraft would not allow modifications, or "conversions" by pilots. Further, under the present regulations, the FAA does not prohibit aircraft owners from altering the original appearance of older aircraft if the alterations are FAA-approved. The FAA does not agree with these commenters and has retained the petitioner's proposal to provide for voluntary conversion of certain aircraft from standard category to the primary category.

Several commenters from the ultralight community expressed concerns about the poor reputation for safety attributed to ultralight vehicles, and suggested that the primary category concept might be a reasonable and cost effective means of developing design standards and airworthiness certification procedures for these vehicles. The FAA agrees and proposes to provide the option for the certification and maintenance of ultralight vehicles as one kind of primary category aircraft, to be designated as "primary category-light". However, ultralight vehicles would not be required to be certificated as aircraft by the provisions of this notice.

Proposed Rules

While the FAA agrees, for the most part, with the intent of the joint AOPA/EAA petition, the specific rule changes proposed by the petitioners require refinement. This proposal integrates the concepts of the petitioners' request, the opinions of approximately 1,000 commenters, and of the FAA's views on how to accomplish these objectives while maintaining safety and cost effectiveness. This NPRM should not be perceived as an effort to deregulate general aviation safety. The FAA believes that the proposals set out below will maintain a level of safety equivalent to that in effect for small, personal-use aircraft certificated under Parts 23, 27, 31, 33, and 35 as applicable. Additionally, the proposals in this NPRM would afford an opportunity to improve the safety of some amateur-built aircraft (certificated as experimental) not presently subject to extensive (or rigorous) type certification or production requirements. There will be no reduction of FAA presence, simply a more efficient use of that presence through increased use of the delegation systems currently in existence.

The economic incentive for pilot-owners to get special maintenance training and perform maintenance under an expanded preventative maintenance program, that might otherwise be deferred, should contribute to safety. The economic incentives could also improve safety by encouraging amateur builders of kit aircraft to seek the supervision and quality control of the primary category aircraft kit manufacturer. In this regard, further public comments with substantive arguments are sought on the safety and economic aspects of each element of this proposal. The final decision on whether to adopt the primary category aircraft concept will depend on such comments.

Falsification of Applications, Reports, or Records

The proposed new § 21.2 would cause a fraudulent or intentionally false statement on any FAA application, report, or record required to be made, kept, or submitted to the FAA by certificate, approval, or delegation holder under Part 21, to be a basis for suspension or revocation of the subject FAA certificate, approval, or delegation which is the subject of the false statement.

The proposed § 21.2 is necessary to deter fraudulent or intentionally false information being submitted in or with applications and reports. The ability to act quickly to suspend or revoke a certificate obtained fraudulently is essential to safety. The possible loss of certificates, approvals, or delegations would serve as a strong deterrent. It is particularly important that a firm but reasonable deterrent to fraudulent or intentionally false statements be present where the FAA must rely heavily on such statements. Even though this provision is particularly important to the success of the primary category concept, the accuracy of statements, records, and reports made and retained by all applicants under Part 21 has a significant influence on the quality of all certifications, approvals, or delegations issued pursuant to Part 21. Therefore, this provision would apply to all applicants who seek an FAA certificate, approval, or delegation under Part 21, not just those concerning primary category aircraft. It would be applicable to all type certificates, supplemental type certificates, design change approvals, production certificates, approved production inspection systems, delegation option authorizations, designated alteration station authorizations, all airworthiness certificates, and export airworthiness approvals. It would also apply to approvals for imported engines, propellers, materials, parts, and appliances, Technical Standard Order authorizations, and design and/or production approvals for other kinds of materials, parts and appliances. Similar provisions are contained in §§ 43.12, 61.59, 63.20, 65.20, 67.20, and 143.20 for certificates issued in accordance with those parts. These provisions are in addition to section 1001 of Title 18 of the United States Code which makes it a federal crime to make false statements

on any U.S. Government application. The provisions of this proposal would permit the FAA to respond quickly with administrative measures, when necessary, to protect the public safety.

Public comments, with substantive arguments, are solicited regarding whether the threat of criminal and/or civil sanctions would serve to deter persons from submitting fraudulent or intentionally false statements in support of applications, reports, or records.

The Primary Category Type Certificate

As used with respect to the certification of aircraft and as defined in § 1.1, category means "a grouping of aircraft based upon intended use or operating limitations." Examples include: transport, normal, utility, Acrobatic, limited, restricted, and provisional categories of aircraft. Consistent with the above, the FAA is proposing to create a new "primary" category of aircraft as defined by the criteria in proposed § 21.24(a)(1).

The Primary Category Airworthiness Certificate

For aircraft type certificated in the primary category, or in another category, that meet the criteria of proposed § 21.24(a)(1), the FAA proposes to establish new § 21.184 for the issuance of a Special Airworthiness Certificate-Primary Category, FAA Form 8130-7, to be used in lieu of the Standard Airworthiness Certificate, FAA Form 8100-2. A special airworthiness certificate is necessary because such aircraft would not meet the requirements for international operations required by Annex 8 to the Convention On International Civil Aviation for "Standard Airworthiness Certification," and because of the operational restrictions on primary category-light aircraft. There is also a need to clearly distinguish them from standard category aircraft to reflect their substantially different type certification standards.

Aircraft Eligibility

Under proposed § 21.24(a)(1), the FAA proposes that aircraft be eligible for type certification in the primary category if they: (1) Have a maximum certificated gross weight of 2,500 pounds or less; (2) are unpowered (gliders and hot air balloons) or are powered by a single, naturally aspirated engine with a certificated takeoff rating of 200 shaft horsepower or less at sea level, standard day conditions; (3) have a maximum occupant capacity of four or fewer persons, including the pilot, adult passengers, children, or infants, and (4) have an unpressurized passenger cabin. These criteria will make many existing aircraft with standard airworthiness certificates eligible for certification in the primary category. The FAA is particularly interested in comments concerning the above eligibility criteria in order to gain a broader perspective of the needs of the aviation community and general public. Classes of aircraft envisioned as eligible for primary category include fixed-wing airplanes, helicopters, gliders, airships, manned free balloons, powered and unpowered ultralight vehicles, and any other kind of aircraft meeting the criteria of proposed § 21.24(a)(1).

Airworthiness Design Standards

The FAA agrees that design standards for small, personal use aircraft can be simplified. The FAA also agrees with the petitioners that the airworthiness design criteria for such aircraft could be developed effectively by the private sector, through associations and consensus groups, and presented to the FAA for final approval. Such a process would be similar to the manner in which technical performance standards are currently developed by the Society of Automotive Engineers, Inc. (SAE), Radio Technical Commission for Aeronautics (RTCA), and other competent bodies, under FAA's Technical Standard Order (TSO) authorization program. At present, SAE and RTCA standards are incorporated by reference in the FAA's TSO's as design standards. The FAA's TSO procedures have been highly successful in promoting safety in the design, production, and quality control of many articles which are safety critical and used in commercial operations. The FAA's TSO approval process enables the public to benefit from the collective technical knowledge of the private sector. The proposed primary category type certification procedures will be available to all type certificate applicants and the FAA envisions that several sets of primary category aircraft standards would eventually be developed by private sector associations. These standards might vary with the class and complexity of aircraft involved. The applicant, not wishing to develop its own standards, would be free to select any FAA-approved design standard applicable to the kind of aircraft to be certificated. The FAA does not envision approving separate standards proposed by individual applicants for their exclusive use. All proposed standards received will be made available for public comment, and, if approved, will be available for public use.

Section 21.21(b)(1) of the FAR and its predecessor, Civil Air Regulation (CAR) section 3.10, provide for the issuance of type certificates based upon a finding that an applicant has complied with all applicable regulations or, if any airworthiness provisions are not complied with, a finding that the applicant's design compensates for the noncompliance by factors that provide an "equivalent level of safety." Historically, findings of equivalency pursuant to these regulations have been made during type certification programs. To the extent that privately proposed airworthiness standards vary from the airworthiness standards presently contained in the FAR, once approved, they will be considered to provide an equivalent level of safety. This proposal will permit persons or organizations other than individual type certificate applicants to develop proposed airworthiness standards for primary category aircraft and submit them to the FAA for approval.

The FAA is aware that several foreign civil air authorities have developed, or are in the process of developing, special airworthiness standards for simple aircraft that would meet the proposed primary category aircraft eligibility criteria. These standards would be eligible for consideration by the FAA for the type certification of primary category aircraft.

Proposed § 21.17(f) would allow standards developed in the private sector or by foreign governments to be reviewed and approved by the Administrator using a public comment process. This process would have to be completed prior to use by an applicant in a certification program. The FAA anticipates that the aviation community will take the initiative in developing these standards. When invited, FAA specialists would assist in the development of such standards as is currently the practice on SAE and RTCA technical committees. Then, similar to the way the FAA develops TSO's, the FAA formal review and adoption process would consist of public notice of the proposed standards, FAA analysis of the standards and comments received, and FAA approval or rejection. This process would assure public participation in the evaluation of the standards. This process is not unprecedented. Part 11 currently allows anyone to propose airworthiness standards for any type of aircraft. Under the Administrative Procedure Act, the FAA must evaluate all such petitions and accept them as proposals, modify and accept them, or reject them.

As indicated in proposed §21.17(f), the airworthiness design standards for primary category aircraft may include

standards for certification of the engine and propeller as part of the aircraft. This is an alternative to the certification standards provided in Parts 33 and 35, respectively, as is currently required for standard category aircraft.

To disseminate this information, the FAA would issue an Advisory Circular in the AC 21 series listing all approved standards and provide information as to where interested persons could obtain copies. This AC would be similar to existing AC 21.23-1 for glider certification. (A copy of AC 21.23-1 is in the docket for reference.)

Once airworthiness standards are approved by the Administrator, any person may apply for a type certificate using those standards as their type certification basis, provided that person possesses a complete copy of the standards and that copy is current. Aircraft designs found to comply with these airworthiness design standards would be eligible for a Primary Category Type Certificate. The type certificate data sheet for the aircraft would indicate the standards used.

Proposed § 21.17(f) would allow applicants for primary category type certificates the option of applying the existing standards of § 21.17(b) or Parts 23, 27, or 31, as appropriate, and still use the streamlined primary category certification procedures of § 21.24. Thus they would have the production certification, special airworthiness certification provisions, and, with certain limitations, the maintenance privileges associated with primary category aircraft.

Under the proposed concept, multiple classes of primary category aircraft could be accommodated, since each individual class of aircraft could have separate, approved airworthiness design standards. A flight manual would be required to set forth operating limitations, but could vary with aircraft design complexity. Airworthiness design standards would be less burdensome than existing standards, because they could be tailored to a particular aircraft design, level of complexity, and intended use.

The FAA, in considering airworthiness design standards proposed under § 21.17(f), would be guided by the goal of achieving the level of safety inherent in Parts 23, 27, 31, 33, and 35 as appropriate. The level of safety provided by the simplified primary category standards would be consistent with that provided by the present regulations. Those persons developing proposed airworthiness design standards would be guided by the level of safety provided by Parts 23, 27, 31, 33, and 35, even though details may differ because of design simplicity. Since the proposed method for developing and approving airworthiness standards for primary category aircraft involves the airworthiness standards presently administered by the FAA Directorate system, policies, procedures, and standardization will be implemented by the Aircraft Certification Service to ensure uniformity in the review and approval of primary category aircraft type certification projects.

Some persons have expressed concern about permitting industry to generate airworthiness standards. In light of existing regulations, §§ 11.25 and 21.17(b), under which procedures are provided for industry-generated airworthiness standards, the FAA is particularly interested in further comments, with substantive arguments, as to the efficacy of a certification system that would allow the use of private sector-generated airworthiness standards that would be subject to FAA approval after a public comment period.

Type Certification Procedures

The FAA proposes to simplify the type certification procedures of Part 21 for primary category aircraft. These procedures will rely heavily on existing delegation procedures and applicant statements. An application for a primary category aircraft type certificate would be submitted to the FAA in accordance with existing procedures and would be valid for 3 years as specified in § 21.17(c). Prior to completion of the type certification program, the applicant would submit a compliance checklist addressing all applicable airworthiness standards used in accordance with proposed § 21.24. The applicable airworthiness standards would have been previously approved by the FAA as discussed earlier. The compliance checklist would also contain a summary of methods used to determine compliance with these standards and to reference all reports or records of engineering analysis and test data used to establish compliance. This checklist would be retained by the applicant as a permanent part of the project file.

Following the applicant's submittal of the compliance checklist, compliance statement, and the data required under proposed § 21.24, the FAA would issue the type certificate, provided that a review by the Administrator of the material submitted and other examinations reveals that the aircraft is of proper design and meets the applicable airworthiness standards, and that no unsafe condition exists. The type certification basis would be referenced on the aircraft's type certificate data sheet, and the complete and detailed type certification basis would become a part of the continued airworthiness documentation.

The FAA would normally base its finding of compliance with the applicable airworthiness standards on initial design familiarization, applicant's certification of compliance with the type certification basis and the review of the compliance checklist. The FAA would retain the right to review drawings and reports and to witness or conduct tests to ensure the integrity of the type certification program. The right to review data and to conduct or witness tests would be exercised if: (1) The design embodies unusual or uncommon design features or characteristics, (2) the applicant's engineering capability is not clearly established, (3) the design contains features known to be unsafe based on past experience, and/or (4) in the course of routine surveillance.

This procedure is similar to the successful TSO authorization program presently used to approve the design and production quality control of many safety critical articles (e.g., gas turbine auxiliary power units, instruments, seats, safety belts, fire extinguishers, fuel system components, evacuation slides, navigation equipment, parachutes, etc.) used on standard category aircraft. To provide a clearer understanding of primary category type certification, some of the salient features are summarized below:

- FAA approves the certification basis
- The applicant provides limitations: AFM, placards, markings
- The applicant provides a certifying statement for type certification basis compliance
- The applicant provides a compliance summary report (checklist)
- The applicant maintains the type design and substantiating data files
- The FAA has the option to review data
- The FAA must find that the aircraft complies with the certification basis
- The FAA must find that there are no unsafe features
- The FAA has the option to inspect products, records, and facilities
- The FAA issues the type certificate
- The FAA issues the airworthiness certificates
- The applicant is responsible for continuing airworthiness

Another burden-alleviating feature of the primary category concept is that the design compliance substantiation data will not be sent, normally, to the FAA for review. Therefore, the applicant would not have to wait for that review

before proceeding with the next phase of the project. The FAA believes that its presence at the major milestones of the primary category type certification program will ensure compliance with the FAA-approved airworthiness design criteria.

The type certification procedures for primary category aircraft will be codified by revising sections of existing Part 21 as opposed to consolidating all requirements in a special "primary category" subpart of Part 21. Except for the revisions proposed herein, all other requirements of Part 21 would apply to the certification of primary category aircraft.

Section 609 of the Federal Aviation Act of 1958, as amended, would remain applicable to the suspension, amendment, or revocation of primary category aircraft certificates. Should the need arise for the FAA to evaluate or reevaluate a type design awaiting approval or already approved, the FAA would follow the normal type certification procedures specified in Part 21, and the applicant would be expected to demonstrate, assist, or provide data to the FAA as necessary under §§ 21.33(a) and 21.49.

Like any other type certification project, the designation of applicable airworthiness standards would be established in accordance with proposed § 21.17(f) when an application is made. On the date of application for the type certificate, the applicant would identify the airworthiness standards, and the specific documents in which they reside, for the aircraft to be type certificated. The applicant may request deviations from previously-approved airworthiness standards, and show that the modified standards are appropriate to the design presented for certification and are consistent with the level of safety provided by the approved standards. If the FAA finds that the applicant's design includes novel or unusual design features not addressed by the airworthiness standards established at the onset of the type certification process, special requirements may be identified by the FAA, under deviation procedures, to assure that the design complies with adequate airworthiness standards.

With respect to changes to type design, the requirements of Part 21, Subpart D, would apply, and those of Part 21, Subpart E, would apply to supplemental type certificates. For approval of such changes, the applicant would apply the process described in § 21.24. The FAA would be guided by § 21.19 when determining whether or not a particular design change presented for approval requires a new type certificate, and possibly new airworthiness standards, in accordance with § 21.17.

Under proposed § 21.24, the applicant normally would not submit all type design data to the FAA for review. However, all data must be retained indefinitely and made available to the FAA or the National Transportation Safety Board upon request, as presently required by § 21.49. The contents of the type certificate and the type design are defined in §§ 21.41 and 21.31, respectively. Therefore, the applicant must retain all of the data until the type certificate is surrendered, suspended, revoked, or terminated, or until the applicant goes out of business, at which time those data must be surrendered to the FAA. Continued application of these requirements to primary category aircraft is necessary to assure that engineering data will be available to correct unsafe conditions that may develop while in service.

Proposed § 21.24 would require the applicant to prepare a flight manual which is consistent with the present requirements of §§ 21.5, 23.1581, and 27.1581, or an alternative approved standard based on these sections. This would ensure that the pilot is provided with all design-related limitations associated with operating the aircraft. Part 91 operating limitations should not be repeated in the flight manual. The flight manual would be reviewed and approved by the type certificate holder for content, format, and consistency with the requirements of the airworthiness standards described in the certification basis. Existing FAA-approved flight manuals or operator's handbooks would remain applicable to aircraft converted from standard to primary category. Reductions in maximum certificated gross weight, rated horsepower, or occupant capacity as set forth in the type certificate data for a previously type certificated aircraft, by supplemental type certificate or other means, would not be approved to make the aircraft eligible as a primary category aircraft.

Proposed § 21.24(c) sets forth import type certification procedures for primary category aircraft which are consistent with the Bilateral Airworthiness Agreements between the United States and other countries in which such aircraft might be developed.

FAA policies and procedures for the type certification of primary category aircraft or the conversion of standard category aircraft to primary category would be published in an AC to ensure that they are available to all applicants.

Public comments, with substantive arguments, are solicited concerning the safety aspects of the proposed type certification procedures.

Production Certification

The holder of a primary category aircraft type certificate would be eligible for a production certificate (P.C.) when the FAA finds that the applicant has complied with the existing requirements in Part 21, Subpart G, for production certification. This notice also proposes, in §§ 21.165 and 21.184, that a manufacturer of a primary category aircraft be permitted to manufacture kits under its P.C. In accordance with proposed § 21.184, a person purchasing such a kit for a primary category aircraft would be offered the option by the P.C. holder to obtain a special airworthiness certificate—primary category. If this option is chosen, the owner's location of aircraft assembly would be considered as an extension of the P.C. holder's manufacturing facility for purposes of quality control responsibility, provided the assembly point is in the United States. This limitation on the location of assembly would permit FAA surveillance of the P.C. holder's supervision and quality control system. The quality of workmanship and type design configuration conformity of all work performed by the assembler would be the responsibility of the P.C. holder under its production certificate. Aircraft production flight tests would be accomplished only by production flight test pilots, approved and employed by, or designated as an agent of, the P.C. holder. The production flight test pilot would be identified by the applicant and authorized by the FAA as part of the manufacturer's P.C.

The procedure of permitting assembly of primary category aircraft under the manufacturer's P.C. at a location remote from the manufacturer's facility is similar to existing practice. For example, many components and subassemblies have been built by subcontractors for a prime manufacturer under the prime manufacturer's P.C. An example of final assembly at a remote location from the manufacturer's facility is the McDonnel Douglas Model DC-9-82 airplane being assembled in China. The airplane is being assembled under the McDonnel Douglas P.C. and is eligible for a U.S. standard airworthiness certificate. Another example is that of the Piper Model PA-18, where a procedure is currently being developed by Piper Aircaft Corporation in coordination with the FAA. This Owner Assembly Program will provide for final assembly to be accomplished at a remote location under the Piper P.C. quality control system through manuals and inspections

by Piper inspectors. Upon completion, the airplane would be eligible for a standard airworthiness certificate. As stated in § 21.165, it is the responsibility of the P.C. holder to maintain the quality control system and to determine that each completed product submitted for airworthiness certification conforms to the type design and is in a condition for safe operation. There is no reason to believe that safety will be derogated provided the requirements of § 21.165 are met.

The holder of a primary category aircraft type certificate would not be eligible for production under Part 21, Subpart F (Production Under Type Certificate Only), since this would be an undue burden on FAA inspection resources.

The FAA believes that safety will not be derogated under the primary category P.C. concepts. These concepts are currently in use and have been very successful. Public comments, with substantive arguments, are solicited regarding safety-related issues associated with aircraft assembly accomplished by the owner of a kit manufactured by a P.C. holder at a location other than the P.C. holder's manufacturing facility.

Special Airworthiness Certification

An aircraft type certified in the primary, normal, utility, or acrobatic categories and meeting § 21.24(a)(1), would be eligible for a special airworthiness certificate as either a primary category aircraft under § 21.184 (a), (b), (c) or (d), or as an experimental primary category aircraft under § 21.191(h) if it is assembled from a kit. The operating limitations, if any, required by Part 91, would depend on the kind of special airworthiness certification (primary category or experimental) under which the aircraft is approved. When a person purchases a primary category aircraft kit from the holder of a production certificate, and the location where the aircraft is assembled is not treated as an extension of the P.C. holder's quality control system, the aircraft would be eligible for only an experimental certificate under new § 21.191(h). When the kit assembler elects to obtain an experimental certificate in lieu of a primary category airworthiness certificate, the more restrictive operating limitations of proposed § 91.42 would apply and be made a part of the airworthiness certificate.

As a matter of policy, the inspection, flight tests, and issuance of special airworthiness certificates for primary category aircraft would normally be accomplished by FAA designees (private persons) authorized to perform those particular functions. To minimize government costs, FAA inspectors and flight test pilots would not normally perform these functions. Applicants, instead, would be encouraged to employ FAA designees as presently prescribed under Part 183. As with all designees, periodic FAA surveillance would continue, and if deemed necessary or in the course of routine surveillance, the right to conduct inspections, witness tests, or issue special airworthiness certificates would be exercised.

Proposed § 21.184(b) sets forth special airworthiness certification procedures for primary category aircraft imported from a country with which the United States has an applicable bilateral airworthiness agreement.

Airworthiness Certification Category Conversion

The FAA proposes that aircraft having a standard airworthiness certificate in the normal, utility, or acrobatic category which meet the weight, power, occupant capacity, and unpressurized cabin eligibility criteria of proposed § 21.24(a)(1) would be eligible for conversion to a special airworthiness certificate in the primary category under new § 21.184(c). Reversion to the normal, utility, or acrobatic category would be accomplished under § 21.183(d), and would require complete type design conformity and condition inspections prior to issuance of a standard airworthiness certificate by the FAA, or an FAA designee such as a Designated Airworthiness Representative. Such inspections would be required to ensure that the aircraft complies with an approved type design for standard certification and that it is in a condition for safe operation. When reverting from primary category to a normal, utility, or acrobatic category under § 21.183(d), responsbility to show that the aircraft conforms to an approved type design and that the aircraft is in condition for safe operation would rest with the applicant. Such an applicant would have to present to the FAA all aircraft records required by Parts 43, 91, etc., including records for the period during which the aircraft was certificated and operated in the primary category.

Conversion of standard category airplanes to the primary category would allow a pilot-owner to perform certain maintenance tasks, newly classified as preventive maintenance, upon successful completion of an FAA-approved training program. Conversion to primary category would not relieve aircraft and its components of the requirements of Airworthiness Directives (AD's) applicable prior to conversion. New AD's applicable to primary category, primary category—light, and primary category—experimental aircraft would identify these aircraft in their applicability statements. Primary category aircraft would not be eligible for multiple certification under any other category.

Pilot Requirements and Marking and Registration

The pilot requirements and the marking and registration requirements for primary category aircraft would be the same as those applicable to aircraft with a standard airworthiness certificate. Therefore, no regulatory changes are proposed for these requirements.

Maintenance

Existing § 43.3(g) permits a pilot, with at least a private pilot certificate, to perform preventive maintenance on standard category aircraft which are owned or operated by that pilot. Paragraph (c) of Appendix A of Part 43 lists 30 specific preventive maintenance tasks that may be performed, under appropriate circumstances, by a private pilot on the specific aircraft involved. The proposed amendments to Part 43 would expand that list, with regard to primary category aircraft only. To qualify for these additional preventive maintenance privileges, the pilot must: (1) Hold at least a private pilot certificate; (2) be the owner or co-owner of the aircraft; (3) have successfully completed special training as evidenced by a certificate of competence specifying the aircraft type for which training was received; and (4) perform the special inspection and preventive maintenance tasks in accordance with an FAA-approved special inspection and preventive maintenance program for the type of aircraft involved. The pilot may receive the special training before becoming a private pilot.

All provisions of Part 43 would be applicable to the maintenance, preventive maintenance, rebuilding, and alterations of primary category aircraft, including the additional special inspections and preventive maintenance tasks performed under the provisions of proposed new paragraph (c)(29), Appendix A of Part 43. At present pilots are required to record preventive maintenance tasks in accordance with § 43.9 and retain those records in accordance with § 91.173. These provisions remain unchanged for the expanded pilot maintenance and inspection functions.

Proposed new § 21.24(b) would provide the means for FAA approval of special inspection and preventive maintenance programs under a primary category type certificate or supplemental type certificate. Such programs may include foreign type certificate holders. The FAA envisions that these programs would be approved by the Aircraft Evaluation Group (AEG) whose membership would include FAA engineering, manufacturing, operations, and maintenance specialists.

Proposed §§ 21.163(b), 141.57(b), and 147.21(f) would provide for FAA approval of special preventive maintenance training courses for persons who wish to perform the special inspection and preventive maintenance programs under proposed item 29, paragraph (c), Appendix A, Part 43. The training courses could be taught by the aircraft manufacturer (production certificate holder), pilot schools, or aviation maintenance technician schools provided they use curricula previously approved by the FAA. Students satisfactorily completing such courses would be issued a certificate of competence specifying the primary category aircraft for which training was successfully completed. Students would not be required to hold private pilot certificates, or be aircraft owners to complete training; however, under existing § 43.3 and the proposed changes to Part 43, Appendix A, such persons would be required to become a private pilot and owner or co-owner of the aircraft prior to exercising the privileges of § 43.3.

This proposal would not allow for the certification of schools under Part 141 or 147 that teach only the special preventive maintenance training. Schools would be required to meet all other requirements of Part 141 or 147 and be previously certificated to apply for FAA approval of these special courses.

Proposed new § 91.169(c)(4) would allow the required annual inspection to be extended to a biennial inspection for primary category aircraft, provided the aircraft records document proper accomplishment of an FAA-approved special inspection and preventive maintenance program by a person authorized under § 43.3.

Public comments, with substantive arguments, are solicited concerning the safety aspects of pilot-owner performed maintenance by pilots who have satisfactorily completed FAA-approved maintenance training programs.

Flight Instruction—Air Traffic and General Operating Rules

Primary category aircraft are intended for personal, non-commercial use; they are not intended to be used for compensation or hire or to train primary pilot trainees. The FAA recognizes, however, that these aircraft will be used in a variety of training situations because of their low operational costs. The lower costs associated with primary category aircraft will result in an expanded general aviation market and increased pilot activity. This growth will make it necessary to ensure a continued high level of proficiency in the pilot population. Therefore, aeronautical experience, including flight instruction, obtained while operating a primary category aircraft (excluding primary category-light aircraft) will be creditable toward pilot certificate and rating requirements in accordance with Part 61. It should be noted that aircraft used for training by Part 141 pilot schools will continue to require standard category airworthiness certificates. Thus, aircraft certificated as primary category aircraft would be precluded from use in approved Part 141 training school programs.

The current fleet of training aircraft certificated in the standard category (e.g., Cessna C-152, Piper PA-28, and Beechcraft C-23 aircraft) are adequately fulfilling the general aviation training mission. These standard category aircraft have evolved over the years to include design refinements enabling them to safely withstand the rigors of the daily training environment. In light of the proven reliability of these standard airworthiness category aircraft, the FAA does not intend or envision that these aircraft will be replaced in the training fleet by primary category aircraft. As previously stated, however, aeronautical experience obtained in a primary category aircraft (excluding primary category-light) will be creditable toward pilot certification requirements.

Proposed new § 91.21(d) sets limitations on the use of "primary category-light" aircraft for flight training. These aircraft are not considered suitable for flight instruction in obtaining a pilot's certificate rating under Part 61. Therefore, proposed § 91.21(d) would prohibit all flight training in such aircraft, except for flight training in the operation of that specific aircraft type, provided no other person or property are carried. Flight instructors may be compensated for this training. Such training need not be given in an aircraft owned by the person being trained. This would allow pilots to pay to get "checked out" in "primary category-light" aircraft that they do not own.

It is pointed out that all of the provisions of existing § 91.21 would apply to primary category aircraft, including those designated as "primary category-light." Thus, fully-functional, dual controls would be required for all flight instruction.

Proposed § 91.44(a) would prohibit the use of primary category aircraft for compensation or hire.

Proposed § 91.44(b) would, in the interest of safety in the air traffic system, restrict persons from operating an aircraft designated as "primary category-light" within an airport traffic area, control zone, terminal control area, airport radar service area, or positive control area, unless prior authorization is received from the air traffic facility having jurisdiction over that airspace.

Proposed § 91.44(c) would require any person operating a primary category-light aircraft to maintain visual reference with the surface. This will preclude a pilot from being caught "on top" and creating an unsafe situation for that pilot and other airspace users.

The FAA solicits public comment, supported by substantive arguments, relating to the restrictions and uses of primary category and primary category-light aircraft.

Noise

Primary category airplanes, including those designated as "primary category-light" will be required to meet the present requirements of Part 36, Appendix F, for small propeller-driven airplanes. Other kinds of primary category aircraft would not be affected by Part 36 because noise standards do not exist for them.

Ultralight Vehicles

On September 2, 1982, the FAA established 14 CFR Part 103 governing the operation of ultralight vehicles in the United States (47 FR 38770). Part 103 defines powered and unpowered ultralight vehicles and excludes such ultralights from the requirements for airman certification, aircraft certification, and aircraft registration and marking.

The primary purpose of Part 103 is to maintain safety by protecting the airspace, and persons and property on the ground. When establishing Part 103, the FAA chose not to require aircraft registration, airworthiness certification, or pilot certification for ultralight vehicles provided that, among other restrictions, the aircraft were used for sport or recreation purposes only.

Ultralight flying is considered a "sport" generally conducted away from population centers and aircraft operations. The ultralight community was challenged to develop programs for pilot and aircraft certification, and aircraft registration to promote the safety of ultralight operations.

This notice proposes no changes to Part 103. However, manufacturers of vehicles meeting the ultralight criteria of Part 103 would have the option of type certificating their vehicles as primary category-light aircraft, thus affording their owners a higher level of design safety. Owners of such type certificated aircraft would have the option of obtaining a special airworthiness certificate and operating them within the operational limitations imposed on primary category-light aircraft. Public comments are being requested concerning the feasibility and acceptability of the primary category-light aircraft proposals as they relate to ultralight vehicles.

Assessment of Safety and Economic Impact

The FAA believes that the primary category airworthiness certification concept, described in the AOPA and EAA joint petition as modified in this notice, provides an opportunity to reduce costs to present and future aircraft manufacturers, and the pilot-owners of simple, personal use aircraft without adversely impacting the safety. Fixed-base operators, maintenance facilities, maintenance airmen, and other associated businesses would be expected to realize a net economic benefit from the anticipated growth in personal use general aviation operations stimulated by the adoption of the primary category aircraft concept.

As previously discussed, this NPRM should not be perceived as an effort to deregulate general aviation safety. The FAA believes that these proposals will maintain an equivalent level of safety. The certification requirements listed in proposed § 21.17(f) provided levels of safety equivalent to those of Parts 23, 27, 31, 33, and 35 for the types of aircraft affected. In addition, the proposals in this NPRM will afford an opportunity to improve the safety of a segment of amateur-built aircraft not presently subject to extensive (or rigorous) type certification or production requirements without requiring changes to the amateur-built provisions of Part 21. The level of safety of such aircraft, which would otherwise be treated as "experimental aircraft," could be significantly enhanced. This proposed rule provides all elements for ensuring the level of safety prescribed by the current regulations. There will be no reduction of FAA presence, simply a more efficient use of that presence through increased use of the delegation systems currently in existence. The primary category aircraft defines a system that will provide levels of safety equivalent to those currently existing for small personal-use aircraft.

The continuing experience of many thousands of small aircraft certificated under earlier, less complex, airworthiness standards illustrates that a return to simpler design certification requirements for these types of aircraft would not reduce that current level of safety. The economic incentive for pilot-owners to get special maintenance training on their aircraft, and the increased awareness of the importance of maintenance to safety could enhance safety. More frequent pilot inspections under approved special inspection programs together with expanded preventive maintenance, that might otherwise be deferred, should also contribute to safety. The economic incentives could also improve safety by encouraging amateur builders of kit aircraft to seek the supervision and quality control of the primary category aircraft kit manufacturer during assembly to make the finished aircraft eligible for a special airworthiness certificate in the primary category. Even if amateur builders are satisified with an experimental certificate, safety levels would be improved because the kits would be produced under an FAA-approved quality control system.

The FAA is aware of the need to reduce the cost of its operations and proposes to reduce its involvement in type certification of aeronautical products wherever possible. This proposal is intended to maintain the present level of safety while minimizing the associated costs to the private sector and Government.

The FAA expects the number of private sector organizations that will undertake development of primary category standards will be small. However, by using private sector organizations to prepare the primary category standards, the FAA can reduce its administrative costs.

Once these standards are developed and approved, the simplified type certification process would reduce the time required of FAA technical personnel. Additionally, many FAA inspections and tests, leading to issuance of primary category type certificates, would be done by qualified private persons under the existing FAA designee program. This proposal will facilitate type, production, and airworthiness certification of small, personal-use aircraft.

Simplified airworthiness standards and type certification procedures should reduce certification costs and delays for manufacturers of primary category aircraft. The FAA considers neither the cost associated with design development, including developmental testing, nor the costs of analyses and tests incurred by the manufacturer to meet product liability responsibilities, to be "certification costs." Certification costs are those costs incurred by a manufacturer to show compliance with design requirements by engineering analysis and tests that would not otherwise be done to develop and test a design for market. Administrative costs incurred in working with the FAA throughout the certification process are also considered "certification costs."

Public comment, with substantive arguments, is urged specifically with respect to the safety implications of the issues listed below:

- Growth in the number of personal-use aircraft expected to be stimulated by the adoption of the primary category aircraft concept.
- Expected participation of the private sector in the development of primary category aircraft certification standards.
- Streamlining of FAA certification procedures by involvement of manufacturers and pilot-owners in type certification, manufacturing, and airworthiness certification of primary category aircraft.
- Expected response to the increased reliance on delegation programs.
- Expected reduction in the pilot-owner's operational costs.
- Expected reduction in the FAA's operational costs.
- Overall impact of the primary category concept on aircraft manufacturers.

Additionally, the FAA recognizes that there is concern that primary category aircraft manufacturers would not be willing to assume the liability associated with some of the proposals contained in this notice (e.g., the building of aircraft by the purchaser as an extension of the kit manufacturer's production certificate). This subject is a major concern as evidenced by liability bills, addressing general aviation accidents, which have been introduced in Congress. The FAA is particularly interested in public comments, with substantive arguments, regarding the effect this NPRM may have on the liability of aircraft manufacturers of, and component suppliers for, primary category aircraft.

Regulatory Evaluation Summary

Introduction

The FAA proposes to establish a new category of small aircraft intended for personal use only, that would be classified as "primary category aircraft." The FAA is also proposing simplified type, production, and airworthiness certification procedures and maintenance criteria for this aircraft category. The proposed primary category aircraft would be unpowered or powered by a single, naturally aspirated engine having a certificated takeoff rating of 200 horsepower or less, would have a certificated takeoff weight of 2,500 pounds or less, and would have an unpressurized cabin.

This evaluation discusses how the benefits expected to result from the proposed regulations would outweight their expected costs. The proposed primary category aircraft regulations are expected to reduce costs to designers and manufacturers of small personal use aircraft that would otherwise be regulated by the provisions of Part 21. The proposed regulations would not require ultralight vehicles, operated under Part 103, to be certificated; however, it would offer such vehicles the option to be certificated as "primary category aircraft."

Benefits

Benefits expected to result from the proposed regulations include: (1) New business opportunities and cost savings to aircraft manufacturers who would be able to produce the new primary category aircraft; (2) improved public confidence in kit-built aircraft with improved product liability considerations for kit-built aircraft manufactured under FAA-approved airworthiness standards; (3) preventive maintenance cost savings to pilot-owners of primary category aircraft; and (4) stimulation of business associated with general aviation activities.

Cost savings resulting from revised procedures for obtaining airworthiness certifications have been estimated by industry spokesmen to range from 10 to 80 percent of the costs of compliance with current Part 21 procedures and existing airworthiness standards. For example, certification costs under Part 23 for simple, single-engine aircraft generally range from $2 million to $10 million per aircraft design. These costs vary depending upon aircraft complexity. Certification cost for an advanced four-place aircraft with highly innovative systems will be greater than those for a simple one- or two-place aircraft with rudimentary systems. Some industry spokemen maintain that savings from the proposed rule would never exceed 10 percent of the existing costs, because product liability considerations force prudent manufacturers to exceed the substantive content of most of the existing airworthiness standards, even in the absence of regulations. These individuals maintain that the costs of conducting tests, such as wing structure integrity, flight capabilities, etc., necessary to satisfy product liability considerations, would be essentially the same under either existing standards or under any other simplified regulation.

Conservatively, the FAA assumes that savings to manufacturers of primary category aircraft would be 10 percent of existing certification costs. Thus, the FAA estimates that manufacturers who elect to use the primary category aircraft certification concept could save from $200,000 to $1 million per new aircraft design. (See the Regulatory Evaluation in the docket for details about these estimates.) The FAA has no basis upon which to predict accurately cost savings that would accrue to these aircraft manufacturers. Such predictions inherently require some knowledge of the number of manufacturers that would enter the primary category aircraft field and the number and complexity of the aircraft models they would produce.

Under the proposed regulations, pilot-owners of primary category aircraft would also benefit from savings associated with: (1) Assembling a portion of their aircraft themselves; (2) performing certain maintenance tasks and inspections themselves, and (3) having the inspection period of their aircraft extended from 1 to 2 years. The FAA has no basis for estimating these costs savings. The portions of the aircraft that may be assembled and the maintenance procedures that pilot-owners may perform have not as yet been determined, and their performance by the pilot-owner would be optional. Also, these procedures would vary with aircraft complexity.

In general, the proposed regulations would provide cost savings to all manufacturers and pilot-owners of primary category aircraft. The FAA believes that the benefits of the proposed regulations would more than offset any costs they would impose.

While the FAA does not have data to accurately estimate these benefits, it believes that they could be substantial. For example, if 5 to 10 new manufacturers enter the primary category aircraft field and produce two new models per year, then the cost savings accruing to the entering manufacturers could range from $2 to $20 million per year. These benefits do not include: (1) Cost savings to primary category aircraft pilot-owners through reduced maintenance and inspections costs, (2) jobs provided by new manufacturers, (3) increased business for fixed based operators due to increased personal use aircraft activities.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress in order to ensure primarily that small entities are not disproportionately affected by Government regulations. The RFA requires Federal Government agencies to review regulations to determine whether they may have "a significant economic impact on a substantial number of small entities."

The proposed primary category aircraft regulations would directly impact entities who produce small, single engine general aviation aircraft and certificate them under existing airworthiness standards. The FAA defines a small aircraft manufacturer as one with less than 75 employees. It defines a substantial number as one that is not less than 11 and that is more than one-third of the small entities subject to the proposed regulations. A significant economic impact is defined as $14,258 per year to each of these small manufacturers.

A review of the aircraft manufacturers indicates that about 11 small manufacturers may be subject to the proposed regulations. However, in order for a substantial number to be affected, all 11 of the estimated number of manufacturers would have to choose to produce aircraft under these regulations. The FAA has no basis for estimating how many manufacturers will choose to produce aircraft under the proposed regulations or the level of complexity of these aircraft. Thus, it cannot presently estimate the level of impact on these manufacturers. If it is determined, at promulgation, that this proposal would have a significant impact on a substantial number of small entities, a regulatory flexibility analysis will be prepared and placed in the docket.

Trade Impact Assessment

The proposed primary category aircraft regulations, if adopted, could have a beneficial impact on trade opportunities both for U.S. firms doing business overseas and foreign firms doing business in the United States. The airworthiness authorities of several other countries are known to be developing regulations similar in concept to these proposed primary category aircraft regulations. These

regulations could afford new opportunities for international trade between the U.S. and other countries in general aviation personal use aircraft and their opponents. Adoption of the primary category aircraft concept would also provide a means for U.S. import certification of several personal use aircraft that are being developed abroad, many of which incorporate U.S. manufactured components. United States citizens, fixed base operators, maintenance facilities, and service organizations would benefit from the availability of these aircraft for personal use in the United States.

Federalism Implications

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this proposed regulation is not major under Executive Order 12291. In addition, it is certified that this proposal, if adopted, 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. This proposal is considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

A draft regulatory evaluation of the proposals, including a Regulatory Flexibility Determination and Trade Impact Assessment, has been placed in the regulatory docket. A copy may be obtained by contacting the person identified under the caption "**FOR FURTHER INFORMATION CONTACT**".

List of Subjects

14 CFR Part 21

Aviation safety, Aircraft, Production certification, Safety, Type certification.

14 CFR Part 36

Aircraft noise, Type certification.

14 CFR Part 43

Aircraft, Aviation safety, Safety.

14 CFR Part 91

Aircraft, Aviation safety, Safety.

14 CFR Part 141

Air safety, Aviation safety, Education, Educational facilities, Pilot schools, Schools

14 CFR Part 147

Aircraft, Air safety, Aviation safety, Education, Educational facilities, Schools.

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend Parts 21, 36, 43, 91, 141, and 147 of the Federal Aviation Regulations (14 CFR Parts 21, 36, 43, 91, 141, and 147) as follows:

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

1. The authority citation for Part 21 is revised to read as follows:

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

2. Part 21 is amended by adding a new § 21.2 to read as follows:

§ 21.2 Falsification of applications, reports, or records.

(a) No person shall make or cause to be made—

(1) Any fraudulent or intentionally false statement on any application for a certificate or approval under this part;

(2) Any fraudulent or intentionally false entry in any record or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or the exercise of the privileges of any certificate or approval issued under this part;

(3) Any reproduction for a fraudulent purpose of any certificate or approval issued under this part; or

(4) Any alteration of any certificate or approval issued under this part.

(b) The commission by any person of an act prohibited under paragraph (a) of this section is a basis for suspending or revoking any certificate or approval issued under this part and held by that person.

3. Section 21.17 is amended by adding a new paragraph (f) to read as follows:

§ 21.17 Designation of applicable regulations.

* * * * *

(f) For primary category aircraft, the applicable requirements are:

(1) The appropriate airworthiness requirements contained in Parts 23, 27, 31, 33, or 35 of this subchapter, or such other airworthiness criteria the Administrator may find appropriate and applicable to the specific design and intended use and which provide a level of safety equivalent to that provided by those parts.

(2) The noise standards of Part 36 applicable to small, propeller driven primary category airplanes.

4. Part 21 is amended by adding a new § 21.24 to read as follows:

§ 21.24 Issue of type certificate: primary category aircraft.

(a) The applicant is entitled to a type certificate for an aircraft in the primary category if—

(1) The aircraft—

(i) Is unpowered or powered by a single, naturally aspirated engine with a certificated takeoff rating of 200 shaft horsepower or less under sea level standard day conditions;

(ii) Has a maximum certificated gross weight of not more than 2,500 pounds;

(iii) Has a maximum occupant capacity limit of not more than four persons, including the pilot; and

(iv) The cabin is unpressurized.

(2) The applicant has submitted—

(i) Except as provided by paragraph (c), a statement, in a form and manner acceptable to the Administrator, certifying that the applicant has completed the necessary engineering analysis; conducted appropriate flight, structural, propulsion, and systems tests necessary to show that the aircraft, its components, and its equipment are reliable and function properly; the type design complies with the airworthiness standards and noise requirements established for the aircraft under § 21.17(f); and no feature or characteristic makes it unsafe for its intended use;

(ii) A flight manual, in accordance with § 21.5(b) containing the applicant's approval, information on operating limitations, markings and placards, and other information required to be furnished by the airworthiness standards;

(iii) Instructions for continued airworthiness in accordance with § 21.50(b); and

(iv) A report that summarizes how compliance with each provision of the type certification basis was determined, lists the specific documents in which they reside, contains a list of all necessary drawings and documents used to define the type design (such as a master drawing list), and contains a list of all the engineering reports on tests

and computations that the applicant will retain and make available under § 21.49 to substantiate compliance with the applicable airworthiness standards.

(3) The Administrator finds that—

(i) The aircraft complies with those appropriate airworthiness requirements contained in Parts 23, 27, 31, 33, or 35 of this subchapter, or such other airworthiness criteria the Administrator may find appropriate and applicable to the specific design and intended use; and

(ii) The aircraft has no feature or characteristic that makes it unsafe for its intended use.

(b) The applicant is entitled to a special inspection and preventive maintenance program, as part of the aircraft's type design, or supplemental type design, on aircraft approved under this section.

(c) If the applicant is located in a foreign country with which the United States has an agreement for the acceptance of these products for export and import, and the aircraft is to be imported into the United States—

(1) The statement required by paragraph (a)(2)(i) of this section must be made by the Foreign Civil Airworthiness Authority (FCAA) of the country of the applicant; and

(2) The required manuals, placards, listings, instrument markings, and documents required by paragraphs (a) and (b) of this section must be submitted in the English language.

5. Section 21.31(c) is amended by adding the phrase ", or otherwise required by the Administrator" after the word "chapter".

6. In § 21.31 paragraph (d) is redesignated as paragraph (e) and new paragraph (d) is added to read as follows:

§ 21.31 Type design.

* * * * *

(d) For Primary Category Aircraft, if desired, any special inspection and preventive maintenance program designed to be accomplished by an appropriately rated and trained pilot.

§ 21.35 [Amended]

7. Section 21.35(a) is amended by adding "§ 21.24" in place of "§ 21.25".

§ 21.93 [Amended]

8. Section 21.93(b)(3) is amended by adding the word "primary, " before the word "normal,".

9. Section 21.163 is amended by redesignating the introductory paragraph as paragraph (a); by redesignating paragraphs (a) and (b) as (a)(1) and (a)(2); and by adding a new paragraph (b), to read as follows:

§ 21.163 Privileges.

(a) The holder of a production certificate may—

(1) Obtain an aircraft airworthiness certificate without further showing, except that the Administrator may inspect the aircraft for conformity with the type design; or

(2) In the case of other products, obtain approval for installation on certificated aircraft.

(b) Notwithstanding the provisions of §§ 141.3 and 147.3, the holder of a production certificate for a primary category aircraft type design or for a normal, utility, or acrobatic category aircraft of a type design that is eligible for special airworthiness certification in the primary category under § 21.184(c) may—

(1) Conduct training for persons in the performance of a special inspection and preventive maintenance program approved as a part of the aircraft's type design under § 21.24(b), provided the training is given by a person holding a mechanic certificate with airframe and powerplant ratings issued under Part 65 of this chapter.

(2) Issue a certificate of competency to persons successfully completing the approved training program, provided the certificate specifies the aircraft to make and model to which the certificate applies.

§ 21.165 [Amended]

10. Section 21.165(b) is amended by adding the phrase ", including primary category aircraft assembled under a production certificate by another person in the United States from a kit provided by the holder," after the word "product".

§ 21.175 [Amended]

11. Section 21.175(b) is amended by adding "primary," after the word "are".

§ 21.181 [Amended]

12. Section 21.181(a)(1) is amended by adding the words ", special airworthiness certificates-primary category," after the words " Standard airworthiness certificates".

13. Section 21.182 is amended by revising paragraph (b)(2) as follows:

§ 21.182 Aircraft identification.

* * * * *

(b) * * *

(2) An experimental certificate for an aircraft that is not "amateur-built" or "kit-built."

* * * * *

14. Part 21 is amended by adding a new § 21.184 to read as follows:

§ 21.184 Issue of special airworthiness certificates for primary category aircraft.

(a) *New primary category aircraft manufactured under a production certificate.* An applicant for a special airworthiness certificate-primary category for a new aircraft that meets the criteria of § 21.24(a)(1), manufactured under a production certificate, including aircraft assembled by another person in the United States from a kit provided by the holder and under the supervision and quality control of the holder, is entitled to a special airworthiness certificate without further showing, except that the Administrator may inspect the aircraft to determine conformity to the type design and condition for safe operation.

(b) *Import aircraft.* An applicant for a special airworthiness certificate-primary category for an import aircraft type certificated under § 21.29 is entitled to a special airworthiness certificate if the Foreign Civil Airworthiness Authority of the country in which the aircraft was manufactured certifies, and the Administrator finds after inspection, that the aircraft conforms to an approved type design that meets the criteria of § 21.24(a)(1) and is in a condition for safe operation.

(c) *Aircraft having a current standard airworthiness certificate.* An applicant for a special airworthiness certificate-primary category for an aircraft having a current standard airworthiness certificate, that meets the criteria of § 21.24(a)(1), may obtain the primary category certificate in exchange for its standard airworthiness certificate without further showing. For the purposes of this paragraph, a current standard airworthiness certificate means that the affected aircraft conforms to an approved normal, utility, or acrobatic type design, complies with all applicable airworthiness directives, has been inspected and found airworthy within the last 12 calendar months in accordance with § 91.169(a)(1) of this chapter, and is found to be in a condition for safe operation by the Administrator.

(d) *Other aircraft.* An applicant for a special airworthiness certificate-primary category for an aircraft that meets the criteria of § 21.24(a)(1), and not covered by paragraphs (a), (b), and (c) of this section, is entitled to a special airworthiness certificate if—

(1) The applicant presents evidence to the Administrator that the aircraft conforms to an approved primary, normal, utility, or acrobatic type design, including compliance with all applicable airworthiness directives;

(2) The aircraft has been inspected and found airworthy within the past 12 calendar months in accordance with § 91.169(a)(1) of this chapter and;

(3) The aircraft is found by the Administrator to conform to an approved type design and to be in a condition for safe operation.

(e) A multiple category airworthiness certificate in the primary category and any other category will not be issued; and a primary category aircraft may only hold one airworthiness certificate.

(f) *Noise requirements.* For all primary category propeller driving small airplanes (except for airplanes that are designed for "agricultural aircraft operations" as defined in § 137.3 of this chapter, as effective on January 1, 1986), no special airworthiness cerificate is originally issued under this section unless the applicant shows that the type design complies with the applicable noise requirements of Part 36 of this chapter in addition to the applicable airworthiness requirements in this section.

(g) *Primary category-light.* Primary category aircraft that have a maximum certificated gross weight of 1,000 pounds or less must be designated as "primary category-light" on the special airworthiness certificate.

15. Section 21.187 is amended by revising paragraph (a) to read as follows:

§ 21.187 Issue of multiple airworthiness certification.

(a) An applicant for an airworthiness certificate in the restricted category, and in one or more other categories, except primary category and primary category-light, is entitled to the certificate, if—

* * * * *

16. Section 21.191 is amended by adding a new paragraph (h) to read as follows:

§ 21.191 Experimental certificates.

* * * * *

(h) *Operating kit-built aircraft.* Operating an aircraft certificated in the primary category that meets the criteria of § 21.24(a)(1) which was assembled by the applicant from a kit production certificate, but which was assembled without the supervision and quality control of the production certificate holder under § 21.184(a).

PART 36—NOISE STANDARDS: AIRCRAFT TYPE AND AIRWORTHINESS CERTIFICATION

17. The authority citation for Part 36 is revised to read as follows:

Authority: 49 U.S.C. 1344, 1348, 1354(a), 1355, 1421, 1423, 1424, 1425, 1428, 1429, 1430, 1431(b), 1651(b)(2), 2121 through 2125; 42 U.S.C. 4321 et seq.; Sec. 124 of Pub. L. 08–473, E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

§ 36.9 [Amended]

18. The introductory paragraph of § 36.9 is amended by adding the word "primary," before the word "normal,".

§ 36.501 [Amended]

19. Section 36.501(a)(1) is amended by adding the word "primary," before the word "normal,".

PART 43—MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION

20. The authority citation for Part 43 is revised to read as follows:

Authority: 49 U.S.C. 1354, 1421 through 1430; 49 U.S.C. 106(g) (Revised Pub L. 97–449, January 12, 1983).

21. Paragraph (c) of Appendix A of Part 43 is amended by adding a new item (31) to read as follows:

Appendix A—Major Alterations, Major Repairs, and Preventive Maintenance

* * * * *

(c) * * *

(31) The inspection and maintenance tasks prescribed and specifically identified as preventive maintenance in a primary category aircraft type certificate or supplemental type certificate holder's approved special inspection and preventive maintenance program when accomplished on a primary category aircraft provided:

(i) They are performed by the holder of at least a private pilot certificate issued under Part 61 who is the registered owner (including co-owners) of the affected aircraft and who holds a certificate of competency for the aircraft involved issued by a school approved under § 141.57(b) or § 147.21(f) of this chapter, or issued by the holder of a primary category aircraft production certificate that has a special training program approved under § 21.163(b) of this subchapter; and

(ii) The inspections and maintenance tasks are performed in accordance with instructions contained in the special inspection and preventive maintenance program approved under § 21.24(b).

PART 91—GENERAL OPERATING AND FLIGHT RULES

22. The authority citation for Part 91 continues to read as follows:

Authority: 49 U.S.C. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 *et seq.*; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub L. 97–449, January 21, 1983).

23. Section 91.21 is amended by adding a new paragraph (d) to read as follows:

§ 91.21 Flight instruction; simulated instrument flight and certain flight tests.

* * * * *

(d) No person may give flight instruction in a primary category aircraft designated as "primary category-light" on its special airworthiness certificate, or with an aircraft having an experimental certificate that has a maximum certificated gross weight of 1,000 pounds or less, except for the purpose of providing flight training in the operation of that aircraft and provided that no other persons or property are carried.

24. Section 91.42 is amended by redesignating existing paragraph (e) as (f), and by adding a new paragraph (e) to read as follows:

§ 91.42 Aircraft having an experimental certificate; operating limitations.

* * * * *

(e) No person may operate an aircraft having an experimental certificate that has a maximum certificated takeoff weight of less than 1,000 pounds within an airport traffic area, control zone, terminal control area, airport radar service area, or positive control area, unless that person has prior authorization from the air traffic facility having jurisdiction over that air space.

* * * * *

25. Part 91 is amended by adding a new § 91.44 to read as follows:

§ 91.44 Primary Category Aircraft: Operating limitations.

(a) No person may operate a primary category aircraft carrying persons or property for compensation or hire.

(b) No person may operate a primary category aircraft designated as "primary category—light" on the special airworthiness certificate within an airport traffic area, control zone, terminal control area, airport radar service area, or positive control area, unless that person has prior authorization from the air traffic facility having jurisdiction over that airspace.

(c) No person may operate a primary category aircraft designated as "primary category—light", except by visual reference with the surface.

26. Section 91.169 is amended by adding a new paragraph (c)(4) to read as follows:

§ 91.169 Inspections.

* * * * *

(c) * * *

(4) An aircraft having a special airworthiness certificate—primary

category, except primary category aircraft with an experimental certificate, when inspected and maintained by a person authorized under § 43.3 of this chapter to perform preventive maintenance in accordance with a special inspection and preventive maintenance program approved under § 21.24(b) of this chapter; and the aircraft is inspected in accordance with paragraph (a)(1) of this section each 24 calendar months.

* * * * *

PART 141—PILOT SCHOOLS

27. The authority citation for Part 141 is revised to read as follows:

Authority: 49 U.S.C. 1354, 1355, 1421, 1422, and 1427; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

28. Section 141.57 is amended by redesignating the current paragraph as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 141.57 Special curricula.

* * * * *

(b) A pilot school certificated under this part may apply for and receive approval for special courses in the performance of special inspection and preventive maintenance programs for primary category aircraft type certificated under § 21.24(b) of this chapter, provided the special courses are taught by persons holding a mechanic certificate with airframe and powerplant ratings issued under Part 65 of this chapter.

§ 141.65 [Amended]

29. Section 141.65 is amended by redesignating the current paragraph as paragraph (a) and adding a new paragraph (b) to read as follows:

(a) * * *

(b) The holder of an examining authority may issue a certificate of competency to persons successfully completing training provided under § 141.57(b), provided the certificate specifies the aircraft make and model to which the certificate applies.

30. Section 141.73 is amended by adding a new paragraph (c) to read as follows:

§ 141.73 Privileges.

* * * * *

(c) The holder of a pilot school or a provisional pilot school certificate may issue a certificate of competency to pilots successfully completing training provided under § 141.57(b), provided the certificate specifies the aircraft make and model for which the certificate applies.

PART 147—AVIATION MAINTENANCE TECHNICIAN SCHOOLS

31. The authority citation for Part 147 is revised to read as set forth below and the authority citations following the sections of Part 147 are removed:

Authority: 49 U.S.C. 1354(a), 1355, 1421, and 1427; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

32. Section 147.21 is amended by adding a new paragraph (f) to read as follows:

§ 147.21 General curriculum requirements.

* * * * *

(f) Notwithstanding the provisions of paragraphs (a) through (e) of this section and §147.11, the holder of a certificate issued under Subpart B of this part may apply for and receive approval of special courses in the performance of special inspection and preventive maintenance programs for a primary category aircraft type certificated under § 21.24(b) of this chapter. The school may also issue certificates of competency to persons successfully completing such courses provided all other requirements of this part are met and the certificate of competence specifies the aircraft make and model for which the certificate applies.

Issued in Washington, DC, on March 1, 1989.

M.C. Beard,

Director, Aircraft Certification Service.

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