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Thursday
November 13, 1986

Briefings on How To Use the Federal Register—
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THE FEDERAL REGISTER
WHAT IT IS AND HOW TO USE IT

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 2 1/2 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.

WASHINGTON, DC

WHEN: November 18 at 9:30 a.m.

WHERE: National Archives Theater, 8th and Pennsylvania Avenue NW., Washington, DC

RESERVATIONS: Laurice Clark, 202-523-3419.

NEW YORK, NY

WHEN: December 5 at 10:00 a.m.,

WHERE: Room 305A, 26 Federal Plaza, New York, NY

RESERVATIONS: Arlene Shapiro or Stephen Colon, New York Federal Information Center, 212-264-4810.

PITTSBURGH, PA

WHEN: December 8 at 1:30 p.m.,

WHERE: Room 2212, William S. Moorehead Federal Building, 1000 Liberty Avenue, Pittsburgh, PA

RESERVATIONS: Kenneth Jones or Lydia Shaw
Pittsburgh: 412-644-INFO
Philadelphia: 215-597-1707, 1709

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Presidential Documents

Title 3—

The President

Notice of November 10, 1986

Continuation of Iran Emergency

On November 14, 1979, by Executive Order No. 12170, the President declared a national emergency to deal with the threat to the national security, foreign policy, and economy of the United States constituted by the situation in Iran. Notices of the continuation of this national emergency were transmitted by the President to the Congress and the **Federal Register** on November 12, 1980, November 12, 1981, November 8, 1982, November 4, 1983, November 7, 1984, and November 1, 1985. Because our relations with Iran have not yet returned to normal and the process of implementing the January 19, 1981, agreements with Iran is still underway, the national emergency declared on November 14, 1979, must continue in effect beyond November 14, 1986. Therefore, in accordance with Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Iran. This notice shall be published in the **Federal Register** and transmitted to the Congress.

Ronald Reagan

THE WHITE HOUSE,
November 10, 1986.

[FR Doc. 86-25807
Filed 11-12-86; 10:02 am]
Billing code 3195-01-M

Rules and Regulations

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 906 and 944

Oranges and Grapefruit Grown in Texas, and Imported Oranges; Revision of Grade, Size, Container, and Container Marking Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule temporarily: (1) Relaxes the current minimum grade requirements for Texas oranges, Texas grapefruit, and imported oranges; (2) lowers the minimum size requirement for Texas grapefruit; and (3) suspends certain container marking requirements. Such action will permit shipment of oranges and grapefruit which are slightly lower in quality, and grapefruit which are slightly smaller in size during the 1986–87 season, in recognition of the overall quality of the crop and anticipated market conditions. Also, it will authorize another container which is needed for shipment of Texas oranges and grapefruit.

EFFECTIVE DATE: November 7, 1986.

FOR FURTHER INFORMATION CONTACT: Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250, telephone 202–447–5697.

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

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

The purpose of the RFA is to fit regulatory 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 Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

Pursuant to the requirements set forth in the RFA, the Administrator of AMS has considered the impact of this rule upon small entities. This action relaxes for the 1986–87 season the grade and size requirements for Texas grapefruit, and the grade requirements for Texas and imported oranges. Likewise, a container marking requirement pertaining to U.S. No. 2 grade Texas oranges and grapefruit would be relaxed. Also, another container would be authorized on a permanent basis for the shipment of Texas oranges and grapefruit. This action will impose no new or additional costs of affected handlers, producers, and importers.

It is estimated that 22 handlers of Texas oranges and grapefruit under the marketing order for fresh oranges and grapefruit grown in the Lower Rio Grande Valley in Texas and 10 importers of oranges will be subject to regulation during the course of the current season which began in early October 1986 and ends on July 31, 1987. The great majority of these handlers, producers, and importers may be classified as small entities. In addition, there are in excess of 3,000 producers in the production area.

This revision of the Texas orange and grapefruit requirements is issued under the marketing agreement, as amended, and 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 agreeement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This revision of the Texas orange and grapefruit requirements is based upon the unanimous recommendation of an information submitted by the Texas Valley Citrus Committee, established under the order, and upon other available information.

This final rule: (1) Relaxes for Texas oranges and imported oranges, the current minimum grade requirement of U.S. No. 2, to U.S. No. 2 with additional allowances for fruit with thorn scratches, scale, green spots, oil spots, and discoloration; (2) relaxes for Texas grapefruit the current minimum grade requirement of U.S. No. 2, to U.S. No. 2 with additional allowances for thorn scratches, scale, green spots, and shape; and (3) permits the shipment of smaller size grapefruit by lowering, for all grades of Texas grapefruit, the minimum size requirement to pack size 112 with a minimum diameter of 3 5/16 inches. These changes are in effect through July 31, 1987. Currently, the minimum size requirement for U.S. No. 2 grade Texas grapefruit is pack size 96 with a minimum diameter of 3 9/16 inches, while for U.S. No. 1 grade grapefruit the minimum is already pack size 112 with a minimum diameter of 3 5/16 inches.

Section 8e of the Act (7 U.S.C. 608e–1) provides that whenever specified commodities, including oranges and grapefruit, are regulated under a Federal marketing order, imports of that commodity are prohibited unless they meet the same grade, size, quality, or maturity requirements as those in effect for the domestically produced commodity. Since this action would relax the minimum grade requirement for domestically produced oranges, this change would also be applicable to imported oranges during the period that the domestic handling requirements are in effect. This action does not change the import requirements for grapefruit because imported grapefruit is governed by Grapefruit Regulation 6 (7 CFR 944.106). Regulation 6 applies the requirements for Florida grapefruit (7 CFR Part 905) to imported grapefruit.

Because the current minimum grade requirements are relaxed in this final rule by permitting additional allowances for scratches and other imperfections, the container marking provision is suspended through July 31, 1987. The suspension is designed to prevent the need for a "qualified U.S. No. 2 grade" stamp and to prevent confusion on the part of packinghouse personnel who stamp the "grade" on the containers. In addition, the rule authorizes the use of a new container by permitting handlers to ship Texas oranges and grapefruit in a

⅔ fiberboard crib, provided that the crib is used only once for the shipment of citrus fruit. The one-time use requirement is necessary to help control the spread of postharvest diseases commonly found in the marketplace. The dimension, shape, and strength of the container are specified in the regulation and are consistent with the other container requirements currently in effect. The committee has found the ⅔ fiberboard crib to be a suitable container based on its use on an experimental basis over several seasons.

The relaxed grade, size, and container marking requirements for the 1986–87 season are the same as those in effect during the 1985–86 season.

Relaxation of the current minimum grade and size requirements for Texas oranges and grapefruit recognizes the overall quality of the crop and anticipated market conditions and should result in increased fresh market sales and improved returns to growers. The committee reports that while the quality of the 1986–87 Texas orange and grapefruit crop is good, only a small volume of fruit will be available for fresh market shipment. The committee recommended the grade and size relaxations to allow shipment of as much fruit into the fresh market as the 1986–87 crop conditions will allow, while providing consumers with an acceptable product. This continues the industry's efforts to get back into the fresh market since the devastating freeze in 1983.

Similar to last year, the committee reports that for the 1986–87 season Texas oranges and grapefruit have abnormal amounts of skin blemishes due to bird pecks, wind and twig scarring, and inadequate spray coverage. The committee believes that a considerable amount of fruit on the trees will not meet current minimum grade and size requirements and that some of this fruit would likely be abandonded unless current requirements are relaxed because of inadequate market outlets for such fruit. This is partly due to the fact that the juice plants are expected to operate for a short period of time this season. Because the 1986–87 Texas orange and grapefruit harvest began in early October, prompt action is required.

The 1985–86 season marked the first commercial production of citrus from Texas since the freeze of December 1983. However, only about two percent of a normal (pre-freeze) grapefruit crop was produced and about six percent of a normal orange crop was produced. Texas orange production is estimated by the committee at 1.45 million cartons, 2.4 times greater than the 0.6 million cartons produced in 1985–86. This would represent about 15 percent of pre-freeze orange production levels of about 11–12 million cartons. Competing domestic orange production areas are also expected to have larger crops this season with an 11 percent increase in U.S. orange production predicted.

At four million cartons, the 1986–87 grapefruit crop is forecast by the committee to be ten times greater than last year's 0.4 million carton crop. However, if attained, this level of grapefruit production would only be 15 percent of a normal (pre-freeze) crop. Pre-freeze grapefruit production levels were about 25–30 million cartons. Although the Texas grapefruit crop is expected to be ten times larger than last year, it is still only 15 percent of normal (compared to two percent last year). U.S. grapefruit production is only expected to show a five percent increase.

The suspension of the container marking requirement and the authorization of another container for shipments will facilitate the packing and shipment of Texas oranges and grapefruit this season.

After consideration of the information and recommendation submitted by the committee, and other available information, it is found that amendment of §§ 906.340, 906.365, and 944.312 will tend to effectuate the declared policy of the Act and be in the public interest.

Pursuant to 5 U.S.C. 553, it is hereby found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and to engage in public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) This action relaxes restrictions on the handling of Texas oranges and grapefruit and imported oranges; (2) handlers of Texas oranges and grapefruit are aware of this action which was recommended by the committee at a public meeting, and they will require no additional time to comply with the rule; (3) this rule should become effective as soon as possible because shipment of the 1986–87 season Texas orange and grapefruit crops has already began; and (4) the orange import requirements are mandatory under section 8e of the Act.

List of Subjects

7 CFR Part 906

Marketing agreement and orders. Oranges, Grapefruit, Texas.

7 CFR Part 944

Food grades on standards, Imports, Oranges.

1. The authority citation for 7 CFR Parts 906 and 944 continues to read as follows:

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

2. Section 906.340 is amended by adding a paragraph (a)(1)(ix), by changing the period to a colon and adding a proviso following the last word in paragraph (a)(3) of such section.

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

§ 906.340 Container, Pack and Container Marking Regulation.

(a) * * *

(1) * * *

(ix) Octagonal or rectangular ⅔ fiberboard crib with dimensions of 46 inches long, 38 inches wide, by 24 inches high: *Provided,* That the crib has a Mullen or Cady test of at least 1,300 pounds: *Provided further,* That the crib be used only once for the shipment of citrus fruit.

* * * * *

(3) * * * : *Provided,* That such container grade marking requirement is suspended through July 31, 1987.

* * * * *

3. Section 906.365 is amended by adding paragraph (c) to read as follows:

§ 906.365 Texas Orange and Grapefruit Regulation 34.

* * * * *

(c) Notwithstanding the requirements specified for oranges and grapefruit in paragraphs (a) (1) through (4) of this section, any handler may ship through July 31, 1987:

(1) Oranges if such fruit grades at least U.S. No. 2, except very serious damage by thorn scratches, scale, green spots, oil spots, and discoloration shall be permitted, provided such defects are within the acceptance levels specified in § 51.689;

(2) Grapefruit if such fruit grades at least U.S. No. 2, except very serious damage by thorn scratches, scale, green spots, and shape shall be permitted, provided such defects are within the acceptance levels specified in § 51.628; and

(3) Such grapefruit are at least pack size 112, except that the minimum diameter limit for pack size 112 grapefruit in any lot shall be 3 5/16 inches. Applicable grade and size requirements are defined in 7 CFR 51.620–51.653, and 51.680–51.714.

PART 944—FRUITS; IMPORT REGULATIONS

3. Section 944.312 is amended by adding a new paragraph (g) to such section to read as follows:

§ 944.312 Orange Import Regulation 13.

* * * * *

(g) Notwithstanding the requirements specified for oranges in this section, any person may import oranges through July 31, 1987, if they grade at least U.S. No. 2, except very serious damage by thorn scratches, scale, green spots, oil spots, and discoloration shall be permitted, provided such defects are within the acceptance levels specified in § 51.689. Such grade is defined in 7 CFR 51.680–51.714.

Dated: November 7, 1986.

Joseph A. Gribbin,

Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 86–25636 Filed 11–12–86; 8:45 am]

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7 CFR Part 966

Tomatoes Grown in Florida and Tomatoes Imported Into the United States; Amendment to Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule increases the minimum size requirement for domestic tomatoes covered under the marketing order for tomatoes grown in Florida, and for all tomatoes offered for importation into the United States from 2⁵⁄₃₂ inches in diameter to a 2⁸⁄₃₂ inches in diameter. This change is intended to consistently supply fresh market outlets with tomatoes of acceptable maturity and quality. Smaller size tomatoes generally take longer to ripen than the larger tomatoes. Because of this, they normally do not develop proper flavor. Also, the change would eliminate from fresh shipments smaller size tomatoes which are usually of negligible economic value to producers. The change in the minimum size applicable to domestic tomatoes was recommended by the Florida Tomato Committee, the body which works with the Department in administering the Federal marketing order for Florida tomatoes. The change in minimum size applicable to tomatoes offered for importation is necessary under section 8e of the Agricultural Marketing Agreement Act of 1937.

EFFECTIVE DATE: The change in the minimum size requirement for Florida and imported tomatoes is effective December 1, 1986, through June 15, 1987, for the 1986–87 season. For the 1987–88 season and each season thereafter these regulations are effective October 10 through June 15.

FOR FURTHER INFORMATION CONTACT: Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250, telephone (202) 447–5697.

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

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

The purpose of the RFA is to fit regulatory actions to the scale of the businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (the Act, 7 U.S.C. 601–674), and rules promulgated thereunder, are unique in that they are brought about through the group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 103 handlers of Florida tomatoes subject to regulation under the Florida tomato marketing order handling regulation. There are approximately 180 growers of tomatoes in the production area. Finally, there are approximately 31 importers of fresh tomatoes subject to the tomato import regulation during the 1986–1987 season. 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 $100,000 and agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers, producers, and importers of Florida tomatoes may be classified as small entities.

Pursuant to requirements set forth in the RFA, the Administrator of the Agricultural Marketing Service (AMS) has considered the impact of this rule on small entities. The regulatory action in this instance is a final rule increasing the minimum size requirement for tomatoes that will eliminate the 7x7 classification for fresh tomatoes having a minimum diameter of 2⁵⁄₃₂ inches and a maximum diameter of 2¹⁹⁄₃₂ inches. The handling regulation is applicable to fresh tomatoes grown in the production area and shipped outside the regulated area during the period October 10 through June 15 each marketing season. Pursuant to section 8e of the Act, when such a regulation is in effect for domestic shipments, imports are required to meet the same requirements. As indicated earlier the change in the minimum size requirement for the domestic and imported tomatoes will be effective December 1, 1986, through June 15, 1987, for the 1986–87 season. Each season thereafter these regulations will be effective October 10 through June 15. the final rule is the same as the proposed rule except that the effective date for the 1986–87 season has been changed to December 1, 1986.

The 1985–86 annual report of the Florida Tomato Committee provides data on shipments 7x7 classification tomatoes during the October 10, 1985, through June 15, 1986, shipping season for fresh tomatoes grown in the Florida production area and shipped outside the regulated area. The statistics divide tomatoes into two categories, mature green and vine-ripe. For mature green tomatoes in the 7x7 classification, there were 3,132,880 containers of 25-pound equivalents or 6.69 percent of the total mature green shipments of 46,834,876 containers for all sizes. With an average price of $4.07 a container, the 7x7 mature green tomatoes were valued at $12,739,586 or about 3.5 percent of the total sales dollars of $364,055,331 for all sizes of mature green tomatoes. Vine ripe tomatoes in the 7x7 classification totaled 131,716 containers in 20-pound equivalents or 1.89 percent of the total of 6,983,646 containers for all sizes. At an average price of $3.00, the 7x7 vine-ripe tomatoes were valued at more than $395,000 or about one percent of the total sales dollars of $44,046,160 for vine-ripe tomatoes of all sizes. Therefore, the total sales dollar volume of all 7x7 classification tomatoes shipped last season represented about 3.2 percent of the total dollar volume of all sizes of tomatoes shipped.

While this regulation will not permit shipment of 7x7 classification tomatoes outside of the regulated area, exemptions to the handling regulation will continue to be available. For example, several varieties or types of tomatoes are completely exempt and handlers may ship up to 60 pounds of tomatoes per day without regard to the requirements of the handling regulation. The handling regulation does not prevent the handling of tomatoes within the regulated area and the regulation

permits shipments of tomatoes for canning, experimental purposes, relief, charity, or export. Importers could also ship up to 60 pounds of tomatoes per day exempt from the import regulation.

It is the Department's view that under this regulation the impact of the regulation upon the growers, handlers, and importers will not be adverse. Any additional costs to handlers, growers, and importers in implementing this rule will be significantly offset when compared to the potential benefits of the rule.

Marketing Order No. 966 regulates the handling of tomatoes grown in Florida. The program is effective under the Act. The Florida Tomato Committee, established under the order, is responsible for its local administration.

The Florida Tomato Committee met September 5, 1986, and recommended that the current minimum size requirement of 2 5/32 inches in diameter for tomatoes grown in the production area be increased to 2 8/32 inches in diameter. The effect of this change would be the elimination of the 7x7 size classification for tomatoes with a minimum diameter of 2 5/32 inches and a maximum diameter of 2 1 0/32 inches. The committee recommended that the change be effective at the start of the 1986–87 season. Other handling requirements under M.O. 966, including the minimum requirement that tomatoes be at least U.S. No. 3 grade remain unchanged.

According to the committee, the increase in the minimum size requirement is necessary to prevent tomatoes of lower quality and maturity and undesirable size from being distributed in fresh market channels. It also stated that such tomatoes are usually of negligible economic value to producers. The committee believes this action would provide consumers with tomatoes of good quality and size throughout the season consistent with the overall quality of the crop and improve economic returns to growers.

Section 8e of the Act (7 U.S.C. 608e–1) provides that whenever specified commodities, including tomatoes, are regulated under a Federal marketing order, imports of that commodity are prohibited unless they meet the same grade, size quality, or maturity requirements as those in effect for the domestically produced commodity. Since this rule will increase the minimum size requirement for domestically produced tomatoes, this change will also be applicable to imported tomatoes during the period that the domestic handling requirements are in effect. Conforming changes to § 966 323(d)(3) *For special packed tomatoes* and § 966.323(f) *Applicability to imports* will be made to reflect the increase in the minimum size requirement. No change is needed in the import regulation for tomatoes which appears in Part 980 (7 CFR 980.212; 42 FR 55192; October 4, 1977).

Notice of this change for Florida tomatoes and imported tomatoes was contained in a proposed rule published in the **Federal Register** on October 3, 1986 (51 FR 35358). A total of 57 comments were filed. The committee filed a comment supporting its recommendation. Other comments from Florida growers and handlers and consumers supported the committee's efforts to improve the quality of tomatoes entering fresh market channels. Comments from repackers primarily from the northeastern part of the United States objected to the change as did several retail stores, packaging and cellophane manufacturers, and some consumers.

Comments supporting the proposed increase in the minimum size requirements contend that it is necessary in order to prevent tomatoes of lower quality and maturity from being distributed in fresh market channels, and that this action would improve the overall quality of tomato shipments and improve economic returns to growers. These commentors further contend that tomatoes smaller than 2 8/32 inches in diameter generally are immature fruit that takes longer than normal to ripen and does not develop full flavor. A detailed discussion of these contentions is included later in this final rule.

Those opposing the increased minimum size to 2 8/32 inches indicated that eliminating the 7x7 size classification would cause unemployment, lost tax revenues, and wasted inventories of wrapping materials and containers dedicated to the 7x7 size tomato. Also, the commentors contend that removal of the smaller sized 7x7 tomatoes will decrease the supply of existing tomatoes and thus increase the price for all tomatoes. Several comments indicated that 7x7 size tomatoes were more affordable for lower income families than larger size tomatoes. One comment was received from a senior citizen living on a fixed income indicating that 7x7 tomtoes are satisfactory. Another comment was received representing the views of forty-two low-income families. The comment indicated that they purchased the smaller size tomatoes because the price fit their budget and that they found nothing wrong with the taste or quality of smaller tomatoes.

Several comments from food chain stores indicated that the 7x7 size tomato was one of their best sellers with lower and fixed income groups and that the quality and taste did not appear to be a problem.

Several comments were received from repackers of Florida and imported tomatoes disputing the tomato committee's claim that small 7x7 tomatoes are of lower quality and maturity and undesirable to consumers, and thus should be eliminted from the marketplace. These repackers contend that consumers prefer buying several smaller size tomatoes rather than one or two large tomatoes at the same price. Also, they indicated taste studies show that smaller tomatoes actually taste better than the larger, over-sized tomatoes. However, the name of the study and its author or authors were not indicated and, hence, the contentions are not verifiable.

A telephone comment and a written comment were received from two Florida handlers under the marketing order. They objected to the elimination of 7x7 tomatoes on the basis that the proposal did not represent the views of the regulated industry and its members. However, this assertion is belied by the fact that the recommendation is a unanimous recommendation of the Florida Tomato Committee. In its comment, the committee has indicated that there were more than 120 people present at the time of the September 5, 1986, committee meeting who represented more than 90 percent of the volume of tomatoes produced in the production area as defined in § 966.4.

In accordance with the declared policy of the Act, one of the Department's principal objectives is to establish a current level of prices to growers up to parity at a rate the Department deems to be in the public interest and feasible in view of the current demand in domestic and foreign markets. The 1986–87 season aveage f.o.b. shipping point price for Florida tomatoes is not expected to exceed the parity equivalent price. The Florida Tomato Committee expects that fresh tomato shipments from Florida during the 1986–87 season will be slightly less than the 1985–86 total with about 47 million 25-pound equivalent containers of tomatoes. In addition, preliminary reports from the U.S. Agricultural Attache in Mexico indicate that fresh tomato exports to the U.S. during the 1987 winter and spring will be at least slightly larger than in the 1986 season. Imports of fresh tomatoes from Caribbean countries also may increase compared with 1985–86.

In the 1985–86 season, Florida tomato prices averaged $29.20 per

hundredweight. This compares with $18.40 per hundredweight in the previous season and a 1979–80 through 1983–84 average of $24.15 per hundredweight. The 1985–86 season average price is 69 percent of the Florida parity equivalent price compared with an average of 60 percent in the five previous seasons.

In support of the committee's contention concerning the negligible economic value of tomatoes smaller than 2⁵⁄₃₂ inches in diameter and the maturity and quality of such tomatoes, the committee submitted the following information on returns to growers and the maturity of these tomatoes in its comment.

The committee indicated that total shipments of 7x7 tomatoes during the 1985–86 season were 3,132,880, 25-pound equivalent packages of mature greens at an average price of $4.07, and 131,716, 20-pound equivalent packages of vine-ripes at an average price of $3.00. The committee also indicated that during 18 weeks of the 36-week 1985–86 season that the average price received for 7x7 tomatoes was less than the average harvesting and marketing costs of $3.14 per 25-pound unit. It further indicated that in only one week of the 1985–86 season was the average price for 7x7 tomatoes higher than the average total costs of $6.08 per 25-pound equivalent for producing and marketing such tomatoes. These total costs include production, harvesting, and marketing costs. In 1984–85, a total of 2,264,904 packages of 7x7 mature greens were shipped at an average price of $4.80, and 104,181 packages of vine-ripes were shipped at an average price of $3.77. The committee indicated that during 22 weeks of the 35-week 1984–85 season that the average price for mature green 7x7 tomatoes was less than the average harvesting and marketing costs of $3.14 per 25-pound unit. The committee further indicated that in only nine weeks of the 35-week 1984–85 season was the average price for 7x7 tomatoes higher than the average total costs of $6.08, for producing, harvesting, and marketing such 7x7 tomatoes. The committee indicated that the higher prices were a direct result of freezing temperatures that greatly reduced supplies that season. This information shows that grower returns for 7x7 tomatoes are limited except during times of extremely low supply. Obviously, this is an important concern to the Florida tomato industry.

Size is generally the most important consideration in pricing at shipping point and wholesale. For a given grade, the largest tomatoes sell at the highest price. Large U.S. No. 2 grade tomatoes normally are priced above small U.S. No. 1 tomatoes. The price spread between sizes is largest during periods of normal or light supplies but narrows appreciably when supplies are heavy.

The October 7, 1986, compilation of Florida weekly tomato acreage planted for harvest for the 1986–87 season published by the Florida Agricultural Statistics Service shows that 5,258 more acres were planted this season over the past season. The additional acreage is expected to result in an oversupply of tomatoes. Although total output will be highly dependent on the weather, the committee believes that the 1986–87 crop will total about 47 million 25-pound equivalents. Last year's crop totalled about 52 million 25-pound equivalents. The committee's initial estimate of that crop was 49 million 25-pound equivalents. As indicated earlier, the Department has information which projects that tomato imports from Mexico and Caribbean countries will be slightly greater for the 1986–87 season than last year. Increased imports to the United States would further increase the supply of tomatoes. With ample supplies of tomatoes from domestic and foreign sources, any price increases resulting from this action are expected to be minimal.

While the repackers and other interested parties contend that small size tomatoes are mature, taste better and are preferred by their customers, the committee has submitted information which contradicts these contentions. The information submitted shows that small 7x7 tomatoes generally take longer to ripen after harvest than larger tomatoes and because of that are less flavorful and undesirable to the consumer.

Growers attempt to pick these 7x7 tomatoes generally when they have reached mature green. Subsequently, they are gassed in handling facilities to hasten the coloring and ripening process. Then they are packed and shipped to fresh market channels. Mature green means that the surface of the tomato is completely green in color. The shade of green color may vary from light to dark. Currently tomato pickers, working on a per bucket basis, must try to size tomatoes that are 2⁵⁄₃₂ inches in diameter and larger as quickly as possible. This rapid procedure of picking tomatoes sometimes includes smaller, immature tomatoes.

However, a recent study conducted on ripening mature green tomatoes by Dr. Jeffrey K. Brecht, Assistant Professor, Vegetable Crops Department, IFAS, University of Florida, indicates that the 7x7 size class of tomatoes tends to be too immature on an average and thus of very low quality. Fully mature green tomatoes according to the study, will begin coloring within a few days of harvesting and ripen at 68 degrees Fahrenheit. Since there are no easily identified surface indicators of full maturity in green fruit, pickers are forced to rely on size rather than maturity when harvesting tomatoes. The result of this with regard to the small 7x7 size class is immature tomatoes which may require two weeks or more to begin ripening. Attainment of the full ripe stage requires on the average a week to 10 days additional time. Hence, the full ripening process could take as along as four weeks. According to the study, tomatoes held this long after harvest have extremely poor taste quality. The researcher indicates that elimination of the 7x7 class would be of benefit to the industry and the consumer.

The researcher also reported the results of an experiment designed to show the effect of ethylene treatment on the internal development of immature tomatoes. The fruit used were 7x7 tomatoes obtained from a commercial packinghouse. About 60 percent of the fruit from the lot used were completely immature. The rest were almost all just partially immature. At the end of 16 days, the controlled fruit was still substantially shy of the breaker stage. A breaker is a tomato in the first stage of changing color; it is primarily green with a little yellow or pink coloring at the blossom end. The researcher concluded that continuous ethylene treatment had a substantial effect on the rate of development on the small tomatoes. But in his opinion, the fruit was basically tasteless.

This study strongly supports the industry's quality observation on small size 7x7 tomatoes. That is, that small size 7x7 tomatoes are generally immature and do not reach a level of maturity that provides the consumer with a good product. The tendency for 7x7 tomatoes to be immature and of lower quality appears to be an important factor in the low market price for such tomatoes.

Quality assurance is very important to the Florida tomato industry in light of their decision to spend hundreds of thousands of dollars on promotion and education programs to increase per capita consumption and teach consumers how to properly ripen tomatoes. It is the committee's opinion that it would not be in the best interest of Florida tomato growers and handlers for the committee to spend great sums of

money for promotion and education purposes and continue to sell a product which is not preferred by consumers, especially when more than ample supplies of tomatoes are available to meet market needs.

The committee contends that its recommendation to raise the minimum size requirement from 2 5/32 inches in diameter to 2 8/32 inches in diameter will provide fresh market outlets and consumers with a better quality product. A product that is more desirable and appealing to the consumer, and which will provide greater economic returns to tomato producers.

Another comment states that the proposal to eliminate the shipment of size 7x7 tomatoes is contrary to the Secretary's Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders, published by the U.S. Department of Agriculture on January 25, 1982. While quality control provisions may impact supplies, this impact is secondary to their primary purpose of providing the public with acceptable quality merchandise from season to season recognizing changing crop conditions and buyer preferences. This primary consideration has been adequately justified by the evidence submitted by the committee.

Several commentors indicated that they have substantial sums of money invested in packaging machinery and raw material for repacking 7x7 tomatoes. One firm indicated that the elimination of the 7x7 size category could cost his firm close to $750,000. Another firm indicated that it has over $25,000 in packaging supplies, including printed film and trays which cannot be used for tomatoes larger than the size to be eliminated. Another firm indicated that the dollar value of its tray inventory for 7x7 tomatoes was $44,000.

In recognition of the possible financial losses on packaging material inventories, the Department has given consideration to delaying the effective date of the size changes. The Department recognizes that the Florida tomato industry is anxious to improve the quality and maturity of tomatoes shipped into fresh channels. However, the Department believes that repackers and packaging manufacturers should have time to dispose of some of their packing material and lessen their financial losses, if any, on this material. To give these firms the opportunity to obtain 7x7 tomatoes from Florida, other tomato producing States, and foreign sources, the effective date of this action is being delayed until December 1, 1986.

Each comment was carefully considered in reaching the final decision on this action. On the basis of the comments received, and other available information, it has been determined that the minimum size requirement for Florida tomatoes and tomato imports will be 2 8/32 inches in diameter effective December 1, 1986.

The specified requirements for both Florida and imported tomatoes will continue in effect from marketing season to marketing season indefinitely unless modified, suspended, or terminated by the Secretary upon recommendation and information submitted by the committee or other information available to the Secretary. Although the seasonal regulations will be effective for an indefinite period, the committee will continue to meet prior to and during each season to consider recommendations for modification, suspension, or termination of the regulation. Prior to making any such recommendations the committee would submit to the Secretary a marketing policy for the season including an analysis of supply and demand factors having a bearing on the marketing of the Florida tomato crop. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department will evaluate committee recommendations and information submitted by the committee, and other available information, and determine whether modification, suspension, or termination of the regulations on shipments of Florida and imported tomatoes would tend to effectuate the declared policy of the Act.

After consideration of all relevant information, including the proposal set forth in the notice and comments filed with respect thereto, it is hereby found that the following changes in the domestic and imported tomato requirements, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is hereby further found that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** (5 U.S.C. 553) for the following reasons: (1) Shipments of the 1986 tomato crop grown domestically have begun; (2) to maximize benefits to handlers, producers, and consumers, this regulation should apply to as many shipments as possible during the marketing season; (3) to assure the quality of imported tomatoes, the tomato import regulations should apply effective December 1, 1986.

List of Subjects in 7 CFR Part 966

Marketing agreements and orders, Tomatoes, Florida, Import regulations.

PART 966—TOMATOES GROWN IN FLORIDA

1. The authority citation for 7 CFR Part 966 continues to read as follows:

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

2. Section 966.323 is amended by revising the introductory text and paragraphs (a)(2)(i), (d)(3), and (f) to read as follows:

§ 966.323 Handling regulation.

During the period December 1, 1986, through June 15, 1987, during the 1986–87 season, and during the period October 10 through June 15 each season thereafter, no person shall handle any lot of tomatoes for shipment outside the regulated area unless they meet the requirements of paragraph (a) or are exempted by paragraphs (b) or (d).

(a) * * *

(2) *Size.* (i) Tomatoes shall be at least 2 8/32 inches in diameter and be sized with proper equipment in one or more of the following ranges of diameters. Measurements of diameters shall be in accordance with the methods prescribed in paragraph 51.1859 of the U.S. Standards for Grades of Fresh Tomatoes.

Size classification	Inches	
	Minimum diameter	Maximum diameter
6x7	2 8/32	2 15/32
6x6	2 15/32	2 26/32
5x6 and larger	2 26/32	

* * * * *

(d) * * *

(3) *For special packed tomatoes.* Tomatoes which met the inspection rquirements of paragraph (a)(4) which are resorted, regraded, and repacked by a handler who has been designated as a "Certified Tomato Repacker" by the committee are exempt from (i) the tomato grade classifications of paragraph (a)(1), (ii) the size classifications of paragraph (a)(2) except that the tomatoes shall be at least 2 8/32 inches in diameter, and (iii) the container weight requirements of paragraph (a)(3).

* * * * *

(f) *Applicability to imports.* Under section 8e of the Act and § 980.212 "Import regulations" (7 CFR 980.212) tomatoes inspected during the period December 1, 1986, through June 15, 1987, during the 1986–87 season and October 10 through June 15 each season thereafter shall be at least U.S. No. 3 grade and at least 2 8/32 inches in diameter. Not more than 10 percent, by

count, in any lot may be smaller than the minimum specified diameter.

Dated: November 7, 1986.

Joseph A. Gribbin,

Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 86-25637 Filed 11-12-86; 8:45 am]

BILLING CODE 3410-02-M

Animal and Plant Health Inspection Service

9 CFR Part 91

[Docket No. 86-090]

Ports Designated for Exportation of Animals; Deletion of Indianapolis International Airport

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule.

SUMMARY: We are amending the regulations on "Inspection and Handling of Livestock for Exportation" by deleting Indianapolis International Airport from the list of ports of embarkation. We are taking this action because Indianapolis International Airport no longer has export inspection facilities.

DATES: Interim rule effective; November 13, 1986; comments must be received on or before January 12, 1987.

ADDRESSES: Submit comments to Steven R. Poore, Acting Assistant Director, Regulatory Coordination, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that they refer to Docket Number 86-090. Written responses may be inspected at Room 728 of the Federal Building between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Harvey A. Kryder, Jr., Senior Staff Veterinarian, Import-Export and Emergency Planning Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 806, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782; (301) 436-8695.

SUPPLEMENTARY INFORMATION: 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. Section 91.14 of the regulations lists ports of embarkation. Only ports satisfying specific requirements can be designated as ports of embarkation. A port must, among other things, have an inspection facility available for animals intended for export. Private parties or State departments of agriculture own and operate these export inspection facilities.

The Animal and Plant Health Inspection Service provides export inspection services at the request of the operator of an inspection facility. The decision to establish, operate, or close an animal export inspection facility rests with the operator alone, and may change at any time.

We are removing Indianapolis International Airport from the list of ports of embarkation in § 91.14(a) of the regulations because the export inspection facility has been closed by the operator.

Emergency Action

Dr. John K. Atwell, Deputy Administrator of the Animal and Plant Health Inspection Service for Veterinary Services, has determined that an emergency situation exists which warrants publication of this interim rule without prior opportunity for public comment. It is necessary to make this interim rule effective immediately, to notify animal exporters that this port of embarkation is no longer available.

Therefore, pursuant to the administrative procedure provisions in 5 U.S.C. 533, it is found upon good cause that prior notice and other public procedures with respect to this interim rule are impracticable and contrary to the public interest; and good cause is found for making this interim rule effective upon publication. Comments are solicited for 60 days after publication of this document. A final document discussing comments received and any amendments required will be published in the **Federal Register.**

Executive Order 12291 and Regulatory Flexibility Act

This rule is issued in conformance with Executive Order 12291 and has been determined to be not a "major rule." Based on information compiled by the Department, we have determined that this rule will not have a significant effect on the economy; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not 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.

It is anticipated that the closing of the animal export inspection facility at Indianapolis International Airport will affect only one business concern. Approved embarkation ports are available in nearby Chicago, Illinois, and Cincinnati, Ohio, so that there should be no significant economic impact on this entity.

Under the circumstances explained above, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12291.

Paperwork Reduction Act

This interim 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 the provisions of 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 is amended as follows:

1. The authority citation for Part 91 continues to read as set forth below:

Authority: 21 U.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. In § 91.14, paragraph (a)(5) is removed and paragraphs (a)(6) through (a)(16) are redesignated as paragraphs (a)(5) through (a)(15).

Done in Washington, DC, this 7th day of November.

B.G. Johnson,

Deputy Administrator, Veterinary Services.

[FR Doc. 86-25635 Filed 11-12-86; 8:45 am]

BILLING CODE 3410-34-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 86-CE-57-AD; Amendment 39-5464]

Airworthiness Directives; British Aerospace Model B.121 Series I, II, and III Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new Airworthiness Directive (AD), applicable to all British Aerospace (BAe) Model B.121 Series I, II, and III airplanes which requires initial and repetitive visual inspections for cracks in the structure that attaches the vertical fin to the fuselage. BAe has received reports of cracks being found in these areas. Inspection in the area where the vertical fin attaches to the fuselage will detect these cracks before structural failures occur, and preclude subsequent loss of airplane control.

DATES: *Effective* December 18, 1986.

Compliance: As prescribed in the body of this AD.

ADDRESSES: British Aerospace Service Bulletin (S/B) No. B121/86, dated March 29, 1984, applicable to this AD may be obtained from British Aerospace, Engineering Department, Post Office Box 17414, Dulles International Airport, Washington, DC 20041; Telephone (703) 435-9100. A copy of this information is also contained in the Rules Docket, FAA, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Mr. T. Ebina, Brussels Aircraft Certification Staff, AEU-100, Europe, Africa and Middle East Office, FAA, c/o American Embassy, 1000 Brussels, Belgium; Telephone 513.38.30; or Mr. John P. Dow, Sr., FAA, ACE-109, 601 East 12th Street, Kansas City, Missouri 64106; Telephone (816) 374-6932.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an AD requiring initial and repetitive visual inspections for cracks in the structure that attaches the vertical fin to the fuselage, and repair as necessary on all BAe Model B.121 Series I, II, and III airplanes, was published in the **Federal Register** on August 14, 1986, 51 FR 29110. The proposal resulted from BAe receiving a report of cracks being found on a Model B.121 Series airplane (a) on the center angle attaching the upper Rear Fuselage sloping diaphragm to STN 207.85 Frame Assembly, (b) on the upper decking diaphragm attached between the same frame assembly and STN 218.5 Frame Assembly, and (c) in the heel of the side skin attachment flange on Frame 207.85 adjacent to the tailplane front spar attachment bolts. Consequently, British Aerospace issued BAe S/B No. B121/86, dated March 29, 1984, which: (1) Specified an initial visual inspection of the vertical fin/fuselage structure within 50 hours time-in-service (TIS) for airplanes having 2,450 hours or more TIS, (2) specified repetitive visual inspection at intervals of 50 hours TIS thereafter, and (3) requires a repair procedure if cracks beyond specific limits are found.

The Civil Aviation Authority-United Kingdom (CAA-UK), which has responsibility and authority to maintain the continuing airworthiness of these airplanes in the United Kingdom, classified this service bulletin and the actions recommended therein by the manufacturer as mandatory to assure the continued airworthiness of the affected airplanes.

On airplanes operated under United Kingdom registration, this action has the same effect as an AD on airplanes certificated for operation in the United States. The FAA relies upon the certification of the CAA-UK, combined with FAA review of pertinent documentation in finding compliance of the design of these airplanes with the applicable United States airworthiness requirements and the airworthiness and conformity of products of this design certificated for operation in the United States.

The FAA examined the available information related to the issuance of BAe S/B No. B121/86, dated March 29, 1984, and the mandatory classification of this service bulletin by the CAA-UK, and concluded that the condition addressed by BAe S/B No. B121/86, dated March 29, 1984, was an unsafe condition that may exist on other airplanes of this type certificated for operation in the United States. Accordingly, the FAA proposed an amendment to Part 39 of the FAR to include an AD on this subject.

Interested persons have been afforded an opportunity to comment on the proposal. No comments were received. Accordingly, the proposal is adopted without change.

The FAA has determined that this regulation involves two airplanes at an approximate annual cost of $105 for each airplane, or a total annual fleet cost of $210.

The FAA has determined that this document: (1) Involves a regulation that is not a major rule under the provisions of Executive Order 12291, (2) is not a significant rule under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979), and (3) certifies under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact on a substantial number of small entities.

Therefore, I certify that this action: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 2, 1979); and (3) will not have a significant economic impact an a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

List of Subjects in 14 CFR Part 39

Air transportation, Aviation safety, Aircraft, Safety.

Adoption of the Amendment

PART 39—[AMENDED]

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

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

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

2. By adding the following new AD:

British Aerospace: Applies to Model B.121 Series I, II, and III (all serial numbers) airplanes certificated in any category.

Compliance: Required initially within 50 hours time-in-service (TIS) for airplanes having or upon accumulating 2,450 hours or more TIS, and thereafter at intervals of 50 hours TIS, unless already accomplished.

To assure the integrity to the vertical fin/fuselage attachment structure, accomplish the following:

(a) Visually inspect for cracks in the following areas:

(1) Center Angle, Part Number (P/N) BE-10-10085 in accordance with paragraph 3. "ACTION" subparagraph (c) of British Aerospace (BAe) Service Bulletin (S/B) No. B121/86, dated March 29, 1984.

(i) If cracks are found that equal or exceed the conditions shown in paragraph 3. "ACTION" subparagraph (c) of BAe S/B No. B121/86, prior to further flight, repair in accordance with repair instructions obtained from the manufacturer, British Aerospace, and approved by the Manager, Aircraft

Certification Staff, AEU-100, Europe, Africa and Middle East Office, FAA, c/o American Embassy, 1000 Brussels, Belgium (hereinafter referred to as "Manager, AEU-100").

(ii) If no cracks are found or if cracks do not exceed the limits shown in paragraph 3. "ACTION" subparagraph (d) of BAe S/B No. B121/86, repeat the inspection at intervals not exceeding 50 hour TIS.

(2) The underside of Diaphragm Decking upper, P/N BE-10-10155/1, in accordance with paragraph 3. "ACTION" subparagraph (d) of BAe S/B No. B121/86, dated March 29, 1984.

(i) If cracks are found, prior to further flight, repair in accordance with the repair instructions obtained from the manufacturer, British Aerospace, and approved by the Manager, AEU-100.

(ii) If no cracks are found, repeat the inspection at intervals not exceeding 50 hours TIS.

(3) The heel of the side skin attachment flange (left and right) adjacent to the tailplane from spar attachment bolts in accordance with paragraph 3. "ACTION" subparagraph (e) of BAe S/B No. B121/86, dated March 29, 1984.

(i) If cracks are found, prior to further flight, repair in accordance with repair instructions obtained from the manufacturer, British Aerospace, and approved by the Manager, AEU-100.

(ii) If no cracks are found, repeat the inspection at intervals not exceeding 50 hours TIS.

(b) Extension or elimination of the repetitive inspections specified in this AD may be inculded as part of the FAA-approved repair obtained in accordance with paragraphs (a)(1)(i), (a)(2)(i), and (a)(3)(i) of this AD.

(c) Aircraft may be flown in accordance with Federal Aviation Regulation 21.197 to a location where this AD can be accomplished.

(d) An equivalent means of compliance with this AD may be used if approved by the Manager, Aircraft Certification Staff, AEU-100, Europe, Africa and Middle East Office, FAA, c/o American Embassy, 1000 Brussels, Belgium.

All persons affected by this directive may obtain a copy of the document referred to herein upon request to British Aerospace, Engineering Department, Post Office Box 17414, Dulles International Airport, Washington, DC 20041; Telephone (703) 435-9100, or FAA, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment becomes effective on December 18, 1986.

Issued in Kansas City, Missouri, on November 3, 1986.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 86-25533 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 78-CE-23-AD; Amdt. 39-5460]

Airworthiness Directives; Great Lakes Models 2T-1A-1 and 2T-1A-2 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment revises Airworthiness Directive (AD) 78-26-10, Amendment 39-3384 applicable to Great Lakes Models 2T-1A-1 and 2T-1A-2 airplanes. AD 78-26-10 requires repetitive visual inspections of the support plates at both ends of the heat exchanger for cracks. The manufacturr subsequently introduced a design change to the cockpit heater system which makes the requirements of AD 78-26-10 inapplicable to those airplanes which are equipped with a cockpit heater system other than Part Number (P/N) 50146. Accordingly, the amendment allows those airplanes which have installed such a cockpit heater system to be exempt from compliance with the AD.

EFFECTIVE DATE: December 17, 1986.

Compliance: As prescribed in the body of the AD.

ADDRESSES: Information applicable to this AD is contained in the Rules Docket and may be obtained from the Federal Aviation Administration, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 78-CE-23-AD, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Mr. Terry Fahr, ANE-153, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803; Telephone (617) 273-7103.

SUPPLEMENTARY INFORMATION: This amendment revises Amendment 39-3384 (44 FR 1081), AD 78-26-10, which currently requires repetitive inspection of the cockpit heater system on all Great Lakes Models 2T-1A-1 and 2T-1A-2 airplanes to preclude contamination of the cockpit heater air with carbon monoxide. Subsequent to issuance of this AD, the manufacturer introduced a design change to the cockpit heater system which makes the requirements of AD 78-26-10 inapplicable for those airplanes which are equipped with a cockpit heater system other than P/N 50146. Consequently, a proposal to amend Part 39 of the Federal Aviation Regulations (FAR) to revise AD 78-26-10 to allow those airplanes which have a cockpit heater system other than P/N 50146 to be exempt from further compliance with the AD was published in the **Federal Register** on July 15, 1986 (51 FR 25569).

Interested persons have been afforded an opportunity to comment on the proposal. No comments or objections were received on the proposal or the FAA determination of the related cost to the public. Accordingly, the final rule will be adopted without change.

This amendment imposes no additional burden on any person. The cost of compliance with the revised AD is unchanged from the current AD and will not have a significant financial impact on any small entities operating these airplanes.

Therefore, I certify that this action: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

PART 39—[AMENDED]

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

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

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

§ 39.13 [Amended]

2. By revising AD 78-26-10, Amendment 39-3384, as follows:

Revise paragraphs A)1., A)2., A)3., and Figure 1 by replacing "cockpit heater system" with "P/N 50146 cockpit heater system".

Revise paragraph (C) to read as follows:

The actions and inspections specified in paragraphs A)2. and A)3. of this AD may be discontinued upon either removal of the P/N 50146 cockpit heater system per paragraph B) of this AD, or replacement of the P/N 50146 cockpit heater system with a different FAA approved cockpit heater system.

Revise paragraph (D) to read as follows:

Any equivalent method of compliance with this AD must be approved by the Manager, Boston Aircraft Certification Office, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803.

This amendment revises AD 78-26-10, Amendment 39-3384.

This amendment becomes effective on December 17, 1986.

Issued in Kansas City, Missouri, on October 31, 1986.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 86-25530 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 86-CE-55-AD; Amdt. 39-5462]

Airworthiness Directives; Collins Model DME-42 Distance Measuring Equipment

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new Airworthiness Directive (AD), applicable to Collins Model DME-42 Distance Measuring Equipment (DME) transceivers which have incorporated Collins Service Bulletin, DME-42 SB-5, dated August 11, 1986. Transceivers modified by this Service Bulletin, identified as Part Number (P/N) 622-6263-002, may cause erroneous display of the station identifier with associated distance to go, time to go and audio identifier that is different from the station manually selected. This display of erroneous information during periods of high cockpit workload in IFR conditions such as an ILS approach, could result in incorrect interpretation of aircraft location and possible subsequent loss of the aircraft. The removal and modification of these transceivers as prescribed in the AD will assure safe and proper operation of the DME.

DATES: Effective November 17, 1986. Compliance: As prescribed in the body of the AD.

ADDRESSES: Collins Service Bulletin DME-42 SB-6, dated October 15, 1986, may be obtained from Collins Avionics Division/Rockwell International, 400 Collins Road NE., Cedar Rapids, Iowa 42498. A copy of this information is also contained in the Rules Docket, FAA, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Mr. Bill Trammell, FAA, Atlanta Aircraft Certification Office, ACE-130A, 1075 Inner Loop Road, College Park, Georgia 30337; Telephone (404) 763-7781.

SUPPLEMENTARY INFORMATION: Collins reported to the FAA that a condition of erroneous display was found during flight testing of a newly installed DME-42 transceiver. This erroneous display can result in an incorrect interpretation of aircraft location and if this occurs during a critical phase of flight, loss of the aircraft could result.

Collins confirmed by engineering laboratory tests that the erroneous display is attributed to incorporation of Collins Service Bulletin DME-42 SB-5, dated August 11, 1986, into the transceiver. This Service Bulletin modifies the transceiver, and re-identifies the unit as P/N 622-6263-002. As a result, Collins issued Service Bulletin DME-42 SB-6, dated October 15, 1986, which removes the modification of Service Bulletin SB-5 and restores the P/N 622-6263-001 identification. Transceivers that have not incorporated Service Bulletin DME-42 SB-5 or those P/N 622-6263-002 transceivers restored by Service Bulletin DME-42 SB-6 to P/N 622-6263-001 configuration do not demonstrate this malfunction.

Since the FAA has determined that the unsafe condition described herein is likely to exist in other transceivers which have incorporated Collins Service Bulletin DME-42 SB-5, an AD is being issued requiring the removal of these transceivers from service and modification back to the original configuration. Because a situation exists that requires the immediate adoption of this regulation, it is found that notice and public procedures hereon are impractical and good cause exists for making this amendment effective in less than 30 days.

The FAA has determined that this regulation is an emergency regulation that is not major under section 8 of Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct this condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required). A copy of it, when filed, may be obtained by contacting the Rules Docket under the caption "**ADDRESSES**" at the location identified.

Lists of Subjects in 14 CFR Part 39

Air transportation, Aviation safety, Aircraft, Safety.

PART 39—[AMENDED]

Adoption of the Amendment

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

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

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

2. By adding the following new AD:

Collins Avionics Division/Rockwell International: Applies to Collins Model DME-42, P/N 622-6263-002, Distance Measuring Equipment.

Compliance: Required as indicated after the effective date of this AD, unless already accomplished.

To prevent display of erroneous DME-42 information, accomplish the following:

(a) For aircraft with Collins Model DME-42 Distance Measuring Equipment installed, within the next 25 hours time-in-service after the effective date of this AD:

(1) Visually inspect all installed DME-42 equipment to determine if Part Number (P/N) 622-6263-002 transceivers are installed.

(2) If installed, prior to further flight remove the transceiver(s), and tag the unit(s) unserviceable until the modification specified in paragraph (b) of this AD is accomplished.

(b) For all affected DME-42 transceivers, P/N 622-6263-002, not installed in an aircraft, prior to further use modify and reidentify the transceiver in accordance with the instructions contained in Collins Service Bulletin DME-42 SB-6, dated October 15, 1986.

(c) Aircraft may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(d) An equivalent means of compliance with this AD may be used if approved by the Manager, Atlanta Aircraft Certification Office, ACE-115A, FAA, 1075 Inner Loop Road, College Park, Georgia 30337; Telephone (404) 763-7428.

All persons affected by this directive may obtain copies of the document(s) referred to herein upon request to Collins Avionics Division/Rockwell International, 400 Collins Road NE., Cedar Rapids, Iowa 52498; or the FAA, Rules Docket, Office of Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment becomes effective on November 17, 1986.

Issued in Kansas City, Missouri on October 31, 1986.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 86-25539 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 86-CE-16-AD, Amdt. 39-5461]

Airworthiness Directives; Consolidated Aeronautics Incorporated Lake Model 250 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new Airworthiness Directive (AD), applicable to Consolidated Aeronautics Incorporated Lake Model 250 airplanes which requires the addition of hardware on the fuel shutoff handle. This hardware is needed to prevent the fuel shutoff handle from binding on the cabin upholstery which could result in preventing the flight crew from isolating the fuel system from the engine compartment, thereby creating an extreme hazard if the airplane experiences an inflight fire or similar emergency.

DATE: Effective: December 17, 1986. Compliance: As prescribed in the body of the AD.

ADDRESSES: Lake Service Bulletin No. B-66, dated May 31, 1985, applicable to this AD, may be obtained from: Lake Aircraft, Laconia Airport, Laconia, New Hampshire 03646. A copy of the service bulletin is contained in the Rules Docket, Docket Number 86-CE-16-AD, in the Office of the Regional Counsel, Federal Aviation Administration, Central Region, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Mr. Wayne Gaulzetti, ANE-153, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803; Telephone 617-273-7102.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an AD requiring the addition of hardware on the fuel shutoff handle on certain Lake Model 250 airplanes was published in the **Federal Register** on July 8, 1986 (51 FR 24715).

The proposal was prompted by the discovery that in certain Lake Model 250 airplanes the upholstery can restrict movement of the fuel shutoff valve, preventing the flight crew from isolating the fuel system from the engine compartment if the airplane experiences an inflight fire or similar emergency.

Interested persons have been afforded an opportunity to comment on the proposal. No comments or objections were received on the proposal or the FAA determination of the related cost to the public. Accordingly, the proposal is adopted without change.

The FAA has determined that this regulation involves approximately 16 airplanes, at an approximate one-time cost of $75 for each airplane or a total one-time fleet cost of $1200. The cost is so small that compliance with the proposal will not have a significant financial impact on any small entities owning affected airplanes. Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation Safety, Safety.

PART 39—[AMENDED]

Adoption of the Amendment

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

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

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

2. By adding the following new AD:

Consolidated Aeronautics Incorporated: Applies to Consolidated Aeronautics Incorporated, Lake Model 250 Airplanes, Serial Numbers 2 through 17, equipped with fuel shutoff valve mouting plate part number 3-6572-17, certificated in any category.

Compliance: Required within the next 100 hours time-in-service after the effective date of this AD, unless already accomplished.

To prevent the possible contact of the fuel shutoff valve handle hardware and the cabin rear upholstery panel, accomplish the following:

(a) Modify the fuel shutoff valve mounting plate in accordance with instructions in Lake Aircraft Division Consolidated Aeronautics Incorporated Service Bulletin No. B-66 dated May 31, 1985.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD can be accomplished.

(c) An equivalent means of compliance with this AD may be used if approved by the Manager, Federal Aviation Administration, Boston Aircraft Certification Office, ANE-150, 12 New England Executive Park, Burlington, Massachusetts 01803.

All persons affected by this directive may obtain copies of the documents referred to herein upon request to Lake Aircraft, Laconia Airport, Laconia, New Hampshire 03646; or Federal Aviation Administration, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment becomes effective on December 17, 1986.

Issued in Kansas City, Missouri, on October 31, 1986.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 86-25538 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 211

[Release No. SAB-65]

Staff Accounting Bulletin No. 65

AGENCY: Securities and Exchange Commission.

ACTION: Publication of Staff Accounting Bulletin.

SUMMARY: The interpretations in this staff accounting bulletin indicate the staff's views on certain matters involved in the application of Accounting Series Release Nos. 130 and 135 regarding risk sharing in business combinations accounted for as pooling of interests.

DATE: November 5, 1986.

FOR FURTHER INFORMATION CONTACT: Lawrence Salva, Office of the Chief Accountant (202-272-2130), or Howard P. Hodges, Jr. Division of Corporation Finance (202-272-2553), Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The statements in staff accounting bulletins are not rules or interpretations of the Commission nor are they published as bearing the Commission's official approval. They represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering

the disclosure requirements of the Federal Securities laws.

Shirley E. Hollis,

Assistant Secretary.

November 5, 1986.

PART 211—[AMENDED]

Part 211 of Title 17 of the Code of Federal Regulations is amended by adding Staff Accounting Bulletin No. 65 to the table found in Subpart B.

Staff Accounting Bulletin No. 65

The staff hereby adds Section E to Topic 2 of the staff accounting bulletin series. Section E discusses the staff's views on certain matters involved in the application of Accounting Series Release Nos. 130 and 135 regarding risk sharing in business combinations accounted for as pooling of interests.

Topic 2: Business Combinations

* * * * *

E. Risk Sharing in Pooling of Interests

Facts: The Commission established and published guidelines in Accounting Series Release Nos. 130 and 135[1] which are used in making determinations on whether the sharing of rights and risks among constituent stockholder groups will have occurred in order for a business combination to be accounted for as a pooling of interests. Those guidelines indicate that the requisite risk-sharing will have occurred if no affiliate of either company reduces his risk relative to any common shares received in the business combination until publication of financial results covering at least 30 days of post-merger combined operations.

Question 1: Are affiliates of each combining company restricted from dispositions of their shares or do the restrictions apply only to affiliates of the "target" company actually receiving shares in the business combination?

Interpretive Response: Affiliates of each combining company may not reduce their risk relative to their common shareholder positions during the indicated time period in order to achieve the risk sharing required for the applicability of pooling of interests accounting. Any one of the combining companies may issue shares in exchange for the shares of the other combining companies. Alternatively, a new corporation may be formed to issue its shares to effect a combination of the companies. As indicated in APB Opinion 16, "the choice of issuing corporation is essentially a matter of convenience." The staff therefore believes that allowing affiliates of the issuing company to immediately sell or otherwise dispose of their shares while restricting such actions by the affiliates of the "target" company would be inconsistent with the risk sharing element that is essential in poolings.

Question 2: Will a disposition of shares by an affiliate, before the exchange of shares to effect the combination occurs, cause the staff to question the application of pooling of interests accounting?

Interpretive Response: Yes, in some cases. Although continuity of ownership interests is not a condition to accounting for a business combination by the pooling of interests method under APB Opinion 16, the Opinion clearly articulates the need for a sharing of risk. To allow affiliates to sell their shares shortly before the consummation of the combination while restricting such sales immediately following the exchange would be inconsistent.

The Opinion contemplates that business combinations accounted for as pooling of interests must normally be consummated within one year after the plan of combination is initiated and the staff notes that such combinations have typically been consummated within a few months of initiation. While it can be argued that risk sharing should begin when a formal plan of combination is initiated, in some situations this may be an unreasonably long period to restrict affiliates from selling their shares or otherwise reducing their risk with respect to the combined company. This is particularly the case in combinations that require a lengthy period between initiation and consummation (such as between financial institutions that require regulatory approval) and where the affiliate transactions are relatively minor and routine. In view of these practical considerations, the staff will generally not raise a question about the applicability of pooling of interests accounting as a result of dispositions of shares by affiliates prior to 30 days before consummation of a business combination.[2]

[FR Doc. 86-25625 Filed 11-12-86; 8:45 am]

BILLING CODE 8010-01-M

[1] These guidelines were codified in section 201.01 of the Codification of Financial Reporting Policies (FRP), a separate publication issued by the Commission.

[2] Registrants are reminded, however, of AICPA Interpretation Nos. 34 and 37 of APB Opinion 16, which indicate that combinations that require, or are contingent upon, the sale of shares by shareholders of either of the combining companies would be accounted for as purchases.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 154

[Docket No. RM84-6-033; Order No. 399-C]

Refunds Resulting From Btu Measurement Adjustments

Issued: November 5, 1986.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order postponing deadline for payment.

SUMMARY: The Federal Energy Regulatory Commission is postponing the deadline for payment of Btu refunds attributable to royalty interest owners for any first seller that has a petition pending for a waiver of or postponement of the deadline to pay such Btu refunds until 30 days after the Commission issues an order disposing of the petition.

EFFECTIVE DATE: November 5, 1986.

FOR FURTHER INFORMATION CONTACT: Darrell Blakeway, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 357-8213.

SUPPLEMENTARY INFORMATION:

Order Postponing Deadline for Refund

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

In Order No. 399[1] the Commission established November 5, 1986, as the deadline for first sellers to pay their Btu refund obligations attributable to payments made to their royalty interest owners. The Commission also stated that it would consider, on a case-by-case basis, requests to waive the interest on, or postpone the deadline for

[1] In Order No. 399, Refunds Resulting from Btu Measurement Adjustments, 47 FR 37735 (Sept. 26, 1984), FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30,597, the Commission established procedures and deadlines for the refund of charges for natural gas that exceeded NPA ceilings as a result of Btu measurements based on the water vapor content of the gas "as delivered", rather than on a water saturated basis. In so doing, the Commission was implementing the decision of the United States Court of Appeals for the District of Columbia Circuit in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984).

paying, such refunds. In Order No. 399-A, the Commission concluded that it could waive the principal of a refund obligation attributable to royalty payments if the first seller demonstrated that the refund is uncollectible.[2]

Numerous first sellers have filed petitions for adjustment under section 502(c) of the Natural Gas Policy Act of 1978 (NGPA) seeking a waiver of the refund obligation attributable to royalty payments or a postponement of the deadline for paying such refunds to their pipeline/purchasers until the royalty owners remit the amounts owed to first sellers. Several petitioners seeking such relief have requested the Commission to postpone the November 5, 1986 deadline for their payment of such refunds until at least 30 days after the Commission rules on their petitions on the merits.

The Commission has determined to grant interim relief to any first seller that has a petition on file with the Commission seeking waiver of Btu refunds attributable to royalty payments or for a postponement of the deadline to pay such refunds. In order to provide an opportunity for the Commission to rule on the merits of the pending requests, the Commission postpones the November 5, 1986 deadline for any such first seller until 30 days after issuance of an order by the Commission or the Director of the Office of Pipeline and Producer Regulation (acting pursuant to a delegation of authority by the Commission) disposing of the pending petition.[3]

By the Commission. Commissioner Stalon dissented.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25528 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[2] 49 FR 46353 at 46,361 (Nov. 26, 1984), FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30,612 at 31,217. *See also* G.E.C. Oil and Gas Operations, 33 FERC ¶ 61,013 (1985); Wylee Petroleum Corporation, 33 FERC ¶ 61,014 (1985); Inland Ocean, Inc., 33 FERC ¶ 61,015 (1985); Conoco, Inc., 33 FERC ¶ 61,016 (1985); and Witt Oil Production, Inc. 33 FERC ¶ 61,018 (1985), where the Commission established standards for determining when a Btu refund obligation may properly be considered uncollectible.

[3] Interest on the refund obligation continues to accrue until paid, unless the principal is ultimately waived or the refund is attributable to royalties paid to a state or federal governmental authority that makes refunds to the first seller but does not pay interest thereon. See 18 CFR 273.302(e) (1986), 18 CFR 154.102 (c) and (d) (1986), and 49 FR at 37,739 (Order No. 399).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs Not Subject to Certification; Morantel Tartrate Cartridge

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental NADA filed by Pfizer, Inc., providing for a 106-day withdrawal period for use of Paratect® (morantel tartrate) Sustained Release Cartridge used to remove and control the adult stage of certain gastrointestinal nematode infections in weaned calves and yearling cattle.

EFFECTIVE DATE: November 13, 1986.

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

SUPPLEMENTARY INFORMATION: Pfizer, Inc., 235 East 42d St., New York, NY 10017, filed supplemental NADA 134-779 which provides for oral use of Paratect® (morantel tartrate) Sustained Release Cartridge as an anthelmintic in yearling cattle and weaned calves weighing at least 200 pounds. The regulations in 21 CFR 520.1450b provide for use of the product. The supplemental NADA revises the withdrawal period from 160 to 106 days before slaughter for food use. The supplement is approved and the regulations are amended to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of Part 20 (21 CFR Part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii)), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, from 9 a.m. to 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.24(d)(1)(i) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither and environmental assessment nor an environmental impact statement is required.

List of Subjects in 21 CFR Part 520

Animal drugs.

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

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

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

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

§ 520.1450b [Amended]

2. Section 520.1450b *Morantel tartrate cartridge* is amended in paragraph (d)(3) by removing the number "160" and inserting in its place "106".

Dated: November 5, 1986.

Marvin A. Norcross,

Associate Director for New Animal Drug Evaluation.

[FR Doc. 86-25541 Filed 11-12-86; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

Land Uses

AGENCY: Forest Service, USDA.

ACTION: Final rule; technical amendments.

SUMMARY: This final rule reorganizes 36 CFR Part 251—Land Uses into a Subpart A and B and centralizes the authority citations at the Subpart level in conformance with new **Federal Register** document requirements. This action will facilitate subsequent reference and amendment to the part.

EFFECTIVE DATE: This rule is effective November 13, 1986.

FOR FURTHER INFORMATION CONTACT: Marian P. Connolly, Regulatory Coordinator, Forest Service, USDA, P.O. Box 2417, Washington, DC 20013, (202) 235-1488.

SUPPLEMENTARY INFORMATION: As noted in the Semi-annual Regulatory Agenda of April 21, 1986 (51 FR 13835), the Forest Service is presently reviewing several existing regulations within Part 251 and intends to issue new rules to this part on access to National Forest

System lands and on special uses. To accommodate these rulemakings, it is necessary to reorganize the Part and to relocate certain authority citations within the part in compliance with new **Federal Register** format requirements.

This final rule is a technical rule with no substantive impact on the general public or small entities. The rulemaking also has no information collection requirement impacts. Therefore, it is exempt from the regulatory review procedures of E.O. 12291, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

List of Subjects in 36 CFR Part 251

Electric power, National forests, Public lands—rights of way, Reporting and recordkeeping requirements, Water resources.

Therefore, for the reasons set forth in the preamble, Part 251 of Title 36 of the Code of Federal Regulations is hereby amended as follows:

PART 251—[AMENDED]

1. Remove the authority citation for Part 251 that occurs at the end of the Table of Contents.

§§ 251.9-251.35 [Designated as Subpart A]

2. Designate existing §§ 251.9 through 251.35 as Subpart A—Miscellaneous Land Uses, retaining the undesignated centered headings for these sections within the Table of Contents.

§§ 251.9-251.35 [Amended]

3. Remove the authority citations that occur at the end of §§ 251.9 through 251.35 and add a centralized authority citation for Subpart A to read as follows:

Subpart A—Miscellaneous Land Uses

Authority: 7 U.S.C. 428a. 1011; 16 U.S.C. 518, 551, 678a, 1131-1136, 1241-1249, 1271, 1287; 54 Stat. 1197.

4. Designate §§ 251.50 through 251.64 as Subpart B—Special Uses, and removing the undesignated centered heading and editorial note.

5. Add a centralized authority citation for Subpart B to read as follows:

Subpart B—Special Uses

Authority: 16 U.S.C. 472, 551, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761-1771.

Dated: November 4, 1986.

Douglas W. MacCleery,

Deputy Assistant Secretary for Natural Resources and Environment.

[FR Doc. 86-25638 Filed 11-12-86; 8:45 am]

BILLING CODE 3410-11-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SHW-FRL-3108-4]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Final Exclusion and Final Organic Leachate Model (OLM)

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is granting final exclusions for the solid wastes generated at two particular generating facilities from the lists of hazardous wastes contained in 40 CFR 261.31 and 261.32. This action responds to delisting petitions received by the Agency under 40 CFR 260.20 and 260.22 to exclude wastes on a "generator-specific" basis from the hazardous waste lists. The effect of this action is to exclude certain wastes generated at these facilities from listing as hazardous wastes under 40 CFR Part 261. In addition, this notice addresses comments received by the Agency on its approach to evaluating organics data in delisting petitions.

EFFECTIVE DATE: November 13, 1986.

ADDRESSES: The public docket for this final rule is located in the Sub-basement, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20406, and is available for public viewing from 9:30 a.m. to 3:30 p.m., Monday through Friday, excluding Federal holidays. Call Mia Zmud at (202) 475-9327 or Kate Blow at (202) 382-4675 for appointments. The reference number for this docket is "F-86-CCEF-FFFFF". The public may copy a maximum of 50 pages of materials from any one regulatory docket at no cost. Additional copies cost $.20/page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/Superfund Hotline, toll-free at (800) 424-9346, or (202) 382-3000. For technical information, contact Dave Topping, Office of Solid Waste (WH-562B), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 382-4690.

SUPPLEMENTARY INFORMATION: On November 27, 1985, EPA proposed to exclude specific wastes generated by thirteen facilities. Four of these exclusions have been finalized in earlier notices. One exclusion will be reproposed (Eli Lilly, located in Clinton, IA; see 51 FR 27061-27064, July 29, 1986). Six of the proposed exclusions will be finalized in other notices. The remaining two proposals are the subject of today's notice: (1) Continental Can Company, located in Milwaukee, Wisconsin (see 50 FR 48915); and (2) Star Expansion Company, located in Mountainville, New York (see 50 FR 48934).

These actions were taken in response to petitions submitted by these companies (pursuant to 40 CFR 260.20 and 260.22) to exclude their wastes from hazardous waste control. In their petitions, these companies have argued that certain of their wastes were non-hazardous based upon the criteria for which the waste was listed. The petitioners have also provided information which has enabled the Agency to determine whether any other toxicants are present in the wastes at levels of regulatory concern. The purpose of today's actions is to make final those proposals and to make our decisions effective immediately. More specifically, today's rule allows these two facilities to manage their petitioned wastes as non-hazardous. The exclusions remain in effect unless the waste varies from that originally described in the petition (*i.e.*, the waste is altered as a result of changes in the manufacturing or treatment process.)[1] In addition, generators still are obligated to determine whether these wastes exhibit any of the characteristics of hazardous waste.

The Agency notes that the petitioners granted final exclusions in today's **Federal Register** have been reviewed for both the listed and non-listed criteria. As required by the Hazardous and Solid Waste Amendments of 1984, the Agency evaluated the wastes for the listed constituents of concern as well as for all other factors (including additional constituents) for which there was a reasonable basis to believe that they could cause the waste to be hazardous. These petitioners have demonstrated through submission of raw materials data, EP toxicity test data for all EP toxic metals, and test data on the four hazardous waste characteristics that their wastes do not exhibit any of the hazardous waste characteristics, and do not contain any other toxicants at levels of regulatory concern.

Limited Effect of Federal Exclusion

States are allowed to impose requirements that are more stringent than EPAs pursuant to section 3009 of RCRA. State programs thus need not

[1] The current exclusions apply only to the processes covered by the original demonstrations. A facility may file a new petition if it alters its process. The facility must treat its waste as hazardous, however, until a new exclusion is granted.

include those Federal provisions which exempt persons from certain regulatory requirements. For example, States are not required to provide a delisting mechanism to obtain final authorization. If the State program does include a delisting mechanism, however, that mechanism must be no less stringent than that of the Federal program for the State to obtain and keep final authorization.

As a result of enactment of the Hazardous and Solid Waste Amendments of 1984, any States which had delisting programs prior to the Amendments must become reauthorized under the new provisions.[2] To date only one State (Georgia) has received tentative approval for their delisting program. The final exclusions granted today, therefore, are issued under the Federal program. States, however, can still decide whether to exclude these wastes under their State (non-RCRA) program. Since a petitioners waste may be regulated by a dual system (*i.e.*, both Federal (RCRA) and State (non-RCRA) programs), petitioners are urged to contact their State regulatory authority to determine the current status of their wastes under State law.

The exclusions made final here involve the following petitions:

Continental Can Company, Milwaukee, Wisconsin

Star Expansion Company, Mountainville, New York

I. Continental Can Co.

A. Proposed Exclusion

Continental Can Company (Continental) has petitioned the Agency to exclude its incinerator ash from the incineration of several non-halogenated solvents from EPA Hazardous Waste Nos. F003 and F005 based upon the absence, low concentration, or immobilization of the listed constituents of this waste. Data submitted by Continental substantiate their claim that the listed constituents of concern are either not present in concentrations of regulatory concern or are present in essentially immobile forms. As required by the Hazardous and Solid Waste Amendments of 1984, Continental also provided data that indicate that no other hazardous constituents are present in this waste at levels of regulatory concern and that the waste does not exhibit any of the characteristics of hazardous waste.[3]

B. Agency Response to Public Comments

The Agency did not receive any public comments regarding its decision to grant an exclusion to Continental for the waste identified in its petition.

C. Final Agency Decision

For the reasons stated in the proposed exclusion, the Agency believes that this waste is non-hazardous and as such should be excluded from hazardous waste control. The Agency, therefore, is granting a final exclusion to Continental Can Company for its Milwaukee, Wisconsin facility. The incinerator ash is generated from the incineration of spent non-halogenated solvents, listed as EPA Hazardous Waste Nos. F003 and F005. These solvents are used in Continental's multi-stage can assembly process. [The Agency notes that the exclusion remains in effect unless the waste varies from that originally described in the petition (e.g., the waste is altered as a result of changes in the manufacturing or treatment process).[4] In addition, generators are still obligated to monitor these wastes to determine if they exhibit any hazardous characteristics].

II. Star Expansion Co.

A. Proposed Exclusion

Star Expansion Company (Star Expansion) has petitioned the Agency to exclude its treated sludge from EPA Hazardous Waste No. F006, based upon the absence, low concentration, or immobilization of the listed constituents of this waste. Data submitted by Star Expansion substantiate their claim that the listed constituents of concern are either not present in concentrations of regulatory concern or are present in essentially immobile forms. As required by the Hazardous and Solid Waste Amendments of 1984, Star Expansion also provided data that indicate that no other hazardous constituents are present in this waste at levels of regulatory concern and that the waste does not exhibit any of the characteristics of hazardous waste.[5]

B. Agency Response to Public Comments

The Agency did not receive any public comments regarding its decision to grant an exclusion to Star Expansion for the waste identified in its petition.

C. Final Agency Decision

For the reasons stated in the proposed exclusion, the Agency believes that this waste is non-hazardous and as such should be excluded from hazardous waste control. The Agency, therefore, is granting a final exclusion to Star Expansion Company for its treated sludge generated at its Mountainville, New York facility. The treated sludge is generated from the treatment of electroplating wastewaters, listed as EPA Hazardous Waste No. F006, which are generated in the production of fasteners for the construction and transportation industries. [The Agency notes that the exclusion remains in effect unless the waste varies from that originally described in the petition (*i.e.*, the waste is altered as a result of changes in the manufacturing or treatment process).[6] In addition, generators are still obligated to monitor these wastes to determine if they exhibit any hazardous characteristics].

III. Effective Date

This rule is effective immediately. The Hazardous and Solid Waste Amendments of 1984 amended section 3010 of RCRA to allow rules to become effective in less than six months when the regulated community does not need the six month period to come into compliance. This is the case here since this rule reduces, rather than increases, the existing requirements for persons generating hazardous wastes. In light of the unnecessary hardship and expense which would be imposed on the petitioners by an effective date six months after promulgation and the fact that such a deadline is not necessary to achieve the purpose of section 3010, we believe that these rules should be effective immediately. These reasons also provide a basis for making this rule

[2] RCRA Regulation Statutory Interpretation No. 4: Effect of Hazardous and Solid Waste Amendments of 1984 on State Delisting Decisions, May 16, 1985, Jack W. McGraw, Acting Assistant Administrator for the Office of Solid Waste and Emergency Response

[3] See 50 FR 48915–48917, November 27, 1985 for the original proposed exclusion and a more detailed description of why the Agency proposed to grant Continental's petition. See also 51 FR 27061–27064 for the results of the revised Organic Leachate Model for Continental's waste.

[4] The current exclusion only applies to the processes covered by the original demonstrations. A facility may file a new petition if it alters its process. Should such a change occur, the facility must treat its waste as hazardous until a new petition is granted.

[5] See 50 FR 48934–48936, November 27, 1985 for the original proposed exclusion and a more detailed description of why the Agency proposed to grant Star Expansions petition. Also see 51 FR 27061–27064, July 29, 1986, Table 1, for the results of the revised Organic Leachate Model for Star Expansion.

[6] The current exclusion only applies to the processes covered by the original demonstrations. A facility may file a new petition if it alters its process. Should such a change occur, the facility must treat this waste as hazardous until a new petition is granted.

effective immediately under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(d).

IV. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and, therefore, subject to the requirement of a Regulatory Impact Analysis. This proposal to grant exclusions is not major since its effect is to reduce the overall costs and economic impact of EPA's hazardous waste management regulations. This reduction is achieved by excluding wastes generated at specific facilities from EPA's list of hazardous wastes, thereby enabling the facility to treat its waste as non-hazardous.

V. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an Agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment, a regulatory flexibility analysis which describes the impact of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities.

This amendment will not have an adverse economic impact on small entities since its effects will be to reduce the overall costs of EPA's hazardous waste regulations. Accordingly, I hereby certify that this regulation will not have a significant impact on a substantial number of small entities.

This regulation, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 261

Hazardous waste, Recycling.

Authority: Sec. 3001 RCRA, 42 U.S.C. 6921

Dated: November 5, 1986.

Marcia Williams,

Director, Office of Solid Waste.

Appendix: Response to Public Comment Regarding the Organic Leaching and Land Treatment Models

The Environmental Protection Agency (EPA) received a number of comments regarding the proposed rule set forth in 50 FR 48953, November 27, 1985, which discusses the Agency's approach to evaluating petitions for the delisting of organic wastes that are typically landfilled or landfarmed. The comments received and the Agency's responses are presented in this notice in terms of the following four issues: (1) The legislative authority of the proposed rule; (2) assumptions used in the organic leachate model (OLM); (3) assumptions used in the land treatment model; and (4) general comments on the delisting program.

Comments were also received on several of the parameters used in the Agency's vertical and horizontal spread (VHS) groundwater dispersion landfill model. This model was proposed on February 26, 1985 (see FR 7882, Appendix I), comments were solicited and incorporated, and the model was made final on November 27, 1985 (see 50 FR 48886, Appendix). Since the landfill model has already been made final, additional comments on these parameters will not be entertained. Due to the fact that the VHS is a steady-state model, however, the assumed ground-water velocity was not specifically discussed when that model was proposed. Since the ground-water velocity is a factor in evaluating the fate of organic toxicants (due to the implied transport time), comments on this parameter are addressed in today's notice (see section 4). Comments on the general applicability of the landfill and other models are addressed in section 4.

In response to some of the comments on the November 27, 1985 notice, the Agency published a Notice of Availability on July 29, 1986. Today's notice also presents the Agency's response to comments on that notice. (See Section 2.B.)

1. Legislative Authority

A number of comments were received concerning the legislative authority of the proposed use of the OLM. Specifically, the Agency received comments concerning the following issues:

- Petition-specific evaluation
- Right to comment
- Basis for determination of hazard
- Use of health-based standards
- Stringency of the proposed rule.

The comments received and the Agency's responses are presented in the following sections.

A. Petition-specific Evaluation

Comment: One commenter stated that the use of the proposed OLM and the VHS models is not consistent with the legislative intent of section 3001(f)(1) of RCRA which is interpreted by the commenter to stipulate that the delisting process should be applied on an individual basis. The commenter stated that the models exclude relevant evidence by only considering constituent concentration and waste volume, and by assuming that all wastes containing a particular Appendix VIII constituent will behave alike, encounter the same conditions, and be mismanaged alike. Furthermore, the commenter stated that once EPA promulgates its models, the assumptions in the models are no longer subject to challenge. Thus, this approach does not provide for an individual analysis of any specific petition. The commenter recommended that EPA abandon its worst-case assumptions in favor of using actual waste data and site-specific conditions to evaluate a particular generator's waste in relation to its most likely disposal site.

Response: The application of the OLM and VHS models to petition evaluation does not cause the process to be less individualized. The models are intended to be petition evaluation tools, but not to function as the sole basis for evaluation.

The Agency's petition-evaluation process has always emphasized factors that are specific to the subject waste. These factors include the concentration of toxicants in the waste and exhibited in the waste's leachate, and the reasonably expected management practices to which the waste will be subjected. Thus, in evaluating petitions, the Agency does not assume that all wastes containing a particular toxicant will behave alike, encounter the same conditions, or be managed alike. For example, the OLM predicts that two wastes containing different levels of the same toxicant will exhibit different leachate concentrations of that toxicant. Also, a waste that is typically subjected to a particular management (*e.g.*, landfilled) is evaluated differently than a waste which is subject to different management (*e.g.*, land treated). The petition-evaluation process does, therefore, provide for individual analysis of petitions.

In evaluating delisting petitions, the Agency assesses the hazard due to disposal of the waste in a non-Subtitle C setting. The Agency therefore uses a number of reasonable worst-case assumptions about the unit in which the waste will be managed. Since the Agency often has no assurance that a petitioner will continue to dispose of the waste at a particular disposal unit, it is not reasonable to consider site-specific factors for that unit. The Agency is, however, considering the use of site-specific values, on a petition-by-petition basis, in certain rare circumstances. One such situation, for example, would be when it is not reasonable to expect the waste to be moved from the current management unit and the hydrogeology is well known. Should the Agency conclude that such an approach is warranted, that approach will be

proposed in the **Federal Register** and comments will be solicited.

Comment: One commenter stated that the model "fails to balance administrative convenience with accuracy of assessment." EPA interprets this statement to mean that the commenter believes that the model does not consider all relevant parameters to accurately assess the potential hazard of a given waste, and that the model is being used inappropriately to expedite the Agency's review process.

Response. The Agency believes that petitions should be evaluated in both a timely and a thorough manner. The Agency further believes that models are useful and effective tools to evaluate the potential hazard due to unregulated disposal of wastes and that their use in no way diminishes the thoroughness of the review nor precludes the consideration of relevant parameters. While models may appear to limit the number of parameters considered, this is primarily due to the fact that reasonable worst-case values have been assigned to many parameters and that these parameters do not, therefore, appear as variables. For example, while the VHS landfill model (see 50 FR 7882, Appendix I, February 26, 1985 and 50 FR 48896, Appendix, November 27, 1985) may appear to consider only a limited number of parameters, such factors as attenuation and saturated soil conditions were considered in the selection and application of that model. Likewise, the OLM incorporated experimental data from wastes representing a number of different matrices in the data base. (See Organic Leaching Model Background Document, Docket Report, July 18, 1986, which is contained in the docket for 51 FR 27061, July 29, 1986, for a description of the wastes used in the OLM data base.)

Comment: The commenter added that the Agency has considered site- and waste-specific factors for spills that remain in place. The commenter recommended that EPA expand this approach to include wastes managed in on-site land treatment facilities and surface impoundments. A commenter argued that site-specific evaluations are appropriate when the delisted waste is managed onsite and the site hydrogeology is well defined. The commenter recommended that, in such cases, the ground-water transport portion of the VHS model should be revised to consider site-specific hydrogeologic factors.

Response: The Agency will consider such factors in certain rare circumstances. (The Agency notes, however, that the only case where this approach was taken was at a spill site where the contaminant acrolein was treated under an emergency treatment permit (49 FR 8963, March 9, 1984). The acrolein was reduced to its non-toxic degradation products before the emergency permit expired. The concentrations of contaminants in the soil were reduced to non-hazardous levels. Also, the consideration of site- and waste-specific factors in the referenced exclusion did not involve modifications to the VHS or OLM models since these models were not in use at that time.) The Agency anticipates that site-specific factors will only be considered when the petitioner can fully characterize the hydrogeology of the site. Should the Agency choose to adopt such an approach for a specific petition, the analysis, including a description of the hydrogeological factors considered, will be part of the proposed decision on the petition, and will be explained or referred to in the **Federal Register.**

Comment: One commenter suggested that EPA take into consideration state and local standards which may provide controls on the disposal of delisted wastes. The commenter believes that such standards should affect the Agency's development of a reasonable worst-case management scenario on a petition-specific basis.

Response: The Agency agrees that, in certain cases, state or local standards will require that delisted wastes be disposed of in a controlled manner. The Agency has no guarantee, however, that the waste will be managed locally where such protective measures are enforced, thus it is not generally appropriate for the Agency to take state and local standards into consideration.

Comment: The commenter suggested that delisting procedures could include industry-specific considerations, which is consistent with RCRA section 3001(f).

Response: While section 3001(f) requires the consideration of waste-specific factors other than those for which the waste was originally listed, the legislative language does not specify anything concerning industry-specific factors. The Agency points out, however, that industry-specific management practices are already considered in the delisting procedure. When applying models to a petitioned waste, for example, the Agency determines the most common industry-specific management practice for that waste and uses the appropriate model (*e.g.,* petroleum wastes that are typically land treated are evaluated using the land treatment model while metal hydroxide sludges that are typically landfilled are evaluated using the landfill model). Industry-specific waste characteristics are also considered in the evaluation process to identify additional factors and constituents that may cause a waste to be hazardous.

Comment: Another respondent recommended that intended disposal sites be considered since several facilities may dispose their delisted wastes in the same location and collectively influence the contaminant levels at compliance points.

Response: The Agency concedes that codisposal of multiple delisted wastes in one location may influence contaminant levels at compliance points. As previously discussed, however, since the Agency can neither predict nor control where delisted wastes will be disposed, it is not possible to account for this occurrence in petition evaluation.

Comment: One commenter encouraged EPA to consider the characteristics of stabilized products in developing key leachate assumptions for input into EPA's VHS model. The commenter recommended that EPA allow for a waste- and site-specific demonstration of the model's inapplicability to specific wastes.

Response: The Agency agrees with the commenter that the OLM does not specifically address the matrix effect on organic constituents in stabilized wastes. Matrix-specific characteristics of stabilized wastes for inorganics are considered through using the Multiple Extraction Procedure (MEP) analytical test. This test predicts EP toxic metal leachate levels from the stabilized waste following the weathering or degradation of the waste matrix to a fine powder (100 mesh). Petitioners are encouraged to submit additional data concerning matrix characteristics (*e.g.,* buffering capacity, cation exchange capacity, paint filter test) to support an assertion that stabilization will sustain the integrity of the waste in weathering and pulverizing scenarios. The Agency notes, however, that these considerations apply to inorganic toxicants. None of the delisting petitions submitted to date include a stabilization process designed specifically for the immobilization of organics. The Agency believes that the TCLP, if and when adopted for the delisting program, will reflect the ability of specific waste matrices to decrease the leachability of organic toxicants.

B. Right to Comment

Comment: Several commenters stated that because the only information the OLM and VHS models require is waste volume and waste constituent concentrations, the public is not able to comment on any other factors that may

cause a petitioned waste to be nonhazardous or on any erroneous assumptions or incomplete information used in EPA models. One commenter claimed that this is a violation of RCRA section 3001(f)(1), which requires that EPA "provide notice and opportunity for comment on these additional factors before granting or denying such petitions." Another commenter stated that the use of the OLM unfairly restricts the petitioner's submission of relevant data. The commenter recommended that the final rule should state that a proposed denial will be revised if the petitioner, based on the availability of evidence, can rebut the results of the model.

Response: The Agency has never intended to deny the right to comment on proposed petition denials or exclusions. All proposed denials or exclusions are subject to public comment and the Agency will continue to consider any relevant data submitted during the comment periods prior to final decisions. The Agency reiterates that the OLM and the VHS model, like any other regulatory tool used by the Agency (*e.g.*, the EP toxicity test, reactivity test), are used to rank the threat posed by a particular waste under a specific set of circumstances and are not the sole basis for petition evaluation. The Agency has maintained (see November 26, 1985, 50 FR 48910) that petitioners could submit data and arguments detailing the inapplicability of the models to their wastes. The Agency encourages the submission of such information during the petition-review period as well as during the public comment period for proposed decisions. While such submittals may not be used to modify the models, they may be grounds to reconsider the applicability of a model to a given petition.

C. Reasonable Basis for the Determination of Hazard

Comment: Comments were received concerning the Agency's basis for determining whether a waste is hazardous and the extent to which that basis is reasonable. Commenters stated that the models assume an implausible waste management scenario that is inconsistent with EPA's previous position, which one commenter characterized as "that for a waste to pose a 'substantial' hazard covered by RCRA section 1004(5), the improper management of the waste must be plausible (see 45 FR 33113, May 19, 1980)."

Response: EPA disagrees with the commenters in part. The Agency asserts that the models portray reasonable worst-case scenarios and that EPA has carefully considered the comments and suggestions provided by the public in order to ensure that the models are reasonable.

The commenters' interpretation of the cited statute and preamble, however, is correct. RCRA section 1004(5) defines the term "hazardous waste" as:

> . . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (a) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

The cited preamble states that:

> In the Agency's view, the hazards posed by a waste are not "substantial" (section 1004(5)(B)) if hazards could arise only as a result of implausible types of waste mismanagement. Thus, the Agency would not examine possible hazards arising from improper waste incineration if the waste in question is not likely to be incinerated.

These citations show that Congress and EPA intend that appropriate types of mismanagement scenarios be considered. For example, if a specific waste is typically landfilled, the hazards of landfill mismanagement should be evaluated. That is what the Agency does. Thus, the disposal conditions assumed in the models, and the ways in which the models are applied are plausible (*i.e.*, a waste that the Agency applies the land treatment model to should reasonably be land treated and land treatment could reasonably pose as much of a hazard as assumed in the land treatment model).

Comment: One commenter stated that EPA has not demonstrated that the worst-case assumptions used in the model are reasonable, since factors such as attenuation and biodegradation have not been considered. Therefore, the commenter characterizes the model as unreasonable in its approach to determining whether a waste is hazardous.

Response: These factors were considered by the Agency and it was determined that the assumption of no attenuation or biodegradation represented a reasonable worst case (see 50 FR 48903, 48954 and 48961, November 27, 1985). Further discussion of biodegradation is provided later in this notice.

D. Use of Health-Based Standards

Comment: Two commenters stated that the rulemaking cannot be reviewed completely or adequately without EPA providing the health-based standards that will be used in the decision-making process. EPA must demonstrate that these standards are appropriate and reasonable for such use. In addition, the commenters recommended that the health-based standards be proposed for at least a 60-day public comment period and that background materials be available at the beginning of the comment period. One of the commenters also stated that no explanation was provided concerning the use of these standards as regulatory standards or how the standards were developed. The commenter also stated that EPA's current approach is confusing and fails to constitute a reasonable regulatory approach of determining and presenting these standards for comment, thus violating 5 U.S.C. 553 of the Administrative Procedure Act.

Response: The Agency agrees that the health-based standards must be proposed for public comment and review. EPA regrets that all necessary background materials were not available at the beginning of the comment period for the November 27, 1985 notice. The comment period was therefore extended in a Notice of Availability for the health-based standards used in petition decisions published in the November 27, 1985 notice (see 51 FR 27061, July 29, 1986). Measures have been taken to ensure that current and future public dockets are complete. The Agency points out, however, that documents and references that are readily accessible to the public are not normally placed in the docket. The Agency intends to propose all health-based standards to be used in support of the petition evaluation process and will demonstrate their appropriateness. These standards will be developed on an as-needed basis. Some standards will be proposed in a group as a separate FR notice, while other standards may be proposed individually as part of a proposed exclusion or denial (see proposed nickel standard, 50 FR 20247, May 15, 1985).

Comment: One commenter stated that it is not clear whether these "health-based" standards are the only standards EPA intends to use when evaluating petitions and whether these standards will be applicable only to ground-water-related impacts or to air exposures as well.

Response: The relevant health-based standards for each hazardous constituent will be adopted as delisting standards. As petitions are evaluated that require a consideration of standards for new constituents,

standards for these additional constituents will be developed. Interim standards will be used when necessary. Standards will be developed separately for groundwater and air exposures. Ground-water standards will consider Reference Doses (RfDs) and Maximum Concentration Levels (MCLs) for a 70 kg man who consumes 2 liters of contaminated water daily. Air exposure standards will be developed as needed, and proposed with the individual delisting proposals.

Comment: The commenter stated that many of the standards are at such low concentrations that when they are used to "back-calculate" a constituent concentration, the levels in the waste are below current analytical detection limits. The commenter stated that while EPA recognizes this problem and has agreed to act upon a petition if the waste is non-hazardous at best achievable detection limits (50 FR 48909), this intent was not included in the proposed rule. The commenter also stated that these detection methods are not statistically reliable at the detection limits.

Response: The Agency recognizes that, for several constituents in some waste matrices, current SW-846 analytical methods do not provide sufficient detection limits to enable petitioners to demonstrate that the constituents are not present at levels of regulatory concern. Through back calculation from the health-based standards (using the OLM and the appropriate dispersion model), petitioners can determine the level of detection that is required for each constituent in their waste prior to the submission of analytical data in support of their petitions. When a petitioner determines that SW-846 methods are insufficient to demonstrate that an expected constituent is not present at the levels of concern, or when matrix interferences or other analytical difficulties prohibit the achievement of statistically reliable SW-846 method detection limits, the Agency will provide guidance (on a petition-specific basis) as to additional sample clean-up or analytical methods and the acceptability of the achievable detection limit. Where hazardous constituents in a waste are determined to be non-detectable using appropriate analytical methods, the Agency will, as a matter of policy, not regulate the waste as hazardous. Appropriate minimum detection limits will be determined on a case-by-case basis and will depend on the waste matrix.

E. Stringency of Proposed Rule

Comment: One commenter stated that the proposed rule "impermissibly" creates a test for delisting organic wastes that is more stringent than the existing delisting procedure by: (1) Effectively presuming that any waste containing Appendix VIII organic toxicants is hazardous; (2) excluding relevant factors from the model; (3) assigning conservative values to the factors used in the model; and (4) disallowing public comment after promulgation of the model.

Response: The Agency asserts that the OLM is an appropriate, permissible, and useful tool for the evaluation of petitioned wastes. HSWA (section 3001(f)(1)) confers on EPA the authority to consider any factors, including the presence of Appendix VIII constituents, which may cause a petitioned waste to be hazardous. The OLM and VHS models provide the Agency with a means of evaluating whether a given concentration of an Appendix VIII constituent is a threat to human health or the environment. Thus, it is not the presence of a toxicant but, rather, the concentration of the toxicant and its potential mobility that is evaluated in determining whether a waste is hazardous. The Agency does not believe that relevant factors have been omitted from the model and has provided additional discussion elsewhere in this notice concerning assumptions that factors such as biodegradation and attenuation were considered in the development and application of the models. In addition, the Agency believes that the conservative values used in the model are necessary in order to model a reasonable worst-case scenario. Finally, the Agency has provided the requisite comment period for proposed rulemakings, has extended the comment periods on various occasions, and in response to public concern has provided further clarification concerning the assumptions incorporated in the final VHS landfill model after its promulgation.

Comment: One commenter stated that EPA justifies its conservative approach based on the assumption that once a waste is delisted, it is no longer under EPA's control. The commenter argued that this assumption is inapplicable, since generators must still test these delisted wastes to determine if they are hazardous, and if they are, they must be managed as hazardous wastes.

Response: Generally, once a waste is delisted, Subtitle C requirements will no longer apply. The delisting decision, however, is a limited one. It is only a determination that the waste generated at that particular facility is different from the waste listed as typically hazardous. The waste remains a solid waste, and thus if in the future the waste exhibits any of the characteristics, it is a hazardous waste. In addition, except in those cases where a conditional exclusion is granted, petitioners are only required to determine whether their wastes exhibit any of the characteristics of a hazardous waste contained in Subpart C of Part 261. Testing is not required. The Agency's use of reasonable worst-case assumptions in the delisting program is primarily related to the attributes of the disposal unit in which the waste will be managed once delisted. The determination for Subpart C characteristics does not provide for continued Agency control to the extent implied by the commenter. In view of this, the Agency believes that the use of conservative, reasonable worst-case assumptions in the evaluation of petitions is justified.

Comment: One commenter stated that the predicted organic constituent leachate levels from the OLM may not have any similarity to the results of the analytical leachate test currently being developed. The commenter requested clarification of the Agency's approach to evaluating a petition in which a petitioned waste fails the model, but the results of the new analytical test indicate that pollutant levels are lower than the regulatory standards.

Response: EPA reiterates that the OLM will be replaced by an analytical test method such as the TCLP when such a method is available and determined to be appropriate for delisting. The test results will take precedence over the OLM evaluation when a waste can be delisted by the analytical results, but fails the model.

2. Organic Leachate Model Assertions Challenged and Model Revisions

The Agency received a number of comments concerning the assumptions underlying the proposed OLM and the procedures used to develop that model. The Agency agreed with a number of these comments and, since the incorporation of those comments resulted in substantial changes to the model, responded to the comments, presented the revised OLM, and requested comments on the Agency's responses on July 29, 1986 (see 51 FR 27061). The comments that were addressed in the July 29 notice and the Agency's resultant responses are summarized below.

A. Comments on the OLM Incorporated in the July 29, 1986 Notice

Data Set. The OLM is an empirical equation derived from a supporting data base of waste constituent concentrations and experimentally measured leachate concentrations. This data base will be referred to as the leaching data base (LDB) for the remainder of this notice. Several commenters expressed concern over the reliability and development of this data set.

Comment: Two commenters stated that the LDB excluded zero leachate concentration values and other data points, but no explanations were provided in the docket to support these exclusions.

Response: The Agency reconsidered the exclusion of data pairs with zero leachate concentration values. These data pairs were re-incorporated into the LDB and, as a reasonable worst-case analysis, the analytical detection limit value was used instead of zero.

Comment: One commenter questioned the reliability of the OLM due to data transcription errors in the LDB.

Response: The Agency corrected the data transcription errors and has incorporated the corrected values into the LDB.

Comment: One respondent stated that the OLM is based on a limited set of wastes and the data used reflect short-term rather than long-term leachings. The commenter also stated that the LDB is limited to too few leaching media and waste types.

Response: In the course of re-evaluating the LDB, the Agency concluded that the data base inadequately represented data for compounds with very low solubilities (*e.g.*, less than 0.01 ppm), and that it should include data developed during lysimeter tests and during the development of the Toxicity Characteristic Leachate Procedure (TCLP). The Agency therefore incorporated this additional data into the LDB. The revised LDB includes 7 leaching media and 10 waste types.[1] Since the solid to liquid ratio of the TCLP-type leaching test was designed to represent mid- to long-term leaching.[2] the incorporation of that data into the LDB reflects such leaching.

Comment: One commenter stated that because municipal/industrial landfill leachates are not particularly aggressive (*i.e.*, strong), greater weight should be given to leachate data developed using an aqueous, neutral pH medium rather than data derived using acidic leaching media.

Response: The Agency maintains that municipal landfills are known to produce high-strength leachates, which frequently contain significant levels of organic acids formed by the decomposition of carbohydrates. The Agency, therefore, does not agree with the commenter that landfill leachates are not particularly aggressive or that aqueous neutral pH leachate data are more appropriate than acidic leaching media. The EP toxicity test is conducted using acetic acid to maintain an acidic pH of 5 to simulate municipal landfill leachate pH.[3] Acetic acid is the dominant fatty acid found in typical landfill leachate.

The technical literature supports EPA's assumptions that leachates are acidic. The acid strength of leachate is a result of microbial decomposition, which converts waste into organic acids. An initial process of aerobic decomposition depletes the subsurface environment of oxygen. Once oxygen levels are depleted, anaerobic decomposition of carbohydrates into fatty acids occurs. Typical leachate generated by this phase of decomposition contains the following concentrations of organic acids: [4]

	mg/l
Acetic acid	3,800
Propionic acid	1,600
n-Butyric acid	3,500
iso-Butyric acid	145
n-Valeric acid	2,100
iso-Valeric acid	70
Caproic acid	3,700

Free volatile fatty acids have been reported to constitute up to 54 percent of the total organic carbon of fresh leachate.[5] The Agency therefore concluded that the use of data from tests using acidic leaching media is appropriate and retained the results from such tests in the OLM.

Reapplication of the Regression Procedures for the OLM. Through reapplication of the regression procedures, the Agency determined that the leachate behavior of organics can be described effectively by a concentration and solubility logarithmicbased equation. The Agency, using the expanded LDB, re-evaluated the OLM and presented the following mathematical relationship that best describes the baseline leaching behavior of organics from a waste:

$$C_l = 0.00221\ C_w^{0.678}\ S^{0.373}$$

where:

C_l = predicted contaminant concentration in the leachate (mg/l)

C_w = contaminant concentration in the waste (mg/l)

S = contaminant's water solubility at ambient temperature (usually between 18 and 25° C) (mg/l)

The Agency selected this model because it has the best overall fit to the LDB and the highest significance of any model evaluated (R-squared = 0.6453).[6] This equation specifically describes the baseline behavior of leachate concentrations of organics.

In addition to the baseline equation, the Agency proposed a 95 percent confidence interval version of the baseline equation. The Agency specifically solicited comments as to which version of the OLM is appropriate.

Comment: One commenter stated that EPA's original method for determining the 95 percent confidence interval was statistically incorrect and yielded an overly conservative model.

Response: The Agency agreed that the initial methodology was incorrect and revised the methodology for calculating the 95 percent confidence interval in the July 29 notice.

Comment: One commenter stated that EPA's assumption that candidate model equations must pass through the axis origin is unnecessary because in regression analysis, the fitted equation is only applicable approximately over tho range of values for the independent variable. Thus, eliminating non-zero intercept equations is not only unnecessary, but also unrealistic.

Response: The Agency agreed that forcing the model equation to pass through the axis origin was unnecessary, since the model is not based on data pairs near the axis origin. The modeling procedures were re-run without this forcing assumption. It is logical, however, to expect that as the concentration of a constituent in a waste approaches zero, the leachate concentration also would approach zero.

[1] The original data base contained only 1 leaching media.

[2] See *Background Document, Toxicity Characteristic Leaching Procedure*, March 10, 1986. A copy of this document is available in the public docket to today's notice.

[3] U.S. EPA, Office of Solid Waste. May 2, 1980. "Background Document—§ 261.24—EP Toxicity Characteristic." p. 53.

[4] Dunlap, W.K. 1976. Organic Pollutants Contributed to Groundwater by a Landfill. EPA-600-9-76-004. pp. 96-100 in Holmes, J.R. *Practical Waste Management.* John Wiley & Sons, Ltd.

[5] Farquhar, G.J. and Sykes, J.F. 1982. "Control of Leachate Organics in Soil." Conservation and Recycling. Vol. 5. No. 1. pp. 55-68.

[6] Other models evaluated by the Agency were described in the docket to the July 29, 1986 notice.

B. Comments Submitted in Response to the Notice of Availability

A number of commenters expressed concern that their comments submitted in response to the November 27, 1985 proposal were not addressed in the Notice of Availability. The Agency did not attempt to address all of the November comments in the Notice of Availability, but rather addressed only those comments which resulted in modifications to the LDB, the regression analysis, the application of the 95 percent confidence interval, and the health-based standards. The remaining November comments have been addressed in today's notice in Section 2.C. Comments submitted during the comment period of the Notice of Availability which were duplicative of the November comments are also addressed in Section 2.C.

The remainder of this section addresses those comments concerning the Notice of Availability and its docket.

Accuracy of OLM for Low Solubilities and Low Concentrations

Comment: One commenter stated that the revised OLM does not work for compounds with solubilities lower than 1 mg/l, and pointed out that the coefficient for multiple correlation (R^2) is no higher than 0.32 for these compounds. The commenter also questioned the performance of the OLM for chemicals with total waste concentration less than 1 ppm since R^2 is 0.27 for this subset of the OLM's data base. The commenter believes that there is a clear relationship between R^2 and solubility which suggests that the analysis is being driven by the high solubility compounds. The commenter provided the following recommendations concerning the OLM and low solubility compounds:

- In order to minimize the extent to which highly soluble compounds drive the standard least-squares regression analysis (where large magnitude numbers are given proportionally more weight in determining the position of the regression line), a sample magnitude weighting procedure should be used. This approach has been used by EPA in other rulemakings.
- The application of the model should be limited on a chemical-specific basis. The model should not be applied when the total waste concentration of a compound is likely to result in a leachate concentration below the method detection limit. The commenter recommended that the OLM data base to be used to determine the appropriate lower total waste concentration cutoffs.

Response: The Agency does not believe that it is appropriate to examine small portions of the regression curve since the curve-fitting process incorporates all of the available data. The Agency is not aware of any data which implies that the leaching relationship (as represented by the empirical equation or as derived on a theoretical basis) changes at high or low solubilities or concentrations. The Agency believes that the observed low R^2 for the very insoluble compounds is probably due to the inherent inaccuracies and variabilities of analytical results at very low concentrations rather than an inaccuracy in the empirical equation. The suggestion of a chemical-specific application of the OLM is addressed separately below.

Use of Detection Limit for Non-Detected Leachate Concentrations

Comment: The commenter supported the Agency's inclusion of data pairs with non-detectable leachate concentrations. Two commenters disagreed, however, with the use of the detection limit as the leachate concentration, claiming that this assumption severely biases the results of the regression analysis, particularly when the 95 percent confidence interval is applied. One commenter recognized that one value must be assigned for these data pairs to allow their incorporation in the OLM data base, but stated that the use of the detection limit is unacceptable for these samples where no trace of the constituent was observed.

The commenter suggested that EPA could assign randomly selected concentrations to each sample with a non-detected leachate concentration This would allow the incorporation of all data pairs with non-detectable leachate concentrations without introducing bias.

Response: The Agency agrees that if data pairs with non-detected leachate concentrations are to be included in the LDB, they must be assigned nonzero concentrations. However, the Agency maintains that randomly selected concentrations do not yield a more accurate model for concentrations below the detection limit. The use of randomly selected leachate concentrations ignores the correlation between waste composition and leachate concentration and thus serves only to introduce additional error to the model. Additionally, randomly selected leachate concentrations violate the Agency's policy of conservatism under uncertainty in cases where the leachate is certain to contain the undetected organic compound. The Agency recognized that the use of detection limits in this case introduces some bias to the model but argues that no more adequate approach to imputing values for nondetected leachate concentrations has been recommended by the commenter.

Comment: The commenter agreed with EPA that extrapolation beyond the limits of analytical accuracy (*i.e.*, below the detection limits) lends uncertainty to application of empirical models. The commenter stated that the use of extrapolation is particularly inappropriate when the detection limit is used as the leachate concentration since the model would then be applied beyond the range of the available empirical data.

Response: The Agency maintains that extrapolation beyond the range of the LDB is reasonable for two reasons. First, there is no reason to believe (and no case has been presented to support) that leaching phenomenon as described by toxicant concentration and solubility is different at low solubilities and concentrations. Secondly, the accuracy and precision of the available analytical methods are reduced at low concentrations, thereby increasing the relative reliability of a model based on the more accurate range of data.

For these two reasons the Agency believes that, in this case, extrapolation is appropriate and possibly preferable to analytical methods to evaluate the leachability of toxicants at low solubility and concentration.

Use of the 95 Percent Confidence Level

Comment: The commenter agreed with the Agency's revised method for calculating the upper 95 percent confidence level of the OLM. The commenter, however, does not necessarily believe that the 95 percent confidence level should be used in making delisting decisions. The commenter believes that EPA used a series of overly conservative assumptions in the OLM and VHS and believes that the simultaneous occurrence of all of these assumptions is very unlikely. Given the conservation built into the other components of EPA's delisting methodology, this commenter and others recommended that the base-line version of the OLM be used in delisting petition evaluation.

Response: The Agency agrees with the commenter that the application of the 95 percent confidence interval is not necessary for evaluating organics data in delisting petitions. The Agency, however, does not believe that the underlying assumptions of the OLM and VHS models are overly conservative, but rather that they represent a reasonable worst-case scenario. The application of a 95 percent confidence interval to the OLM, however, will result

in overly conservative results due to the model's large mean square error (MSE). The Agency believes that use of the 95 percent confidence interval will place an undue burden on the petitioners, and thus the Agency has decided to use the baseline version of the OLM.

Comment: The commenter agreed with EPA that there is significant variance in the OLM data base and that the method may not include all relevant variables. The commenter recommends that the delisting petitioners be given the opportunity to submit actual leaching test data for its waste instead of using the model with its inherent flaws.

Response: The Agency agrees that actual leaching data is preferable to the OLM. When a leachate test for organics is promulgated for delisting purposes, petitioners will be requested to submit organics leaching data for evaluation of the waste under the toxicity characteristic and as input to the VHS model. The Agency does not intend, however, to use this data now, in advance of a decision on the TCLP and the extent to which that procedure is appropriate for delisting.

Comment: The commenter believes that the 95 percent confidence level is not appropriate because in some cases (*e.g.*, benzo(a) pyrene, benzo(b)fluoranthene, and dibenzo(a,h)anthracene) the model, at the 95 percent confidence level, predicts a leachate concentration higher than the solubility of the compound.

Response: EPA disagrees that this phenomenon indicates that the use of the 95 percent confidence level is inappropriate. The leaching data base contained a number of data pairs where the leachate concentration exceeded the compound's water solubility. Since the leaching media in a municipal landfill has been shown to be more aggressive than an aqueous leaching media, it is quite possible that leachate concentrations may exceed solubility levels.

Use of OLM or Analytical Leaching Method

Comment: The commenter believes that, for the limited purpose of evaluating existing delisting petitions, the OLM may be a viable approach for certain chemicals and wastes. Since the Agency has proposed the TCLP, however, the OLM has become redundant. Since the OLM is based primarily on results of the EP and the TCLP, the commenter believes that the OLM has no advantage over requiring future petitioners to submit TCLP data. In addition, because the OLM obscures the matrix dependency of leaching, the use of the TCLP is more desirable. Two other commenters recommended that EPA accept TCLP results rather than applying the OLM.

Response: As stated before in the proposed notice (November 27, 1985) and in the Notice of Availability, the Agency intends to replace the OLM with a viable leaching test when such a test is adopted in the delisting program. Until then, the Agency believes that the empirical OLM is an acceptable method of petition evaluation. EPA reminds the commenter that lysimeter data were included in the regression analysis, as well as a number of different leaching media.

Comment: The commenter recommended that petitioners who have already filed with EPA be given the opportunity to submit leaching data using the proposed TCLP as an alternative to the OLM in predicting leachate concentrations. The commenter also believes that the only scenario in which EPA should use the OLM instead of the results of a leaching procedure, is when a petitioner has already submitted a petition and total constituent data and does not wish to provide leaching test data.

Response: The Agency will not consider the results of the TCLP in evaluating delisting petitions until we conclude that it would be appropriate for delisting. The Agency has received extensive comments on the proposed method and is considering a number of potential modifications to the method and its underlying assumptions. Thus, even if the use of the proposed TCLP were submitted, the use of the proposed method could potentially produce different results than the result of the method when promulgated. This would require the petitioner to resample and reanalyze the waste according to the final procedure.

Comment: The commenter, while endorsing the concept of an analytical leaching method, expressed numerous reservations about the proposed TCLP and made reference to comments submitted in response to the TCLP proposal.

Response: The Agency will address the commenter's concerns in a separate notice when we finalize the organic toxicity characteristics. The Agency will examine the underlying assumptions of the leachate test when finalized to determine the most appropriate manner to incorporate this test into the delisting petitions evaluation process.

Comment: The commenter questioned the logic of EPA's statements concerning the lack of an acceptable analytical leaching method while EPA used the results from these "unacceptable" test procedures to develop the OLM. The commenter argued that an empirical model cannot be any more valid than the test procedures from which it is derived.

Response: The Agency has not yet promulgated an organic leaching method because of the variability in the results of the available methods. One purpose of proposing a method for public comment is to allow the public to suggest modifications to increase the dependability of a method. The Agency believed that the results of the TCLP, while variable, were generally acceptable for inclusion into the data base for an empirical model, and that the averaging effects of a regression analysis could cause the resulting model to be representative of the results of a modified and reliable TCLP.

Opportunity for Comment on VHS Land Treatment Model and Health-Based Standards

Comment: The commenter questioned why the July 29, 1986 Notice of Availability did not address the comments submitted in response to the proposed rule concerning the VHS land treatment model and the health-based risk levels and concentration limits. The commenter believes that these components of the delisting methodology contain flaws as significant as those identified for the OLM, and thus the Agency should provide opportunity for comment on EPA's responses to these issues.

Response: The July 29, 1986 notice was intended to be a response to those public comments received on the November 27, 1985 proposal that resulted in significant modifications to the proposed OLM. The comments received on health-based risk levels were addressed through the extension of the comment period provided by the July notice. For the VHS land treatment model, comments did not result in significant changes to the model, thus the comment period was not reopened in July.

Chemical-Specific Approach vs. OLM

Comment: Two commenters believe that there is more theoretical and practical justification for developing either waste-specific or, more appropriately, organic compound-specific equations for predicting leachate concentrations as a function of waste concentrations and matrix type than using the overall generic OLM proposed by the Agency. The commenters questioned the appropriateness of a generic OLM which applies to a large number of organic

chemicals with very different chemical properties. One commenter provided limited evaluations of the OLM leaching data. The commenter suggested that better predictions of leachate concentration as a function of waste concentration are possible using this approach.

Response: The additional data required to develop a series of chemical-specific equations would be tremendous. The Agency is not convinced that such an approach would be a significant improvement over the OLM. The Agency currently has only limited data for many chemicals and an equation based on a very few data points may not be as reliable as one based on a substantial number (such as the OLM). In the Agency's development of a theoretical basis for the OLM, solubility was the only chemical-specific property which affected leaching. The regression analysis showed that the solubility variable has a high degree of significance, which is an indication of the appropriateness of including solubility in the leaching equation.

Cosolvent Effects

Comment: The commenter disagreed with a statement in the Organic Leachate Model Background Document (p. 1–3) which said that the presence of organic compounds in leachate increases the leaching of other organics in the waste. The commenter pointed out that the Oak Ridge National Laboratories report (51 FR 21684, reference 6) conclusions state that the highest ranked extraction fluids for organics were distilled water and carbonic acid, neither of which contains organics.

Response: The Agency's response to this comment is found in Section 2.C, Constituent Mobility.

Theoretical Approach to Modeling

Comment: The commenter disagreed with the Agency's theoretical equation development which was used as the basis for the empirical OLM. Specifically, the commenter stated that the fractions of organic carbon and solids in the immobile phase cannot be assumed to be constants across the different waste matrices which constitute the LDB. The commenter recommended that the Agency abandon the theoretical equation development and recognize that the development of the OLM is primarily a curve-fitting exercise.

Response: The Agency never maintained that the development of the empirical OLM was anything but a curve-fitting exercise. The theoretical equation discussed in the OLM Background Document served as a model form. In the derivation of this form, the variables for the fraction of organic carbon and total solids were not assumed to be constant, but rather were indeterminant and were allowed to "float" in the regression analysis. The effect of this step is the high variance seen in the regression analysis, as stated in the November and July notices. These variables were not included in the OLM because: (1) They were not available for the wastes included in the LDB; and (2) the analytical method for determining the organic carbon fraction of a solid waste is difficult and would be an excessive burden on petitioners.

Data Editing Procedures

Comment: The commenter agreed with the Agency's averaging of multiple leachate values for a given waste matrix when different extraction fluids were used in order to avoid biasing the empirical equation with multiple extractions of one waste. The commenter questioned, however, why the Agency claimed certain samples to be redundant and eliminated them from the LDB. The commenter believes that these samples represent a duplicative analysis of the total waste concentration and leachate concentration from one extraction method, and as such should have been included in the overall average for that data pair. (If the waste concentration was much higher than that for the other sample of the same waste, then the sample should have been included as an independent data pair.)

Response: The samples were eliminated because they were replicate samples that exhibited high variance. These samples were all from one laboratory and the Agency believes that they are unreliable.

Comment: The Agency believes that overall the commenter agreed with the Agency's data editing procedures. The commenter, however, questioned the deletion of samples with high soluble constituents and low leachate concentrations (0.1 percent of waste concentration). The commenter stated that data pairs eliminated in this editing procedure may have been exhibiting a matrix effect rather than an analytical problem. The commenter questioned the need for this procedure since the model optimization process eliminates true outliers from the data set after the initial regression analysis is completed.

Response: The Agency continues to believe that these data pairs exhibiting high solubility and extremely low leaching should not be included in the LDB. The 50 data pairs which were deleted were associated with 22 different wastes. Due to the number of waste matrices involved, the Agency does not believe that the low leaching levels observed for the 50 data pairs were associated with waste matrix effects. The Agency also maintains that some true outliers will not be identified through the regression since the mean square error is large.

Comment: The commenter pointed out that while the Agency deleted samples from the data base when any one constituent's total concentration exceeded 100,000 ppm, the Agency retained waste S–5 for hexachlorobenzene which contained 469,000 ppm of the chemical.

Response: The commenter was mistaken. The data pair was not included in the LDB.

C. Comments on the OLM Not Addressed in the July 29, 1986 Notice

Reapplication of the Regression Procedures

Comment: One commenter asserted that EPA's statistical analysis of waste leachability is invalid because it does not reflect the variability in the LDB due to the use of average data. In addition, the respondent stated that in order for the public to judge the adequacy of the Agency's regression, EPA must provide a confidence interval for the regression curve.

Response: The Agency disagrees that the use of average concentration values for an individual waste in the LDB is inappropriate. Average values were used when the leachate concentration of a constituent within a waste was determined by several leaching techniques. Average values eliminate the variations in laboratory techniques, and thus, the Agency asserts that these values are most likely to be representative of actual leaching rates.

Further discussion on the use of average concentration values is provided in the public docket to today's notice in the OLM Background Document. The background document also contains confidence intervals for the dependent variables in the OLM.

Comment: One commenter stated that a model simulation (*e.g.*, Monte Carlo) is needed to determine the probability or likelihood of the model's outcome.

Response: The Agency has determined that the use of a probability simulation such as a Monte Carlo application to the revised model is inappropriate. The revised OLM is based upon actual concentration and solubility data. When actual data with its inherent variations are available, it is

inappropriate to simulate that data with probability distributions.

Concentration Input to VHS Models

Comment: Two commenters recommended using analytical data rather than the OLM to predict a waste's leachate concentrations. One of the commenters recommended using a test similar to the draft Toxicity Characteristics Leachate Procedure for wastes containing volatile organic constituents and using actual EP test data for non-volatile organic constituents. Another commenter stated that EPA's use of the OLM increases the uncertainty of the delisting process, is unnecessary since actual testing is possible, and is representative of neither the wastes in question nor the constituents of concern.

Response: EPA intends to use the results of an analytical organics leachate test as input to the VHS; however, none of the tests suggested by the commenters or studied by the Agency have been completely evaluated, especially in terms of the comments received on the TCLP to be considered for use in the delisting program. Until a final analytical method becomes available, the Agency believes that the revised OLM is a reliable and useful tool for use in petition evaluation.

Comment: Another commenter stated that the use of maximum leachate concentration or the upper 95 percent confidence value as input to the OLM represents a "worst worst-case" rather than EPA's "reasonable worst-case." The commenter recommended that EPA consider using either the mean plus one standard deviation or the median value as an input concentration.

Response: The Agency disagrees with the commenter. As long as few samples are available, the maximum leachate concentration may represent the actual leachate concentration from the waste. The use of the maximum or 95 percent confidence interval limit is generally appropriate for the evaluation of the analytical data used to characterize the waste. The selection of the proper statistic depends upon petition-specific factors, including the number and location of samples that are analyzed, the distribution of the reported concentrations, and the expected variability of the waste. The Agency refers the commenter to 50 FR 48909, November 27, 1985. Here, the Agency has stated that the mean, maximum, or 95 percent confidence interval may be used, depending on a number of petition-specific factors. In addition, the Agency conducts outlier analyses to measure the extent to which the data is representative. The Agency intends to explain further which value will be used under what circumstances in the near future.

Comment: One commenter recommended that delisting decisions be based upon total concentrations of constituents in the waste rather than upon an extract of the waste, in order to allow the Agency to consider various constituent transport scenarios involving physical migration and the effects of solvent codisposal. The commenter noted that EPA has used this approach in the past and urged its continuance. Another commenter stated that since the waste matrix effects on leachate concentrations are unknown, the leachate constituent concentration should be assumed to be equal to the waste constituent concentration.

Response: The Agency believes that using the total waste concentration of inorganic or organic constituents is appropriate only if the waste could be expected to migrate (*e.g.*, if the waste is a liquid). For solid wastes, however, physical migration is not expected and thus, this approach is overly conservative. A discussion is provided elsewhere in this section concerning the effects of solvent codisposal and waste matrices.

Model Review

Comment: One commenter suggested that EPA submit the model and alternative approaches to the Science Advisory Board (SAB) or some other recognized scientific organization for review and comment.

Response: Since the OLM is an interim tool that will be replaced when an analytical organic leaching test is made final, such review was not believed to be necessary.

Constituent Mobility

Comment: One commenter stated that EPA has not addressed mobility mechanisms, such as physical migration and constituent solubilization, due to codisposal of solvents, and that EPA's conclusion to ignore codisposal with organics cannot be justified, since such disposal occurs on a regular basis in both hazardous and Subtitle D landfills. The commenter submitted further evidence that solvents are likely to be present in Subtitle D facilities. The commenter recommended that all delistings of organic wastes should be delayed until a suitable method for assessing migration associated with codisposal with solvents is developed.

Response: The Agency does consider physical migration of delisted wastes where, for example, the waste is liquid. For liquid wastes, as a reasonable worst-case assumption, the Agency uses the actual concentrations of organics in the waste, rather than the predicted leachate concentration from the OLM, as input values to the VHS models.

The Agency agrees that solvents are present in Subtitle D landfills and resultant leachates. The Agency believes that solubilization effects occur to some degree within wastes that contain soluble solvents and has included wastes with high levels of solvents in the data base used to develop the revised model. EPA believes that, to some extent, solubilization effects are currently reflected in the data used to develop the model. The Agency does not have sufficient data at the moment, however, to consider the cosolvent effects more completely. The Agency is developing a solvency characteristic, which will begin to address the effects of solvency in land disposal.

Comment: One commenter stated that the model will seriously underestimate pollutant mobility, particularly for polynuclear aromatic hydrocarbons (PNAs) in elements of oily wastes. This commenter recommended that the model consider cosolvent effects since there is extensive literature conclusively supporting the mobility of oil in the ground.

Response: While PNAs are likely to be attenuated by solid wastes (as they are in soils), as evidenced by their high sediment organic carbon water partition coefficients (K_{oc}), the models assume no attenuation. The leaching data base contained eight oily wastes which represented 15 percent of the data set. Many other wastes that were included in the data base, such as organic still bottoms, may have oily characteristics. Thus, the Agency believes that oily waste cosolvent effects are reflected in the data base. The Agency is currently considering different methods of evaluating the mobility of oily wastes.

Degradation

Comment: Commenters expressed a wide range of concerns on the degradation of leachate contaminants, as noted below:

- Biodegradation of organic compounds can be estimated using reasonable worst-case conditions. Consideration should be given to a reasonable worst-case biodegradation rate.
- Certain organics decrease in concentration in the environment due to biodegradation.
- Numerous organics, especially halogenated hydrocarbons, are transformed into intermediates of greater toxicity than the parent compounds.
- "It is argued that most organics are not transformed in ground water since recent

studies have shown that many organics are resistant to chemical and/or biological transformation under conditions typical for the subsurface [environment]."

• "Hydrolysis in ground water is poorly documented, and therefore, considering the technical uncertainty in this area, transformation to less toxic compounds cannot be assumed."

• As a reasonable worst-case assumption, the Agency should assume that organics are not transformed. However, when transformation does occur, the reasonable worst-case assumption is that they are transformed to more toxic compounds, since neither abiotic nor biotic transformation of organics necessarily render the parent compounds non-toxic.

• Factors such as chemical concentration and redox conditions may significantly impact transformation.

• Assumptions should be developed to replace the zero biodegradation retardation assumptions on which the model was based.

Response: The Agency recognizes that many of these assertions, under certain circumstances, are true. The concentrations of some organics in the environment are reduced due to biodegradation, but other, more toxic transformation products are sometimes produced instead. The net result of degradation processes in a landfill depends on a wide range of chemical and site-specific factors unique to each landfill. In order to include the effect of degradation in the OLM, the Agency would need substantial evidence from the technical literature that biodegradation either increases or decreases the overall hazard at a landfill. This type of literature, as yet, has not been identified. In the absence of sufficient data to develop such a generalization, the Agency believes it is reasonable to assume that biodegradation does not have a significant effect on leachate concentrations.

Degradation Occurrence in the Subsurface. The technical literature supports the hypothesis that biodegradation of organic compounds occurs in the subsurface environment and therefore influences the fate of organic solvents in landfilled wastes. For example, researchers from Rutgers University concluded that leachate-derived carbon can be used as the sole source of carbon for microbial energy and growth and that the reduction of dissolved organic carbon (DOC) in landfill leachate over time is due to biological oxidation and not to sorption, stripping, or evaporation. The researchers performed microorganism growth and substrate degradation studies on leachate in the absence of glucose and other nutrients and found that the acclimated populations used carbon, phosphorous, and nitrogen derived solely from the leachate.[7]

A similar conclusion was reached when microbial degradation of leachate organic matter was investigated at the University of Waterloo in Ontario, Canada. The destruction of organic matter was observed on a laboratory scale using two packed soil columns operated anaerobically under continuous saturated flow conditions. Decreasing levels of chemical oxygen demand (COD) and total organic carbon (TOC) revealed that significant microbial degradation of organics in soils occurred. The results were compared to field data and were found to simulate closely the situation at a closed sanitary landfill.[8]

Degradation—Mechanisms. Given a suitable environment, soil bacteria degrades a wide variety of hydrocarbons, as evidenced by the low to moderate persistence of some organic hazardous waste constituents in soil.[9] Below the surface of landfills, however, the conditions for bacterial growth are less than optimal. Oxygen is in short supply, and sufficient levels of nutrients are not present. The degradation processes operating on organic chemicals are believed to be anaerobic in nature, and aerobic microbial degradation can be eliminated from consideration as a major pathway for hydrocarbon removal. By contrast, anaerobic decomposition was noted as one of the major modes of degradation in a sanitary landfill, although the route, pathways, rate, and degree of degradation are not well-understood. In theory, anaerobic decomposition involves a two-stage process of liquefaction and gasification. During the liquefaction stage, extracellular enzymes degrade complex carbohydrates to simple sugars; proteins to peptides and amino acids; and fats to glycerols and fatty acids. Following this process, methane bacteria converts these compounds into gases, including methane, carbon dioxide, and ammonia, and into other chemical byproducts. Most of the theory on anaerobic decomposition has been developed from conventional anaerobic wastewater treatment systems (laboratory or pilot-scale).[10]

Degradation—In Ground Water. Researchers from Stanford University and the University of Waterloo restated the belief that biotransformation of trace organic contaminants can and does occur in the ground-water zone under certain conditions. These conditions depend on:

• Water temperature and pH

• The microorganism population (numbers and species)

• The concentration of the organic carbon source (substrate)

• The presence of microbial toxicants and nutrients

• The availability of electron acceptors.

The researchers cautioned, however, that "transformation of a toxic organic solute is no assurance that it has been converted to harmless or less hazardous products." They therefore concluded that it is prudent to assume that hazardous contaminants persist indefinitely.[11] The Agency agrees with the researchers.

Degradation of organic solvents (especially chlorinated solvents) may also occur via hydrolysis. When chlorinated solvents are degraded by hydrolysis, the transformation products are usually chlorinated alcohols and/or carboxylic acids. Laboratory-derived reaction half-lives due to hydrolysis were observed to range from 38 days for chloroethane to 7 years for carbon tetrachloride.[12]

Based on their relatively high persistence values and based on the fact that transformation products in some cases may be less toxic than the original chemical and in other cases more toxic, the Agency believes it is reasonable to assume that degradation does not affect contaminant concentrations in leachate.

Comment: One commenter argued that EPA must allow a petitioner to demonstrate that a waste constituent may biodegrade before reaching a receptor point.

Response: The Agency is always receptive to any supporting data a petitioner may provide and encourages petitioners to supply data to support any assertions made in their petitions. Any

[7] Venkataramani, E.S. and Ahlert, R.C. "Acclimated Mixed Microbial Responses to Organic Species in Industrial Landfill Leachate." *Journal of Hazardous Materials.* Vol. 10. pp. 1–12.

[8] Dunlap, W.K. 1976. Organic Pollutants Contributed to Groundwater by a Landfill. EPA-600-9-76-004. pp. 96–100 in Holmes, J.R., *Practical Waste Management.* John Wiley & Sons, Ltd.

[9] Berkowitz, J.B., Harris, J.C. and Goodwin, B. 1981. "Identification of Hazardous Waste for Land Treatment Research," D.W. Schultz and D. Black, eds: Proceedings of the Seventh Annual Research Symposium, Philadelphia, P.A. U.S. Environmental Protection Agency. pp. 168–177, in Bennett 1985.

[10] Bennett, G. August 1985. *Fate of Solvents in a Landfill.* Open File Report prepared for the Environmental Institute for Waste Management Studies, University of Alabama.

[11] Mackay, D.M., Roberts, P.V., and Cherry, J.A., 1985. "Transport of Organic Contaminants in Groundwater." Environmental Science and Technology. Vol. 19. No. 5.

[12] Smith, et al. in "Mobility and Degradation of Common Solvents in Groundwater." May/June 1985. The Hazardous Waste Consultant.

petitioner who has reason to believe that a waste constituent may biodegrade before reaching a receptor point should provide the Agency with data supporting this claim.

Sorption

Comment: One commenter noted that equations are available for the sorption of certain organics in soils with organic carbon content less than 0.1 percent. The commenter urged EPA to include reasonable worst-case assumptions for organic content and to determine the amount of leachate that would be sorbed onto the soil and aquifer sediments between the disposal-site boundary and the compliance point. Several commenters stated that the model should consider the sorptive/desorptive phenomenon. Evidence was submitted on the attenuative characteristics of a stabilized waste product.

Response: The model is based on experimental measurements of desorption (leaching) of organics from waste matrices; the sorptive/desorptive phenomenon is integral to the model. The Agency asserts that it is inappropriate to include additional sorptive effects in the OLM for several reasons: (1) Waste management site-specific conditions, such as soil types, are not considered in the application of the delisting models (see earlier discussion); and (2) generic soil profiles for a typical landfill and receptor well are difficult both to develop and to defend due to the lack of such data.

Waste Matrix Effects

Comment: Several commenters raised the concern that the model does not account for the importance of waste matrix effects, particularly for stabilized wastes.

Response: The Agency agrees that the model does not specifically account for waste matrix effects as an input parameter. The use of leaching data for a wide variety of waste types in designing the model, however, ensures that waste matrix effects have been integrated into the model. The Agency is not aware of any modeling methodologies that could be used in conjunction with the OLM that would take into consideration the attenuation effects of various molecular structures present in stabilized waste. EPA will consider data relevant to matrix and bulk property effects if it is demonstrated by the petitioner that such effects reduce the mobility of constituents from the petitioned waste.

Use of Informal Surveys

Comment: One commenter stated that the Subtitle D landfill survey[13] was not representative of the population, the response rate was poor, the results were questionable, and the basic principles of statistical surveys were not followed. Another commenter stated that informal surveys are not an adequate basis for rulemaking.

Response: The Agency agrees that the landfill survey was not a statistically precise representation of landfill practices. The survey's purpose was to indicate trends in landfill practices. Ongoing literature searches and other available EPA surveys currently are being investigated to provide more comprehensive descriptions of landfill practices. The Agency, however, believes that the Subtitle D landfill survey is adequate for the limited purposes for which it has been used.

3. Land Treatment Model Assertions Challenged

EPA received a number of comments concerning the assumptions underlying the use of the land treatment model. Specifically, the Agency received comments regarding the following issues:

- Land treatment practices
- Biodegradation/adsorption
- Volatilization
- Ground-water analysis
- Facility dimensions
- Petition-specific evaluations
- Use of informal survey
- Use of other models

The comments received and the Agency's responses are presented in the following sections.

A. Land Treatment Practices

Comment: One commenter criticized the accuracy of the Agency's characterization of land treatment operations and the logic of the assumptions applied to the land treatment model. The commenter asserted that the model is driven by site geometry and noted that it does not account for treatment mechanisms and relevant factors such as climate, site hydrogeology, and the waste matrix.

Response: The Agency believes that the proposed land treatment model represents a realistic and reasonable worst-case land treatment scenario. Land treatment, under a controlled and well-managed operation, can be an effective method of waste disposal. The information provided in the published technical literature, however, is insufficient in scope and detail to support the characterization of a typical non-Subtitle C land treatment facility. Land treatment practices vary considerably among sites. The effectiveness of land treatment waste degradation is contingent on a number of factors, including waste composition, loading rate, facility size, soil type, and climate. Although soil bacteria may degrade oil effectively under optimal conditions of aeration, moisture, and nutrient content, these conditions rarely exist naturally.[14] The Agency therefore cannot assume that delisted wastes will be managed in an environmentally protective manner after they are delisted, since important factors such as loading rate, frequency of application, and nutrient addition are not regulated adequately once a waste is delisted.

EPA conducted a study recently, during the fall and winter of 1985–1986, of state and territorial Subtitle D non-hazardous waste programs.[15] One objective of the study was to evaluate management practices and control technologies at Subtitle D facilities and the extent and causes of human health and environmental impacts at such facilities. The results of this study indicate that for 5,605 industrial land treatment units (this estimate does not include data from the states of Illinois, Louisiana, Missouri, and Montana), 84 percent have had compliance inspections once every 2 years or less frequently, and 24 percent have never been inspected. Of the 1,601 industrial land treatment units inspected in 1984 for compliance with state Subtitle D regulations, 15 percent were reported to be in violation of some requirement. A breakdown of these violations is as follows: 45 units, ground-water contamination; 41 units, ground-water monitoring deficiencies; 60 units, surface water contamination; 10 units, air contamination; and 88 units, operational deficiencies and minor violations. Only 11 percent of the 5,605 industrial land application units perform ground-water monitoring, 2 percent perform surface water monitoring, 4 percent perform soil monitoring, and less than 1 percent perform air monitoring. These findings support the Agency's assertion that wastes likely to be land treated may not be managed properly following delisting. Also, as discussed previously, the

[13] See 50 FR 48956 for a description of the Subtitle D landfill survey.

[14] American Petroleum Institute, 1972. The Migration of Petroleum Products in Soil and Groundwater, Principles and Countermeasures, Washington DC, December.

[15] WESTAT, 1986. Mail Survey of State Subtitle D Programs, Preliminary Data. Performed under contract to U.S.EPA, OSW, Special Wastes Branch, May.

evaluation of site-specific factors in the VHS model is generally not appropriate for wastes being considered for delisting. The Agency therefore believes that its assumptions about land treatment operations are appropriate for wastes being considered for delisting.

Comment: One commenter disagreed with the Agency's calculation of land treatment unit surface areas, which is based on the assumption that the volume of waste generated annually is applied once per year at a depth of 1 foot. The commenter asserted that these assumptions are unrealistic because: (1) Facilities have limited storage capacity; (2) facilities typically apply wastes five to six times per year; and (3) a 1-foot waste application would inhibit using heavy equipment.

Response: The Agency believes that the commenter has misinterpreted the Agency's approach to calculating land treatment unit surface areas. The Agency did not intend to imply that wastes would be land applied once a year with a 12-inch thick waste application. Rather, for modeling purposes, the total volume of waste applied per year is used to determine the facility's X and Y dimensions. The Agency believes that the 1-foot depth is an appropriate approximation to use to determine the site dimensions. According to the "Land Treatment Data Base" of Subtitle C facilities, frequency of application ranged from daily to once every 10 years.[16] Based on the reported size of the land treatment area and the amount of waste land treated annually, the average calculated "depth" of the site was 6 inches; the results ranged from <1 inch to 66 inches. The Agency believes that, in many cases, the calculated loading rate underestimated the actual application rate because the waste was probably not applied to the entire site (e.g., in instances where data were available, only a fraction of the reported site size was considered active). These results are in close agreement with the results of the SAIC survey used to support the proposed rule-making (50 FR 48963, November 27, 1985).

Total waste volume is assumed to be the summation of the waste volumes applied to the zone of incorporation during the course of a year. For example, a facility might use a loading rate that results in a quarterly, 3-inch sludge application. Thus, to determine the length of the land treatment unit (X), which is assumed to be square, the Agency would divide the volume of waste by 1 foot, and take the square root [*e.g.*, V=[X] [X] (1 ft)].

Comment: The commenter also stated that the waste fraction, in the 1-foot zone of incorporation, is more likely to be on the order of 10 percent rather than the assumed 100 percent. The model effectively describes a 1-foot deep landfill because of this assumption. The land treatment unit surface area for a given volume of waste is therefore much greater than assumed in the model because the incorporation volume is not 100 percent.

Response: The Agency believes that the commenter misinterpreted the Agency's approach to calculating the site dimensions (see above). The Agency used the 1-foot depth solely to calculate the X and Y dimensions of the site, based on yearly loading rates. No data are available on Subtitle D facilities to support the commenter's contention that the incorporation of waste is on the order of 10 percent. The Agency notes that its assumption of quarterly application of three inches of sludge, followed by incorporation into the twelve inches of soil, actually represents 20 percent incorporation rather than 100 percent incorporation.

However, since loading rates and other important land treatment criteria are not generally regulated at Subtitle D facilities, saturated conditions can develop, leading to the establishment of anaerobic conditions that may decrease constituent degradation rates and increase constituent longevity.

The Agency cannot be assured that wastes are being applied so as to avoid saturated conditions. This is true of a waste that is delisted and therefore no longer under Subtitle C regulatory control. The Agency will therefore continue to use the 1-foot assumption for purposes of modeling a land treatment unit.

Comment: One commenter stated that the land treatment model is an oversimplification of land disposal practices that consistently and incorrectly estimates that for a given waste volume, higher constituent concentrations could be found at the down-gradient receptor point of a worst-case land treatment unit than of a worst-case landfill. The commenter stated that for a given volume of waste, the calculated land treatment unit surface area is eight times greater than that for a corresponding landfill under the final VHS model. This assumption allows for greater dispersion in the vertical direction; however, due to the domination of surface area in the model calculation, there is, in effect, less dilution for a land treatment unit than a landfill at the downgradient compliance point.

Response: The Agency believes that the proposed land treatment model is an appropriate representation of land-treatment management to which delisted wastes may be subjected. The Agency recognizes that in most instances the land treatment model results in higher compliance-point concentrations than a similar volume of waste would exhibit when evaluated with the landfill VHS model. The Agency believes that this is reasonable since the land treatment model predicts that a large contaminant plume (as compared to the landfill model will be produced since the area of the land treatment unit is relatively large. Since no biodegradation, photodegradation, *etc.* is assumed, the concentration of toxicants in the plume is similar to that from a landfill. This is supported by the fact that, in most cases, the mass of a contaminant in the leachate (from the OLM) is sufficiently less than the total mass available in the waste to allow sustained leaching for a long period of time. Where this is not the case (*i.e.*, insufficient mass is available to sustain leaching), the Agency will evaluate the "continuous leaching" assumption on a case-by-case basis.

B. Biodegradation/Adsorption

Comment: Several commenters considered the model's assumption that no biodegradation, attenuation, sorption, or photodegradation occur in land treatment units to be an extremely unreasonable worst-case scenario for both the zone of incorporation and the ground water. One commenter stressed that the assumption that no biodegradation occurs is unrealistic, since it has been shown to occur under diverse conditions and essentially is the same process that occurs in wastewater treatment systems, but with a longer retention time. The commenter stated that even under unfavorable biodegradation conditions, the slow transport of hazardous constituents through the soil column allows adequate time for degradation. The commenter stressed the importance of photo-oxidation, which can promote biodegradation, and sorption, which immobilizes many organics within the treatment zone, and therefore allows more time for biodegradation. The commenter also pointed out that the Agency has assumed in the development of the Oily Waste EP test that biodegradation occurs in land treatment facilities.

[16] U.S. EPA. 1986. Land Treatment Data Base, February 5. Office of Air Quality Planning and Standards. References in Memorandum of 2/12/86 from Susan Thorneloe, USEPA OAQPS, to Jim Durham, USEPA OAQPS.

Response: The Agency continues to assert that the assumptions of no biodegradation, sorption, or photodegradation are reasonable worst-case assumptions for the land treatment model. The effectiveness of these processes, acknowledged by the Agency as being important in the degradation and treatment of organic wastes, cannot be ensured once a waste is delisted and no longer managed under the Subtitle C program.

While the literature shows that biodegradation generally occurs in well-managed land treatment units, the effectiveness of this process depends greatly on the maintenance of proper operating conditions, such as enhanced aeration, nutrient additions, pH control, etc.[17] [18] The literature reports that N-alkanes are the most rapidly degraded component of land treated oily wastes.[19] [20] [21] Several investigations have indicated, however, that higher molecular weight hydrocarbons are degraded more slowly than N-alkanes. The decomposition of many aromatics is slow, particularly those of higher molecular weight.[22] It has been found that the solubilities of the lighter paraffins and aromatic hydrocarbons tend to make them more toxic to bacteria, and therefore limit bacterial growth.[23] Similarly, water-soluble compounds found in both a petroleum refinery sludge and a petrochemical plant sludge were reported to be extremely mobile in high concentrations, potentially toxic, and exhibited low rates of degradation.[24] The accumulation in the treatment zone of asphaltic materials that exhibit low degradability has been reported.[25] Thus, while the Agency believes that biodegradation occurs, the effectiveness of the biodegradation process is, at best, variable.

Another factor contributing to the Agency's concerns with incorporating biodegradation into the OLM is the biodegradation products. The biodegradation products of land treatment would seem to be more polar in nature than the applied wastes, therefore exhibiting greater mobility. An Arthur D. Little (1983) study reported increased levels of polar organics in soils receiving refinery sludges, suggesting that oxidation degradation was occurring. The study also reported, however, that a significant accumulation of non-oxygenated aliphatic and aromatic hydrocarbons was observed.[26] Increased levels of ethyl ether extractable matter in leachate waters from soils receiving oil applications have also been reported, suggesting incomplete degradation of some individual oil components was occurring.[27] As discussed in Section 2.C, *Degradation In Groundwater,* the Agency points out that the biodegradation of land treated organic constituents may result in the formation of daughter compounds of greater toxicity than the parent constituent. If constituents are leached through the soil column, limited, if any, degradation can be expected at lower depths, since anaerobic biodegradation has been shown to be a slow process compared to aerobic degradation in the treatment zone. In addition, the loss of land treated oil due to photo-oxidation has been reported to be insignificant.[28] [29]

The Agency concludes that, while the processes of biodegradation, sorption, and photodegradation occur in land treatment facilities, these processes are contingent on a number of site-specific and waste management-specific factors that are not appropriate for consideration in the application of the delisting models. In order to evaluate a petitioned wastes leachability in a reasonable worst-case land treatment scenario, the Agency will not include these processes in its land treatment modeling effort.

Comment: One commenter stated that a saturated soil condition as suggested by EPA will not occur within the life of a disposal site for certain waste constituents.

Response: As discussed previously, the Agency continues to believe that saturated soil conditions are a possible consequence of waste mismanagement. The Agency therefore will continue to apply this assumption.

C. Volatilization

Comment: Several commenters stated that the land treatment model's assumption of a simultaneous release of 100 percent of all volatile organic constituents to both the air and the ground water is a physically impossible phenomenon.

Response: The Agency believes that the commenters have misunderstood the Agency's approach to modeling the release of volatile organic constituents (VOC's). The Agency did not intend to suggest that 100 percent of VOCs can be released simultaneously to both the air and the ground water. The Agency stated in the proposed rule (50 FR 48964) that it is modeling two different worst-case scenarios: air release and ground-water release. The Agency stated in the proposed notice that for a specific chemical, volatilization is enhanced by dry conditions and porous soils. More frequent waste applications and greater surface area also increase the potential for volatilization. Conversely, migration to ground water is favored by high rainfall and permeable soils. Decreased soil column depth and low soil pH also can result in increased leaching to ground water. Either situation (release to air or to ground water) can occur. Since the Agency cannot predict or control which will occur, release of 100 percent of the VOCs to air is a reasonable worst case for exposure by air and release of 100 percent of the VOCs to ground water is a reasonable worst case for exposure through drinking water.

Comment: One commenter suggested that the Agency consider various site-specific factors that can affect significantly the volatilization of organics. The commenter referenced an EPA study that reports significant differences in cumulative emissions among several land treatment sites.

Response: The Agency agrees that there are a number of factors that significantly affect the volatilization of organics. These factors (method of waste application, climate, etc.) vary significantly among sites, however, and therefore will not be considered in the land treatment model. As discussed previously, site-specific factors are not appropriate for consideration in the generic application of the delisting models.

[17] See footnote 14.

[18] Dibble, J. and Bartha, R. 1979. Effect of Environmental Parameters and the Biodegradation of Oil Sludge. Applied Envir. Micro., 37(4):729–739.

[19] McGill, W.B. 1980. Factors Affecting Oil Degradation Rates in Soils. In D.M. Shilesky (ed.), Disposal of Industrial and Oily Sludges by Land Cultivation. Resource Systems and Management Association.

[20] Walker, J.D., et al. 1976. Biodegradation Rates of Components of Petroleum. Can. J. Microbiol., 22: 1209–1213.

[21] Cansfield, P.E., and Racz, G.S. 1978. Degradation of Hydrocarbon Sludges in the Soil. Can. J. Soil Sci., 58:339–345.

[22] See footnote 14.

[23] See footnote 19.

[24] Brown, K.W. et al. 1983. Land Treatability of Refinery and Petrochemical Sludges. EPA-600/2/83-074. August, 1983.

[25] See footnote 19.

[26] Berkowitz, et al. 1983. Land Treatment Field Studies: Volume 1—Petroleum Wastewater Pond Bottoms. EPA-600/2-83-057a, July.

[27] Raymond, R.L., et al. 1980. Assimilation of Oil by Soil Bacteria. In: D.M. Shilesky (ed.). Disposal of Industrial and Oily Sludges by Land Cultivation. Resource Systems and Management Association.

[28] McGill, W. B. 1977. Soil Restoration Following Oil Spills. A Review. J. Can. Petro Technology, 16(2):60–67.

[29] Volk, V.V. 1980. Oily Waste and Plant Growth. 1980. In: D.M. Shilesky (ed.), Disposal of Industrial and Oily Sludges by Land Cultivation. Resource Systems and Management Association.

D. Groundwater Analysis

Comment: One commenter stated that increased total organic carbon (TOC) levels downgradient of land treatment units cannot be used as a basis for concluding that hazardous constituents are being leached from a site. The commenter emphasized that TOC is a gross parameter that measures both contaminants and organics occurring naturally in soils. The commenter also stated that even though only a few land treatment facilities identified in the informal survey [30] conduct Appendix VIII groundwater analyses, the Agency should not infer that many land treatment facilities are leaching hazardous constituents to the ground water. On the contrary, the commenter asserted that this indicates that few facilities are leaching hazardous constituents.

Response: The Agency agrees that elevated TOC values are not proof of the existence of hazardous constituents in the ground water. TOC values are used frequently, however, as indicators of possible contamination of ground water by leachate. As previously discussed in the proposal (50 FR 48961, November 27, 1985), there are mobile, non-volatile classes of chemicals, such as phenols, which will tend to migrate readily to ground water. It is logical to expect land treated wastes containing such compounds to be contaminating the ground water when elevated TOC values are found.

The Agency reiterates its position (50 FR 48961) that the small percentage of facilities conducting Appendix VIII ground-water analyses is not indicative that ground water contamination is not occurring at unmonitored sites; thus, as a reasonable worst-case assumption, the Agency assumes that such contamination can occur.

E. Petition-specific Evaluations

Comment: Several commenters stated that on-site land treatment is the prevalent method for disposing petroleum industry waste. One commenter asserted that delisting decisions should therefore be based on site-specific information, including actual groundwater flow data, location of receptors, and volatilization and leaching data. Evaluating the potential hazard associated with waste- and facility-specific factors would allow the Agency to confirm that biodegradation does occur.

Response: The Agency acknowledges the importance of land treatment in a number of industries, including the petroleum and petrochemicals industries. While a majority of land treated wastes are disposed on site (off-site land treatment does occur), the Agency cannot assume that this practice will continue in the future or that on-site characteristics will remain constant after a waste is delisted. As discussed previously (see Section 1.A), therefore, the Agency does not generally consider site-specific factors in its application of the delisting models.

F. Use of Informal Survey

Comment: Several commenters stated that the survey conducted in support of the land treatment model (see 50 FR 48961, November 27, 1985) was inappropriate. One commenter asserted that it is inappropriate to base any land treatment delisting decisions on the land treatment survey because it has inherent methodological problems. The commenter stated that surveying Subtitle C land treatment facilities is inconsistent with reasonable mismanagement scenarios.

Another commenter asserted that the survey does not support EPA's worst-case assumptions and the omission of biodegradation from the model.

One commenter suggested that in order to determine distances to wells, the Agency needs to survey non-regulated facilities applying a margin of safety to account for future well location, or conduct a valid survey of Subtitle C facilities applying several margins of safety to the results.

Response: The Agency agrees that the land treatment survey was not a statistically precise representation of land treatment practices. The survey's purpose was to indicate trends in land treatment practices. Ongoing literature searches and other available EPA surveys currently are being investigated to provide more comprehensive results.

The Agency has reviewed the available Subtitle D land treatment information and has found no data relevant to the proximity of drinking water wells to land treatment units. The Agency will therefore use a distance of 1,000 feet, based on our current survey results.

The Agency has relied, to a large extent, on data from Subtitle C land treatment facilities. The Agency has little information on Subtitle D industrial land treatment facilities, as these facilities fall under the purview of the individual states. The Agency has begun recently to examine the environmental consequences of Subtitle D facilities and is considering a more comprehensive regulatory program. A number of studies currently underway will add considerably to the Agency's understanding of Subtitle D land treatment facilities. (For example, see Footnote 15). Generally, detailed characterizations of Subtitle D land treatment facilities are not available in the literature. The Agency has therefore relied on Subtitle C data due to a lack of a better data set.

G. Use of Other Models

Comment: One commenter stated that the Agency should consider the land treatment model developed by API or the model developed at EPA's Kerr Laboratory, both of which consider biodegradation and attenuation and do not assume 100 percent release of VOCs to both air and ground water.

Response: At this time, the Agency will continue to use the proposed land treatment model, since modeling efforts of both the EPA Kerr Laboratory and the API are inappropriate for delisting evaluations. The Kerr Laboratory land treatment model currently is not available and, when completed, will model well-managed Subtitle C facilities rather than reasonable worst-case Subtitle D scenarios. When this modeling effort and associated biodegradation studies are completed, however, the Agency will consider the results and make modifications to the delisting land treatment model, as appropriate. The API land treatment model referenced by the commenter evaluates the relative treatability of Appendix VIII constituents based on site- and waste-specific factors. Since this methodology considers site-specific factors, it is generally inappropriate for use as the delisting land treatment model for reasons cited previously in this notice. (See Section 1A. Petition-specific Evaluations, for a more detailed discussion of site-specific considerations.)

4. VHS Landfill Model Assertions Challenged

EPA received a number of comments related to the VHS landfill model. These included comments in individual parameters of that model and recommendations for alternative models. Since the VHS landfill model was made final on November 27, 1986 (see 50 FR 48886, Appendix), and all comments received in the proposal for the model were incorporated, these comments will not be entertained. Comments related to the application of the model to organic compound-containing wastes are addressed, however, as are comments related to general applicability of the model.

[30] See 50 FR 48961, November 27, 1985 for a description of the informal survey.

A. Groundwater Velocity

Comment: The commenter considered the 2 meter per year ground-water velocity assumption as totally unsubstantiated. EPA should use hydraulic conductivities specific to the site as defined by hydrogeologic surveys or tracer studies over portions of the potential site. Consideration also should be given to the effect of pumping wells on transport rates and dispersion.

Another commenter considered the solute transport rate assumed by the VHS model, 2 meters per year, to overstate the rate of migration for many constituents, such as benzo(a)pyrene, to receptor wells. The commenter considered the exclusion from the model of a slow organic constituents migration rate to be arbitrary. The commenter also recommended that the VHS model be revised to simulate constituent behavior in groundwater.

Response: The Agency reiterates that petition evaluation is waste-specific and not waste management site-specific. It is inappropriate, therefore, to incorporate groundwater velocities or a consideration of the effect of pumping wells into the model (see Section 1.A). The Agency recognizes that organic toxicants may migrate more slowly than the groundwater. While this does affect the time required for toxicants to reach the receptor, it would not affect the toxicants' concentrations when they do reach the receptor if no degradation is assumed. Should a petitioner demonstrate that degradation does occur (see Section 2.C, *Degradation),* however, the increased transport time due to slower migration rates may become a major factor. This effect should, therefore, be addressed by the petitioner (and will be considered by the Agency) in any demonstrations relative to degradation.

B. Steady-state Release

Comment: The commenter stated that the VHS model relies on a steady-state assumption, a constant leaching rate for 100 years, which violates the law of conservation of mass. The steady-state model fails to consider the constituent's release rate as a result of repeated flushing. The commenter stated that the GLM predicts constituents will be leached completely before the VHS model predicts that steady-state will be reached. EPA also should review the continuous leaching assumption to determine if it is realistic for particular wastes.

The commenter recommended an alternative transport model that is time-varying rather than steady-state and incorporates degradation and retardation. The commenter asserts that this alternative model can accurately consider wastes that will leach out constituents prior to reaching steady-state and can be used when the strength of the source diminishes with time. The suggested equation is: $(C_y)_A = (C_y)_{VHS} \exp(-\lambda aT)$.

Another commenter recommended that a non-steady-state model be considered as an alternative to the steady-state VHS model, since the steady-state model overpredicts leachate generation and input to the aquifer and does not incorporate degradation or retardation data.

Another respondant expressed concern that the steady-state release assumption is unreasonable and unrealistic since it does not consider attenuation which is likely to occur in chemically stabilized products.

Response: The Agency is not convinced of the advantages of using a time-varying model. The steady-state model provides a reasonable worst-case value at the receptor well. A time-varying approach is most useful in a site-specific application to predict periods of maximum leachate concentration; but the Agency is not modeling a management site-specific scenario. Neither approach accounts for worst-case scenarios such as storms and other causes of slug leachate loading. The Agency notes that, in most cases, the concentration of a toxicant in the leachate (from either actual leaching tests or from the OLM) represents only a small fraction of the total mass of that toxicant in the waste. Thus, a sufficient mass of the toxicant is available to sustain the leaching level for long periods of time. When this is not the case (*e.g.,* where a toxicant leaches very readily but the total mass of the toxicant in the waste is low) the Agency agrees that the steady-state approach may not be valid. These cases will be addressed on a petition-specific basis.

C. Mounding Effects

Comment: The commenter stated that the Agency cannot delist surface impoundments based on the existing landfill model, since it does not assume sufficient hydraulic head. The commenter contended that the Agency did not consider the hydraulic head caused by mounded leachate in groundwater, which will tend to displace natural groundwater flow, draw leachate deeper into the aquifer, and divert natural groundwater flow around the facility. The commenter asserted that little vertical dilution would occur and drinking water wells directly downgradient would receive pure leachate rather than a leachate-groundwater mixture. If mounding eliminates the vertical component of dilution, the constituent dilution rate would be reduced less drastically than the model predicts. The commenter also recommended that the effects of mounding on leachate transport be considered the same for surface impoundments as for landfills.

Response: The Agency agrees that mounding effects from surface impoundments are significant. In order to evaluate the influence of mounding on an aquifer, the Agency is developing a model which estimates mound height given facility dimensions, infiltration rates, hydraulic conductivity, and specific yield. This model is still under development for application to surface impoundments and will be proposed for use in the delisting program when its development is complete.

The Agency disagrees, however, that the mounding effects from landfills are comparable to those from surface impoundments. While the surface impoundment model is, as previously stated, still under development, the Agency believes the model may be used to examine the importance of mounding in landfills. The modeling approach under consideration uses the Hantush mounding equation.[31] When this model is evaluated using infiltration rates of 0.25 m/yr as reported for municipal landfills,[32] mounds ranging from 0.5 to 2.5 feet are estimated depending on waste volume. The Agency believes mound heights of this magnitude will have little impact on the underlying aquifer and no effect at the compliance point. While the values chosen for each parameter influences the resultant mound height, the Agency believes that any set of worst reasonable case parameter estimates will yield similarly small mound heights. Based on this analysis, the Agency maintains mounding effects in active landfills will be minimal. In the case of inactive or capped landfills, the Agency believes no mounding will occur. Mounding is a result of increased infiltration under a waste management unit. In an active unit rain water may pool and flow into the unit. The Agency believes that infiltration rates from an inactive unit will not differ from infiltration rates for the surrounding terrain and therefore no mound will be generated. A report describing the mounding equation,

[31] Hantush, M.S. 1967. Growth and Decay of Groundwater Mounds in Response to Uniform Percolation. Water Resources Research 3(1):227–234.

[32] Sobotka & Co., Inc. Comparative Risk Analysis of Sources of Groundwater Contamination, Appendix A. Draft report submitted to U.S. EPA 1985.

parameter estimates, assumptions, and actual computer runs which support these conclusions can be found in the RCRA docket. When a mounding model for surface impoundments is fully developed it will be proposed and comments will be solicited.

The Agency recognizes that the application of the VHS landfill model may not be appropriate for wastes that are managed in surface impoundments. Such application is an interim measure and will be discontinued when an appropriate surface impoundment model is developed. The Agency believes that the evaluation of delisting petitions cannot be postponed until models are available to evaluate all hazards due to all types of waste management. For cases where models are not available to aid in the evaluation of wastes, the Agency relies on other criteria, including groundwater monitoring data for sites, concentration of toxicants in the waste, leachate tests, etc.

5. Comments on Delisting Program

EPA received a number of comments concerning the delisting program in general. As a result, the Agency is providing a response to these comments and further clarification of the delisting program elements.

A. Systematic Approach to Delisting

Comment: Several commenters supported the use of objective and quantitative criteria in the delisting program, but disagreed with a number of assumptions used in the VHS models and their use for delisting organics.

One commenter recommended that models be developed for disposal methods other than land treatment and land disposal. The same commenter stated that delisting program inflexibilities unnecessarily regulate non-hazardous wastes as hazardous.

Response: The Agency has refined the proposed OLM and contends that the new model is an appropriate tool for evaluating delisting petitions until an acceptable analytical leaching method is developed. The Agency is developing models for additional disposal methods including surface impoundments. EPA intends to use as many models as are appropriate in petition evaluation and will propose the use of these models as they are developed.

B. Public Docket

Comment: Several commenters stated that the public docket for the proposed rule was incomplete and that it was difficult to provide useful comments without access to the full docket. .

Response: The Agency agrees that the public docket was inadequately prepared for the November 27, 1985 FR notice. Measures have been taken to correct these inadequacies and to ensure that future notices have complete public dockets at the time of publication. In order to correct this deficiency, the Notice of Availability (see 50 FR 27061, July 29, 1986) reopened the comment period for various aspects of the November 27, 1985 proposed rule that were affected by the incomplete docket.

C. Standard Analytical Methods

Comment: One commenter encouraged EPA to develop an organic leachate test that can be applied with consistent results under laboratory conditions. Another commenter challenged the ability of the organics leachate test currently under development to represent accurately leachate from oily wastes, since the test has not been applied yet to oily sludges.

Response: The Agency is currently developing an organics test, which, when finalized, will generate reproducible results. Since no one test has proven effective to measure the mobility of all constituents from all waste matrices, the Agency is evaluating new procedures and/or modifications to existing procedures to allow more accurate assessments of all types of wastes.

Comment: The commenter challenged the use of the Oily Waste EP test for all wastes with more than 1 percent oil and grease. Assumptions inherent in the test require oils to be separated from the waste to simulate a land treatment degradation scenario. The commenter challenged that the test should not be used for wastes that will be landfilled, recommending that only sludges with a reasonable potential for land treatment be subjected to this test. The commenter also submitted studies to indicate that land treatment is not appropriate for metal hydroxide wastes from metal finishing operations.

Response: The Oily Waste EP test (OWEP) was developed in response to concerns that the EP test is not suitable for wastes which exhibit a substantial oil and grease content (oil fraction). Specifically, concern was expressed that (1) toxic metals may leach at higher levels than those predicted by the EP test if the oil fraction degrades, and (2) the oily fraction, while it may act as a solid in the EP test, could migrate as a liquid once the waste is disposed.

The first concern is based upon a scenario in which the oily fraction coats the solid phase of the waste and the leaching medium. If the oily fraction degrades, as could occur in a well-managed landfarm, the solid phase could be more completely exposed to the leaching medium and increased leaching could occur. (The practice of requesting the OWEP for wastes containing >1 percent oil and grease was based upon the estimate that 1 percent oil and grease would be a sufficient quantity to coat the waste.) The OWEP simulates this effect by removing the oily fraction with toluene and tetrahydrofuran prior to subjecting the waste to the EP test. The OWEP also requires the measurement of the mass of metals in the oily fraction, which is added to the mass of metals that leach in the EP step. This accounts for those metals that are initially in the oily fraction that would be available for leaching once that fraction degrades.

The second concern is based upon the potential for the oily fraction to migrate from the waste. This could result in the contamination of an aquifer by the oily fraction itself. This would be more likely to occur when the waste is managed in a landfill and the oily fraction is not rapidly degraded. The OWEP addresses this concern by assuming that the contaminants in the oily fraction are added to those that are mobilized through the liquid extraction step of the procedure. Since in the original EP test the oily fraction may not be tested as a liquid due to its inability to pass through the filter during the phase separation step, the ability of the toxicants in the oily fraction to behave as a liquid is not addressed in that test. The OWEP, however, by requiring a separate analysis of the oily fraction, allows for an assessment of the additive effects of groundwater contamination potential from both toxicants contained in the organic fraction and those that mobilize from the solid phase during the extraction step. Since the oil phase from oily metal hydroxide wastes in a landfill scenario can mobilize, the Agency will continue to use the OWEP as a tool to measure the concentrations of inorganic toxicants moving in this fraction.

The Agency intends, however, to initiate a testing program to determine: The percent oil content of various waste matrices that will result in a mobile oil phase; whether the TCLP is a more accurate measure of the mobility of the oil fraction; and the toxicological implications of the oil itself contaminating underlying aquifers.

D. Exclusion Effective Time

Comment: One commenter recommended that delisting exclusions take effect at the point of disposal to ensure proper manifesting.

Response: The Agency asserts that delisted wastes are nonhazardous and

thus are not subject to regulations. Manifests are therefore not appropriate.

E. Ground-water Monitoring Requirements

Comment: One commenter stated that the Agency's practice of processing delistings for facilities with inadequate ground-water monitoring data violates the law, and is not in compliance with 40 CFR Part 265, Subpart F. The commenter asserted that this practice discourages petitioners from developing important monitoring data. The commenter also recommended that EPA refrain from granting exclusions for waste management units that have not been monitored or have been inadequately monitored for their effect on ground-water.

Response: EPA agrees that consideration of ground-water monitoring data is an essential part of petition evaluation. The Agency has made a policy decision however not to impose additional monitoring requirements upon petitioners for which the Agency has already published final or temporary exclusions, since a decision was already made based on the petitioner's characterization of their waste. Further, in many cases the facility owner/operators were not required to develop ground-water monitoring systems as a result of having been issued a temporary exclusion. However, even in these cases the Agency has reviewed any existing groundwater monitoring data. When ground-water contamination is demonstrated, it is used as a basis for petition denial.

Comment: Another commenter recommended that long-term monitoring of the nearest potentially affected well should be required of each petitioner granted an exclusion.

Response: The Agency maintains that if a waste is delistable for all reasons, including the results of the VHS model, monitoring of wells is unnecessary. Petitioners are responsible for reporting any changes in the delisted waste's generation or treatment that may cause the waste to be hazardous. Hence the potential for the waste to become hazardous over the long term is monitored.

F. Conditional Exclusions

Comment: One commenter suggested that EPA consider applying reasonable legal "conditions" to delisted wastes' management, since the Agency already has granted "conditional" temporary delistings. The commenter further suggested that the Agency could set expiration dates for petitions to ensure that generators are managing their wastes in the specified manner.

Commenters provided several examples of conditional exclusions currently used to support their argument. One commenter stated that delisting decisions are conditional on any process changes that may cause a material to exhibit hazardous waste characteristics. The commenter suggested that this concept could be expanded so that breach of any other delisting condition is a violation of Subtitle C regulations. Another commenter characterized the delisting of the mobile incinerator (50 FR 23721) as conditional, since the exclusion is contingent on testing specific containers.

Response: The Agency typically does not grant conditional exclusions on the premise that if a waste cannot be fully delisted, it should remain under Subtitle C control. Even when a conditional delisting is granted, however, the conditions refer to the contaminant concentration in the waste, not the way in which the waste is managed. The Agency does grant conditional exclusions occasionally when, for example, a waste is delisted, on a one-time basis. Specifically, if a petitioner wanted to stabilize a sludge and close the lagoon containing the stabilized product, the sludge may be delisted and the delisting would be contingent on testing conducted during the stabilization process.

G. Air Emission Model

Comment: One commenter described the air quality dispersion model as a simple model that was designed for easy use and stated that this simple, virtual source model is not an accurate representation of the effects of land disposal on air quality. The commenter suggested that petitioners should be allowed to present their analysis using a more realistic source model if they so desire.

Response: The Agency believes that the virtual point source model is both reasonable and appropriate as a screening tool to ensure that emissions from the land disposal of specific wastes do not present a hazard to human health and the environment. The Agency recognizes, however, that the assumptions related to emission rates (*i.e.*, the source) may represent a worst-case scenario. The Agency is currently developing models to more accurately predict these emission rates and is evaluating a number of air dispersion models to use in concert with those source models. These models will be proposed when they are fully developed. In the interim, the Agency agrees that petitioners should be allowed to present their own analyses and encourages the submission of such data when necessary to support delisting petitions.

Comment: One commenter recommended that the state authorization requirements be amended to require States to have delisting programs.

Response: This is not possible. RCRA section 3009 explicitly states that States may impose requirements more stringent than those imposed by EPA's regulations. The decision by a State not to have delisting is a more stringent condition, which, under section 3009, cannot be prohibited.

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40 CFR Part 261

[SW-FRL-3108-8]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is announcing its decision to deny the petitions submitted by five petitioners to exclude their solid wastes from the lists of hazardous wastes contained in 40 CFR 261.31 and 261.32. This action responds to delisting petitions submitted under 40 CFR 260.20, which allows any person to petition the Administrator to modify or revoke any provision of Parts 260 through 256, 124, 270, and 271 of Title 40 of the Code of Federal Regulations, and 40 CFR 260.22, which specifically provides generators the opportunity to petition the Administrator to exclude a waste on a "generator-specific basis" from the hazardous waste lists. Our basis for denying these petitions is that the petitioners have not substantiated their claims that the wastes are non-hazardous. The effect of this action is that all of this waste must be handled as hazardous waste in accordance with 40 CFR Parts 262-266, and Parts 270, 271 and 124.

In addition to the final denials, the Agency is also making final its decision to use the nickel content of a waste as a criteria for evaluating petitioned wastes, and to deny a petition if the concentration of nickel at the compliance point (using the VHS model) exceeds the Agency's interim standard for nickel. (See Appendix I of this notice.)

EFFECTIVE DATE: For the three petitioners, GMC, Lacks Industries, and Radford Army Ammunition Plant, which have temporary exclusions, the effective date of this decision is May 13, 1987; for the other petitioners, the effective date of this decision is November 13, 1986.

ADDRESSES: The public docket for these final petition denials is located in the Sub-basement, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, and is available for public viewing from 9:30 a.m. to 3:30 p.m., Monday through Friday, excluding Federal holidays. Call Mia Zmud at (202) 475-9327 or Kate Blow at (202) 382-4675 for appointments. The reference number for this docket is "F-86-NIDF-FFFFF". The public may copy a maximum of 50 pages of materials from any one regulatory docket at no cost. Additional copies cost $.20/page.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free at (800) 424-9346, or at (202) 382-3000. For technical information, contact Lori DeRose, Office of Solid Waste (WH-562B), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 382-5096.

SUPPLEMENTARY INFORMATION: On September 22, 1986, EPA proposed to deny specific wastes generated by several facilities, including: (1) General Motors Corporation, Chevrolet-Pontiac-Canada Group, located in Pontiac, Michigan (see 51 FR 33630); (2) Lacks Industries, located in Grand Rapids, Michigan (see 51 FR 33632); (3) Light Metals Coloring Co., Inc., located in Southington, Connecticut (see 51 FR 33633; (4) PEC Industries, located in Orlando, Florida (see 51 FR 33635); (5) Radford Army Ammunition Plant, located in Radford, Virginia (see 51 FR 33637). The Agency had previously evaluated three of the five petitions which are discussed in today's notice. Based on our review at that time, these three petitioners were granted a temporary exclusion. Due to changes in the delisting criteria required by the Hazardous and Solid Wastes Amendments of 1984, however, these petitions, as well as the other two have been evaluated both for the factors for which the wastes were originally listed, as well as other factors and toxicants which reasonably could cause the wastes to be hazardous. Based upon these evaluations, the Agency has determined that all five of the petitioning facilities have not substantiated their claims that the wastes are non-hazardous; therefore, the Agency is denying the petitions submitted by all five petitioning facilities and is revoking the temporary exclusions currently held by three of these facilities.

The denials made final here involve the following petitioners:

General Motors Corporation/ Chevrolet-Pontiac-Canada Group, Pontiac, Michigan;

Lacks Industries, Grand Rapids, Michigan;

Light Metals Coloring Company, Inc., Southington, Connecticut;

PEC Industries, Orlando, Florida;

Radford Army Ammunition Plant, Radford, Virginia.

I. General Motors Corporation/ Chevrolet-Pontiac-Canada Group

A. Proposed Denial

General Motors Corporation, Chevrolet-Pontiac-Canada Group (CPC), has petitioned the Agency to exclude its wastewater treatment sludge from EPA Hazardous Waste No. F006, based on the low concentration and immobilization of the listed constituents in the waste. Data submitted by CPC, however, fails to substantiate its claim that the listed constituents are essentially present in an immobile form.[1] (See 51 FR 33630-33632, September 22, 1986, for a more detailed explanation of why the Agency proposed to deny CPC's petition.)

B. Agency Response to Public Comments

The petitioner submitted comments clarifying the facility's intended management and disposal practices for the petitioned waste. The facility pointed out that, although the Agency stated that the waste would be subject to regulation again under 40 CFR Parts 262 through 266 and the permitting standards of 40 CFR Part 270, CPC no longer accumulates the waste of concern in a waste pile. The petitioner claims that the waste is placed directly into a roll-off box when generated and sent directly to a landfill within two production days. CPC believes that they will not need to submit a Part B permit application because the facility will not be operating a hazardous waste pile when the temporary exclusion expires. In addition, CPC believes that a revised Part A will not be required because the facility will not be storing the waste on-site for longer than 90 days. The Agency did not intend in the proposed rule to make a determination on the details of CPC's compliance requirements. The Agency was merely reminding the petitioner of the general regulations the waste falls under.

[1] CPC was granted a temporary exclusion for this waste on November 22, 1982 (see 47 FR 52674).

The petitioner also stated that CPC intends to segregate or eliminate the one chrome plating process which causes their sludge to be hazardous and believes the Agency's redefinition of F006 wastes has impacted their sludge. The Agency has recently reevaluated the scope of the F006 listing criteria and will publish a notice in the near future announcing the results of this reevaluation. The Agency has sent letters to the petitioners who generate F006 wastes explaining the redefinition efforts. CPC believes that due to the F006 redefinition and the segregation of the chrome plating line that they will no longer be generating a listed hazardous waste. The Agency has reviewed CPC's plating operations and agrees that CPC may be able to generate a non-listed hazardous waste if the chrome plating line is segregated or eliminated.

C. Final Agency Decision

For the reasons stated in the proposal, the Agency believes that the vaccum filter sludge generated by CPC is hazardous and as such should not be excluded from hazardous waste control. The Agency, therefore, is denying a final exclusion to General Motors Corporation/CPC Group for its dewatered wastewater treatment sludge (vaccum filter sludge) resulting from electroplating operations, listed as EPA Hazardous Waste No. F006, which is generated at its facility located in Pontiac, Michigan. By this action, the Agency also withdraws the temporary exclusion granted for this waste on November 22, 1982 (see 47 FR 52674).

II. Lacks Industries

A. Proposed Denial

Lacks Industries (Lacks), located in Grand Rapids, Michigan, has petitioned the Agency to exclude its previously generated wastewater treatment sludge (metal hydroxide sludge) from EPA Hazardous Waste No. F006, based on the low concentration and immobilization of the listed constituents in the waste. Data submitted by Lacks, however, fails to substantiate its claim that the listed constituents are essentially present in an immobile form. (See 51 FR 33632-33633, September 22, 1986, for a more detailed explanation of why the Agency proposed to deny Lacks' petition.)

B. Agency Response to Public Comments

The Agency did not receive any comments regarding its decision to deny an exclusion to Lacks for the waste identified in the petition.

C. Final Agency Decision

For the reasons stated in the proposal, the Agency believes that the wastewater treatment sludge generated by Lacks is hazardous and as such should not be excluded from hazardous waste control. The Agency, therefore, is denying a final exclusion to Lacks Industries for its metal hydroxide sludge previously generated from electroplating operations and contained in an on-site surface impoundment, listed as EPA Hazardous Waste No. F006, which was generated and is currently stored at its Grand Rapids, Michigan facility.

III. Light Metals Coloring Company, Inc.

A. Proposed Denial

Light Metals Coloring Company, Inc. (Light Metals) has petitioned the Agency to exclude its previously generated wastewater treatment sludge from EPA Hazardous Waste No. F019, based on the low concentration and immobilization of the listed constitutents in the waste. Data submitted by Light Metals, however, fails to substantiate its claim that the listed constitutents are essentially present in an immobile form.[2] (See 51 *FR* 33633–33635, September 22, 1986, for a more detailed explanation of why the Agency proposed to deny Light Metals' petition.) B. Agency Response to Public Comments.

The Agency did not receive any comments regarding its decision to deny an exclusion to Light Metals for the waste identified in the petition.

C. Final Agency Decision

For the reasons stated in the proposal, the Agency believes that the wastewater treatment sludge generated by Light Metals, and contained in an on-site surface impoundment, is hazardous and as such should not be excluded from hazardous waste control. The Agency, therefore, is denying a final exclusion to Light Metals Coloring Company, Inc. for its wastewater treatment sludge (contained in an on-site surface impoundment) resulting from the chemical conversion coating of aluminum, listed as EPA Hazardous Waste No. F019, which was generated at its Southington, Connecticut facility. By this action, the Agency also withdraws the temporary exclusion granted for this waste on November 22, 1982 (see 47 FR 52675).[3]

IV. PEC Industries

A. Proposed Denial

PEC Industries (PEC) has petitioned the Agency to exclude its wastewater treatment sludge (filter cake) from EPA Hazardous Waste No. F006, based on the low concentration and immobilization of the listed constituents in the waste. Data submitted by PEC, however, fails to substantiate its claim that the listed constitutents are essentially present in an immobile form. (See 51 FR 33635–33637, September 22, 1986, for a more detailed explanation of why the Agency proposed to deny PEC's petition.)

B. Agency Response to Public Comments

The Agency did not receive any comments regarding its decision to deny an exclusion to PEC for the waste identified in the petition.

C. Final Agency Decision

For the reasons stated in the proposal, the Agency believes that the filter cake generated by PEC is hazardous and as such should not be excluded from hazardous waste control. The Agency, therefore, is denying a final exclusion to PEC for for its dewatered wastewater treatment sludge (filter cake) resulting from electroplating operations, listed as EPA Hazardous Waste No. F006, generated at its Orlando, Florida facility.

V. Radford Army Ammunition Plant

A. Proposed Denial

Radford Army Ammunition Plant (RAAP) has petitioned the Agency to exclude its red water from EPA Hazardous Waste No. K047, based on the nonreactive nature of the waste. Data submitted by RAAP, however, fails to substantiate its claim that the waste is non-hazardous.[4] (See 51 FR 33637–33639), September 22, 1986, for a more detailed explanation of why the Agency proposed to deny RAAP's petition.)

B. Agency Response to Public Comments

RAAP submitted a response regarding the notification that the Agency intended to propose to deny their petition.[5] RAAP questioned the rationale for using drinking water standards to evaluate metal concentrations in their waste. They noted that EP toxic levels permit wastes with higher metal concentrations to be landfilled. The Agency, however, evaluates listed hazardous waste with regard to any constituents which may reasonably be expected to be present in the waste. Non-listed solid wastes are evaluated to determine if they exhibit any of the four hazardous waste characteristics: Ignitability; corrosivity; reactivity; and EP toxicity. It is true that concentrations of leachate metals necessary to define a non-listed waste as EP toxic are higher than the concentrations deemed of regulatory concern in the red water generated at Radford. The Agency believes that wastes which exhibit levels of leachable metals above the EP toxic levels are definitely hazardous wastes. Solid wastes which exhibit leachable metal concentrations below the EP toxic levels will be evaluated on an individual basis through the listing and delisting mechanisms. See 45 FR 33111–33112, May 19, 1980.

RAAP was also concerned that the VHS model is used in connection with the proposed land disposal restrictions. In fact, a similar but distinct model was developed in conjunction with the land disposal restrictions. The VHS model is used only to evaluate delisting petitions. The model was made final on November 27, 1985 (see 50 FR 48886).

RAAP questioned the validity of using a landfill disposal scenario in evaluating the red water it generates since they do not plan to dispose of these wastes in a Subtitle D landfill. RAAP also claims that due to the fact that the waste is a liquid, it could not be disposed in a Subtitle D landfill. The Agency first notes that the ban on disposal of non-hazardous liquids in landfills only applies to disposal in a Subtitle C landfill. If delisted, this waste would not be banned from disposal in a Subtitle D landfill. See RCRA section 3004(c)(3). In addition, the Agency notes that the waste could be impounded on site (e.g., if the company recovering the waste was no longer able to do so). The Agency notes that other wastes generated by this facility are in fact presently impounded on-site. Given this reasonable management scenario, the VHS analysis (or a more stringent model for surface impoundments) should apply, and accordingly, the waste may pose a hazard to human health or the environment. The Agency notes that the

[2] Light Metals was granted a temporary exclusion for this waste on November 22, 1982, (see 47 FR 52675).

[3] The Agency formally notified Light Metals on January 6, 1986, that it would recommend to the Assistant Administrator for Solid Waste and Emergency Response that Light Metals' petition be denied and that their temporary exclusion be withdrawn. Light Metals declined to withdraw its petition. See FR 33635, n. 20, September 22, 1986.

[4] Radford was granted a temporary exclusion for this waste on December 16, 1981 (46 FR 61275).

[5] The Agency formally notified RAAP on May 19, 1986 that it would recommend to the Assistant Administrator for Solid Waste and Emergency Response that RAAP's petition be denied and that their temporary exclusion be withdrawn. RAAP declined to withdraw its petition. See 51 FR 33639, n. 38, September 22, 1986.

petitioner had previously identified an alternate facility capable of treating the waste which is no longer available. This reinforces the Agency's belief that the waste could be impounded at some point in time. The Agency notes that RAAP has indicated an on-site treatment and recovery facility is being constructed. RAAP estimates completion of this facility in two to three years. At that time, the facility may wish to reapply for an exclusion.

C. Final Agency Decision

For the reasons stated in the proposal, the Agency believes that the red water generated by RAAP is hazardous and as such should not be excluded from hazardous waste control. The Agency, therefore, is denying a final exclusion to Radford Army Ammunition Plant for its red water resulting from TNT operations, listed as EPA Hazardous Waste No. K047, which is generated at its plant in Radford, Virginia. By this action, the Agency also withdraws the temporary exclusion granted for this waste on December 16, 1981 (see 46 FR 61275).[6]

VI. Effective Date

The Hazardous and Solid Waste Amendments of 1984 amended 3010 of RCRA to allow rules to become effective in less than six months when the regulated community does not need the six-month period to come into compliance.This is the case for two of the petitions included in today's notice (Lacks Industries and PEC Industries) since this rule does not change the existing requirements for the handling of their wastes, because these facilities have been obligated to manage their wastes as hazardous during the Agency's review of their petition. This rule, therefore, is effective immediately for these petitioners.

For the three petitioners having their temporary exclusions revoked and their petitions denied, these facilities will be required to revert back to handling their wastes as they did before being granted these exclusions (*i.e.*, they must handle their waste as hazardous). These petitioners will need some time to come into compliance with the RCRA hazardous waste management system. Accordingly, the effective date of revocation and denial of final exclusions of these temporary exclusions is six months after publication in the **Federal Register.**

VII. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and, therefore, subject to a requirement of a Regulatory Impact Anaylsis. This final denial, which would revoke temporary exclusions and would deny the exclusion petitions submitted by three facilities, is not major. The affect of this proposal would increase the overall costs for the facilities which currently have a temporary exclusion. The actual costs to these companies, however, would not be significant. In particular, in calculating the amount of waste that is generated by these three facilities that currently have temporary exclusions and considering a disposal cost of $300/ton, the increase to these facilities is approximately $4.6 million, well under the $100 million level constituting a major regulation. This final denial is not a major regulation, therefore, no Regulatory Impact Analysis is required.

VIII. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an Agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment, a regulatory flexibility analysis which describes the impact of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities.

This amendment will have the effect of increasing overall waste disposal costs for the three facilities which currently have temporary exclusions. Some of the facilities may be considered small entities, however, this rule only affects three facilities across different industrial segments. The overall economic impact, therefore, on small entities is small. Accordingly, I hereby certify that this final regulation will not have a significant impact on a substantial number of small entities.

This regulation, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 261

Hazardous waste, Recycling.

Authority: Sec. 3001 RCRA, 42 U.S.C. 6921.)

Dated: November 6, 1986

J.W. McGraw,

Acting Assistant Administrator Office of Solid Waste and Emergency Response.

Appendix I—Criteria Used for the Evaluation of Wastes for its Nickel Content

On September 22, 1986, the Agency proposed to use 0.35 mg/l as the regulatory standard for nickel (both to grant and to deny petitions) for the VHS model portion of our petition evaluation. (See 51 FR 33639, September 22, 1986.) This interim standard was based on an expert panel review of the reproductive effects study conducted by Ambrose et al., 1976 (see 50 FR 20247, May 15, 1985) and preliminary results from ongoing toxicological feeding studies and multi-generational fertility and reproductive studies on rats being conducted by the Agency (see 51 FR 33639, September 22, 1986).

Response to Public Comments: One commenter claimed that no petitions should be denied (based on nickel levels) until nickel is formally adopted as a drinking water standard and is added to the list of EP toxic metals in 40 CFR 261.34. The commenter further claimed that the Agency had used a "back door" action to adopt a drinking water standard for nickel and to adopt nickel as a constituent of concern. The commenter also indicated that the regulatory process for setting a health-based standard is much more rigorous than simply issuing a proposed denial of a delisting petition.

The Agency disagrees with the commenter on several issues. First, the Agency does not wait for drinking water standards to be promulgated in order to make decisions on delisting petitions. Prior to HSWA, the Agency addressed all listed constituents for a petitioned waste for EPA Hazardous Waste No. F006, which included cyanide and nickel (which do not have drinking water standards). If the Agency had waited for a drinking water standard to be promulgated, no exclusions would have been granted since 1980. Early on, however, the Agency made a policy decision to process petitions using the best toxicity data available if drinking water or other Agency standards had not been developed. The Agency disagrees with the commenter that we are trying a "back door approach" to adopting nickel as a constituent of concern. Nickel has always been a listed hazardous constituent of concern for EPA Hazardous Waste No. F006. The Agency's policy with regard to the appropriate standard for evaluating this constituent was to use the supporting studies for the ambient water quality criterion and the Agency's own toxicity testing data if statistically defensible. (See 50 FR 20247, May 15, 1985.)

As a result of HSWA, the Agency has been required to consider Appendix VIII hazardous constituents (other than the listed constituents) in petitioned waste, where there is reasonable basis to expect these constituents to be present. Again, in lieu of deferral of decisions, the Agency has used available standards and toxicological data for these additional hazardous constituents. The Agency's policy regarding a procedure for public comment on the standards used for additional Appendix VIII constituents is that the toxicological data and our method used to calculate the standards used in delisting evaluations are filed in the public docket and are referenced in specific proposed delisting decisions.

The comment period provided on the new nickel policy (and the information supporting it) was an opportunity for the commenter (and anyone else) to express their thoughts on the level of concern for nickel in delisting decisions. If the Agency were to defer action rather than pursuing the denial decision as

[6] See footnote 5.

proposed for these five petitioners on September 22, 1986, the three temporary exclusions would lapse on November 8, 1986 and these petitioners would be forced to handle their wastes as hazardous as of that date. The Agency, therefore, believes it is more productive to rely on interim standards as developed under the delisting program, which would allow continued processing of petitions. Our procedures under this program do allow public comment on these standards, and the use of any other more formalized means of generating standards would involve a lengthy process which would essentially result in the Agency's inability to process petitions in any reasonable time-frame.

[FR Doc. 86-25588 Filed 11-12-86; 8:45 am]
BILLING CODE 6560-50-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 6629

[ID-943-07-4220-11; I-7322]

Withdrawal of Public Lands for Protection of the Lower Salmon River, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order withdraws 12,402.60 acres of public lands from surface entry and mining, and 4,435.60 acres of reserved mineral interests in private lands from mining for 20 years to protect the recreational and scenic values of the Lower Salmon River. The lands have been and will remain open to mineral leasing.

EFFECTIVE DATE: November 13, 1986.

FOR FURTHER INFORMATION CONTACT: Larry Lievsay, BLM, Idaho State Office, 3380 Americana Terrace, Boise, Idaho 83706, 208-334-1735.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Subject to valid existing rights, the following-described public lands are hereby withdrawn from settlement, sale, location, and entry under the general land laws, including the United States mining laws (30 U.S.C. ch.2), but not from leasing under mineral leasing laws to protect the Lower Salmon River.

Boise Meridian, Idaho

T. 28 N., R. 1 E.,
Sec. 3, lots 2, 3, 5, 6, 7, 8, 9, 10, NW¼SW¼, NW¼SE¼,
Sec. 10, lots 1, 2, 3, 4, 5, 7, 8, 10, NW¼SW¼;
Sec. 15, lots 1 thru 8, E½SW¼.
T. 29 N., R. 1 E.,
Sec. 3, lots 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, SW¼SW¼:
Sec. 4, lots 1, 2;
Sec. 5, lot 2;
Sec. 10, lots 1 thru 7;
Sec. 11, lots 1 thru 5, SW¼NW¼, NE¼SW¼;
Sec. 14, lots 1 thru 8;
Sec. 23, lots 1, 3, 4, 5, 8, 9, 10, 11, 12, SW¼NE¼, SW¼NW¼;
Sec. 26, lots 1 thru 6, SE¼NW¼;
Sec. 27, lots 1 thru 4;
Sec. 34, lots 1 thru 8; SE¼SE¼,
Sec. 35, W½NE¼.
T. 30 N., R. 1 E.,
Sec. 31, lots 4, 5, 6, 9, NE¼SW¼, N½SE¼;
Sec. 32, lots 1, 2, 5, 6, 7, 8, 9;
Sec. 33, lots 1 thru 7;
Sec. 34, SW¼SW¼.
T. 30 N., R. 1 W.,
Sec. 3, lots 5 thru 9, SW¼NW¼. NW¼SE¼;
Sec. 4, lots 3 thru 10, NW¼SE¼;
Sec. 5, lots 1 thru 6, S½NE¼;
Sec. 6, lots 1 thru 6, SW¼NE¼, SE¼NW¼;
Sec. 10, lots 1 thru 8, NE¼SW¼;
Sec. 15, lots 1 thru 8;
Sec. 22, lots 1 thru 6;
Sec. 23, lots 1, NW¼SW¼, SE¼SE¼;
Sec. 24, S½SW¼;
Sec. 25, lots 1 thru 8, 10, NE¼NW¼;
Sec. 26, lots 1, 2, 6, 7, 8, 12, 13.
T. 31 N., R. 1 W.
Sec. 31, lot 6;
Sec. 32, lots 1, 2, S½SE¼.
T. 30 N., R. 2 W.,
Sec. 1, lots 1, 4 thru 10, NE¼SE¼;
Sec. 2, lots 1 thru 7, S½NW¼.
T. 31 N., R. 2 W.,
Sec. 7, lots 3, 6, 7, 8, 9, 10;
Sec. 8, lot 2;
Sec. 17, lots 2 thru 8;
Sec. 19, lots 1, 4, 5, 6, 7, 10;
Sec. 20, lots 1 thru 10, SW¼NW¼;
Sec. 21, lots 1, 2, 3;
Sec. 27, lots 1, 2, 3;
Sec. 28, lots 1 thru 8;
Sec. 34, lots 2, 3, 4, 5, 7, 8, 10, 11, 12, 13;
Sec. 35, lot 2.
T. 31 N., R. 3 W.,
Sec. 12, lots 3 thru 6;
Sec. 13, lots 1 thru 5, 8, NE¼NW¼;
Sec. 24, lots 1, 4, 5, 8, NE¼NW¼;
Sec. 25, lots 1, 3, 6, 7, SE¼NW¼, SE¼SE¼;
Sec. 26, lots 1, 2, 3, 5, 6, SW¼NE¼;
Sec. 27, lots 4, 5, NW¼NW¼, SE¼SW¼;
Sec. 28, lots 6, 7;
Sec. 29, SE¼SE¼;
Sec. 32, lots 1, 2, 4, NE¼NE¼;
Sec. 33, lots 2, 3, 4, SE¼NW¼, SW¼SW¼.
T. 30 N., R. 3 W.,
Sec. 5, lots 2, 5, 8, SW¼SW¼;
Sec. 6, lots 6, 7, 10, 11;
Sec. 7, lots 1, 2, 5, 6, 8, 11, SE¼NW¼;
Sec. 18, lot 2;
Sec. 19, lots 2, 5, 8, 11, SE¼NW¼;
Sec. 20, SW¼SW¼;
Sec. 29, lots 2, 5, 6;
Sec. 30, lots 1, 2, SE¼NE¼;
Sec. 32, lots 2, 3, 5, 6, 7, 8.
T. 29 N., R. 3 W.,
Sec. 5, lots 3 thru 6, SE¼NW¼, SW¼SW¼;
Sec. 6, lots 6, 7, 8, 11, 12, SW¼SE¼;
Sec. 7, lots 1, 2, 4, 5, 6, 7, 8, NE¼NW¼.
T. 29 N., R. 4 W.,
Sec. 11, lot 4, SW¼SE¼;
Sec. 12, lots 1 thru 8, SW¼NE¼, NW¼SW¼, SE¼SE¼;
Sec. 13, lot 1, NE¼NW¼, NW¼NE¼, NE¼NE¼, SW¼NW¼.

The area described contains 12,402.60 acres in Idaho County.

2. Subject to valid existing rights, the reserved mineral interests in the following described private lands are hereby withdrawn from the United States mining laws but not from mineral leasing laws:

Boise Meridian, Idaho

T. 28 N., R. 1. E.,
Sec. 3, lot 1.
T. 29 N., R. 1 E.,
Sec. 3, lot 15, NW¼SE¼;
Sec. 10, SE¼SE¼;
Sec. 11, NW¼NW¼, SE¼NW¼, NW¼SE¼;
Sec. 14, lot 9, W½NW¼, NW¼SW¼;
Sec. 23, SW¼SE¼;
Sec. 26, NW¼NE¼;
Sec. 27, SW¼NE¼.
T. 30 N., R. 1 E.,
Sec. 32, N½NE¼, SE¼NE¼;
Sec. 33, N½S½;
Sec. 34, NW¼SW¼, SE¼SW¼.
T. 30 N., R. 1 W.,
Sec. 4, lots 1, 2, NE¼SW¼, SE¼SE¼;
Sec. 10, NW¼NW¼;
Sec. 23, W½NW¼, SE¼SW¼, SW¼SE¼.
T. 31 N., R. 1 W.,
Sec. 33 S½SW¼.
T. 30 N., R. 2 W.,
Sec. 1, NW¼SW¼.
T. 31 N., R. 2 W.,
Sec. 17, SW¼NE¼;
Sec. 18, lot 1, N½NE¼, SE¼NE¼, NE¼NW¼, E½SE¼;
Sec. 19, NW¼NE¼, SW¼SE;¼;
Sec. 21, N½SW¼, SW¼SE¼;
Sec. 27, NE¼SW¼;
Sec. 29, N½N½;
Sec. 30, lot 2;
Sec. 33, NE¼NE¼;
Sec. 34, lot 6, NW¼NE¼.
T. 29 N., R. 3 W.,
Sec. 5, lot 2, NE¼SW¼;
Sec. 7, lot 9, SE¼NE¼, NW¼SE¼;
Sec. 8, NW¼NW¼.
T. 30 N., R. 3 W.,
Sec. 5, lots 1, 6, 7, SE¼NE¼, NW¼SE¼;
Sec. 7, lots 7, 9, 10, 12;
Sec. 18, lots 1, 4, 5, 10;
Sec. 19, lots 1, 6, 7, 12;
Sec. 29, lots 1, 3, 4, 7, NE¼NW¼, SE¼SE¼;
Sec. 32, lots 1, 4, NE¼NE¼, E½SE¼.
T. 31 N., R. 3 W.,
Sec. 12, lot NW¼SE¼;
Sec. 24, lots 3, 6, 7;
Sec. 25, lots 2, 8;
Sec. 26, lots 4, 7, 8, SE¼SW¼;
Sec. 27, lots 6, 7, 8;
Sec. 28, lots 4, 5;
Sec. 32, lot 3;
Sec. 33, lot 1, N½NE¼;
Sec. 35, N½NE¼.
T. 29 N., R. 4 W.,
Sec. 11, NE¼SE¼;
Sec. 12, NE¼NE¼.

The area described contains 4,435.60 acres in Idaho County.

3. The withdrawal made by this order does not alter the applicability of those public land laws governing the disposal of their mineral or vegetative resources other than under the mining laws.

4. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be extended.

J. Steven Griles,

Assistant Secretary of the Interior.

October 20, 1986.

[FR Doc. 86-25653 Filed 11-12-86; 8:45 am]

BILLING CODE 4310-GG-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 0

[FCC 86-228]

Delegations of Authority to the Chief Engineer

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action amends Part 0, §§ 0.241 and 0.243 of the Commission's Rules by deleting some subsections, simplifying others and changing the format of § 0.241.

This action is taken by the Commission as part of its regulatory review efforts to eliminate obsolete rules. It will improve service to the public and make Commission processes more efficient.

EFFECTIVE DATE: April 18, 1986.

FOR FURTHER INFORMATION CONTACT: Robert Ungar, Office of Engineering and Technology, (202) 653-8100.

SUPPLEMENTARY INFORMATION:

Note.—The delay in publishing this document is due to amendatory language problems which were not resolved until recently.

Order

In the matter of Amendment of Part 0 of the Commission Rules to Reformat and Simplify the Delegations of Authority to the Chief Engineer.

Adopted: April 18, 1986.

Released: May 9, 1986.

By the Commission.

1. The action taken herein is intended to conform the Chief Engineer's delegations of authority to those of the operating bureaus, to delete those delegations that have become obsolete and to simply various other delegations that are unclear or cumbersome.

Structure of Rules

2. The Chief Engineer's delegations of authority are found in §§ 0.241 and 0.243 of the Commission's Rules. Structurally, the delegation of authority is similar to that of other Commission offices—Office of Plans and Policy, Office of General Counsel, and Office of the Managing Director. The rules state affirmatively what actions may be taken. Anything not contained in the rules must be referred to the Commission.

3. In contrast, chiefs of operating bureaus are permitted to exercise all functions described in the relevant functional section of Part 0, subpart A, except for specified functions that can be performed only by the Commission. These proscribed actions, for the most part involve matters where there is a novel question of law, fact or policy. Where there is established precedent, however, bureau chiefs are free to act. By altering the structure of the Chief Engineer's delegations to conform to those used for operating Bureaus, efficencies are likely to be realized. Routine waivers may be processed faster and service to the pubic will be improved.

Simplification of Rules

4. Various of the Chief Engineer's delegations can be simplified. In particular, the delegations dealing with the equipment authorization process and the granting of licenses for Part 5 experimental stations are unnecessarily complex. The different forms of equipment authorization need not be individually addressed. From time to time new forms of authorization have been added or modifications have been made, and it should not be necessary to amend the delegation list in such an event. Similarly, little is gained by detailing all possible steps in the Part 5 licensing process. A more general delegation to administer these programs is sufficient.

Deletion of Unnecessary Rules

5. Some delegations have outlived their usefulness and can be eliminated entirely. Section 0.243(c) gives the Chief Engineer (with concurrence of the General Counsel) authority to waive the All Channel Receiver rules for TV sets used in hospitals. Obviously this delegation is a vestige of old technology and no longer serves a useful purpose.

6. In addition we have determined that several of the other delegations requiring concurrence of the General Counsel are no longer necessary. Because the concurrence function has become obsolete and given the above-mentioned simplification of the Part 5 delegation we may eliminate § 0.243(a)(1)(4) originally intended to deal with construction permits, assignments and transfers of control and the withdrawal of pleadings. Because we have restructured the rules, it is no longer necessary to retain the specific delegation of § 0.243(d) to dismiss repetitive reconsideration requests. We have also determined that the authority to dismiss rulemaking petitons which ". . . plainly do not warrant consideration. . . " (Section 0.243(e)) will be retained but without the necessity of concurrence by the General Counsel.

7. Since a Notice of Proposed Rulemakings is not required, the Regulatory Flexibility Act, Pub. L. 93-354, does not apply.

8. Prior notice and procedures are not required because the amendments herein pertain only to internal agency procedures and practices. *See* 5 U.S.C. 553(b)(3)(A), 47 CFR 1.412(b)(5).

9. In view of the foregoing and pursuant to sections 4(i), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(c)(1) and 303(4), IT IS ORDERED that part 0 of the Commission's Rules IS AMENDED as set forth below, effective April 18, 1986.

10. IT IS FURTHER ORDERED that because it deals only with internal Commission practice and procedure this Order is effective upon Adoption by the Commission. See 5 U.S.C. 553(d), 47 CFR 1.427(b).

List of Subjects in 47 CFR Part 0.

Organization and functions (Government Agencies).

Federal Communications Commission.

William J. Tricarico,

Secretary.

Rules Changes

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation of Part 0 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Implement; 5 U.S.C. 552 unless otherwise noted.

2. The undesignated center heading above § 0.241 is revised to read "Chief Engineer".

3. Section 0.241 is revised to read as follows:

§ 0.241 Authority delegated.

(a) The performance of functions and activities described in § 0.31 of this part is delegated to the Chief Engineer: Provided, that the following matters shall be referred to the Commission en banc for disposition:

(1) Notices of proposed rulemaking and of inquiry and final orders in rulemaking proceedings, inquiry proceedings and non-editorial orders making changes. See § 0.231(d).

(2) Petitions for review of actions taken to delegated authority. See § 1.115 of this chapter.

(3) Petitions and other requests for waivers of the Commission's rules, whether or not accompanied by an applications, when such petitions or requests contain new or novel arguments not previously considered by the Commission or present facts or arguments which appear to justify a change in Commission policy.

(4) Petitions and other requests for declaratory rulings, when such petitions or requests contain new or novel arguments not previously considered by the Commission or preset facts or arguments which appear to justify a change in Commission policy.

(5) Any other petition, pleading or request presenting new or novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines.

(6) Proposed U.S. positions to be transmitted to the Department of State for international meetings of telecommunications entities.

(7) Any other complaint or enforcement matter presenting new or novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines.

(8) Authority to issue a notice of opportunity for hearing pursuant to § 1.80(g) of this chapter; and authority to issue notices of apparent liability, final forfeiture orders, and orders canceling or reducing forfeitures imposed under § 1.80(f) of this chapter, if the amount set out in the notice of apparent liability is more than $2,000.00.

(9) Proposed actions following any case remanded by the courts.

(b) The Chief Engineer is delegated authority to administer the Equipment Authorization program as described in Part 2 of the Commission's Rules.

(c) The Chief Engineer is delegated authority to administer the Experimental Radio Service program pursuant to Part 5 of the Commission's Rules.

(d) The Chief engineer is delegated authority to examine all applications for certification (approval) of subscription television technical systems as acceptable for use under a subscription television authorization as provided for in this chapter, to notify the applicant that an examination of the certified technical information and data submitted in accordance with the provisions of this chapter indicates that the system does or does not appear to be acceptable for authorization as a subscription television system. This delegation shall be exercised in consultation with the Chief, Mass Media Bureau.

(e) The Chief Engineer is authorized to dismiss or deny petitions for rulemaking which are repetitive or moot or which, for other reasons plainly do not warrant consideration by the Commission.

4. Sec. 0.243 is amended by revising paragraph (a) to read as follows:

§ 0.243 Authority delegated upon securing concurrence of the General Counsel.

(a) The Chief Engineeer, upon securing concurrence of the General Counsel, is authorized to issue notices of apparent liability, final forfeiture orders, and orders canceling or reducing forfeitures imposed under § 1.80(f) of this chapter, in the amount of $2,000.00 or less; and is authorized to issue citations pursuant to § 1.80(d).

* * * * *

[FR Doc. 86-25441 Filed 11-12-86; 8:45 am]
BILLING CODE 6712-01-M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

48 CFR Parts 702

[AIDAR Notice 87-1]

Revision of Contracting Authority

AGENCY: Agency for International Development, IDCA.

ACTION: Final rule.

SUMMARY: The AID Acquisition Regulation (AIDAR) is being amended to limit the Office of Management Operations authority to enter into service contracts; reflecting reassignment of contracting responsibilities within the Directorate for Program and Management Services.

EFFECTIVE DATE: November 13, 1986.

FOR FURTHER INFORMATION CONTACT: Mr. James M. Kelly, M/SER/PPE, Room 1600I, SA-14, Agency for International Development, Washington, DC 20523. Telephone (703) 875-1534.

SUPPLEMENTARY INFORMATION: AIDAR 702.170-10(a) is being revised to limit the Office of Management Operations authority to enter into service contracts.

This Notice is not considered a significant rule subject to FAR 1.301 or 1.5. This Notice is exempted from the requirements of Executive Order 12291 by OMB Circular 85-7. This Notice will not have an impact on a substantial number of small entities, nor will it require any information collection as contemplated by the Regulatory Flexibility Act and Paperwork Reduction Act, respectively.

List of Subjects in 48 CFR Part 702

Government procurement.

For the reasons set out in the Preamble, Chapter 7 of Title 48 of the Code of Federal Regulations is amended as follows:

PART 702—DEFINITIONS OF WORDS AND TERMS

Subpart 702.170—Definitions

1. The authority citation in Part 702 is unchanged, and continues to read as follows:

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979 44 FR 56673, 3 CFR Part 1979 Comp., p. 435.

2. Section 702.170-10 is amended by revising paragraph (a) to read as follows:

§ 702.170-10 Head of the contracting activity.

* * * * *

(a) AID/Washington.

Position	Limitation
Director, Office of Procurement.	None.
Director, Office of Management Operations.	Use of small purchase procedures ($25,000) for supplies and services, except professional non personal services and personal services. Unlimited authority when ordering against GSA or other established U.S. Government ordering agreements.
Director, Office of Foreign Disaster.	Contracts for disaster relief purposes during the first 72 hours of a disaster in a total amount not to exceed $500,000 (AID Handbook 8, Chapter 5). Routing small purchase authority ($25,000).
Director, Office of International Training.	Use of small purchase procedures up to $10,000. Unlimited for procuring participant training based on published catalog prices, using M/SER/PPE approved forms.

Each of these Office Directors will issue warrants to qualified individuals to actually exercise the authority.

* * * * *

Dated: November 3, 1986.

John F. Owens,

Procurement Executive.

[FR Doc. 86-25516 Filed 11-12-86; 8:45 am]

BILLING CODE 6116-01-M

Proposed Rules

Federal Register
Vol. 51, No. 219
Thursday, November 13, 1986

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

Animal and Plant Health Inspection Service

9 CFR Part 51

[Docket No. 86-103]

Animals Destroyed Because of Brucellosis

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the regulations governing the payment of indemnity for animals destroyed because of brucellosis by adding a breed association to the list of registered breed associations. It appears that this action is necessary in order to include in the regulations all the registered breed associations that maintain records concerning the purebreeding of animals adequate to identify an animal as a registered animal of that breed association. This action would allow for proper payment of indemnities to owners of cattle destroyed because of brucellosis, thereby encouraging the elimination of these reactor cattle as a disease source.

DATE: Written comments must be received on or before December 15, 1986.

ADDRESS: Submit written comments to Steven R. Poore, Acting Assistant Director, Regulatory Coordination, APHIS, USDA, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Comments should state that they are in response to Docket Number 86-103. Comments may be inspected at Room 728 of the Federal Building between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Robert E. Wagner, Regulatory Communications and Compliance Policy Staff, VS, APHIS, USDA, Room 827, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8565.

SUPPLEMENTARY INFORMATION:

Background

The "Animals Destroyed Because of Brucellosis" regulations (contained in 9 CFR Part 51 and referred to below as the regulations) provide for the payment of indemnities to owners of cattle, bison, and swine destroyed because of brucellosis. Under these regulations indemnity is paid to an owner of such animals destroyed because of brucellosis to encourage the owner to cooperate in the timely removal of infected animals from the herd or, in the case of herd depopulation, to remove a focus of infection in an otherwise clean area and thereby prevent transmission of brucellosis to nearby susceptible herds. Under § 51.3(a)(1) of the regulations, the indemnity shall not exceed $250 for any registered cattle or nonregistered dairy cattle or, with certain exceptions, $50 for any other nonregistered cattle or bison.

To receive indemnity for registered cattle destroyed because of brucellosis, a claimant must provide registration papers for each animal, issued in the name of or transferred by the registered breed association to the name of the claimant/owner.

Registered cattle are defined in § 51.1(o) of the regulations as:

> Cattle for which individual records of ancestry are recorded and maintained by a breed association whose purpose is the improvement of the bovine species, and for which individual registration certificates are issued and recorded by such breed association.

Section 51.1(cc) of the regulations lists known registered breed associations. It also defines a registered breed association as:

> An association formed and perpetuated for the maintenance of records of purebreeding of animal species for a specific breed whose characteristics are set forth in Constitutions, By-Laws, and other rules of the association. The records maintained by such an association shall include an Official Herd Book or other recordkeeping format and Certificates of Registration or Recordation which identify an animal as a registered animal of that registered breed association.

A claimant is eligible to receive indemnity for cattle as registered animals if they are registered with a breed association listed in § 51.1(cc) of the regulations.

In addition to the registered breed associations already listed, it has been deterined that the "American Blonde d'Aquitaine Association" is within the definition of a registered breed association in § 51.1(cc). Therefore, we propose to add this registered breed association to the list of registered breed associations in § 51.1(cc).

Executive Order 12291 and Regulatory Flexibility Act

This proposed rule is issued in conformance with Executive Order 12291 and has been determined to be not a "major rule." Based on information compiled by the Department, it has been determined that this proposed rule would not have a significant effect on the economy; 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.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12291.

The economic impact of this proposed rule is that it would allow approximately 1,500 small cattle producers owning Blonde d'Aquitaine whose cattle are registered with the American Blonde d'Aquitaine Association to receive a higher indemnity rate when such reactor cattle or exposed cattle must be destroyed because of brucellosis. There are many thousands of small cattle producers who do not own this registered breed of cattle who would not be affected by this proposed rule.

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.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to the provisions of 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 51

Animal diseases, Bison, Brucellosis, Cattle, Hogs, Indemnity payments.

PART 51—ANIMALS DESTROYED BECAUSE OF BRUCELLOSIS

Under the circumstances referred to above, 9 CFR Pat 51 would be amended as follows:

1. The authority citation for Part 51 would continue to read as follows:

Authority; 21 U.S.C. 111–113, 114, 114a, 114a–1, 120, 121, 125, 134b; 7 CFR 2.17, 2.51, and 371.2(d).

2. Section 51.1, paragraph (cc) would be amended by inserting the "American Blonde d'Aquitaine Association," immediately after "The American Black Maine-Anjou Association."

Done in Washington, DC, this 7th day of November 1986.

B.G. Johnson,

Deputy Administrator, Veterinary Services.

[FR Doc. 86–25633 Filed 11–12–86; 8:45 am]

BILLING CODE 3410-34-M

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9 CFR Part 92

[Docket No. 85–038]

Branding of Cattle From Mexico

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We propose to amend our regulations on importation of cattle to require branding of steers imported into the United States from Mexico. Our proposed amendment appears necessary to improve surveillance for bovine tuberculosis in cattle by providing a permanent means of identifying steers of Mexican origin.

DATE: Written comments must be received on or before January 12, 1987.

ADDRESS: Written comments concerning this proposed rule should be submitted to Steven R. Poore, Acting Assistant Director, Regulatory Coordination, APHIS, USDA, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Comments should indicate that they are in response to Docket Number 85–038. Written comments received may be inspected at Room 728 of the Federal Building between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. M. A. Essey, Program Planning Staff, VS, APHIS, USDA, Room 844, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301–436–5961.

SUPPLEMENTARY INFORMATION: Title 9 Part 92 of the Code of Federal Regulations [9 CFR Part 92; and referred to below as the regulations] regulates the importation into the United States of specified animals and animal products to prevent the introduction into the United States of various diseases.

We propose to amend § 92.35(c) of the regulations, which contains provisions restricting the importation of certain Mexican cattle to prevent the introduction of bovine tuberculosis into the United States.

Branding

We propose to add a new paragraph (c)(2) to § 92.35 as follows:

Each steer imported into the United States from Mexico shall be branded with the letter "M", prior to arrival at a port of entry, unless the steer is imported for slaughter in accordance with § 92.40 of this part. The "M" brand shall be not less than 2 inches, nor more than 3 inches high, and shall be applied to each steer's right jaw with a hot iron.

The jaw area is recognized and used by animal health officials around the world as a location for branding for international livestock disease eradication purposes.

Identification

Steers from Mexico are often moved into the United States for fattening prior to slaughter. Once in the United States, these steers normally spend 12 to 18 months on pasture, then are fed for 3 to 6 months in feedlots before being sent to slaughter.

Mexico also serves as a prime source of steers for use on the United States rodeo circuit. Some rodeo animals of Mexican origin may be purchased as "practice" animals by rodeo professionals and amateur enthusiasts. These animals are normally sold for slaughter when no longer able to meet rodeo competition standards.

Steers imported from Mexico are identified with metal eartags inserted prior to their entry into this country. However, eartags are frequently lost or removed after importation. This is particularly true along the rodeo circuit, where metal eartags may be a hindrance or hazard to participants in roping and bulldogging events. At present, it is often impossible to determine the country of origin of a steer that has lost its eartag.

The proposed "M" brand would provide a permanent, highly visible means of identifying steers of Mexican origin. The ability to make this determination with speed and accuracy is of vital importance to this country's National Cooperative State-Federal Bovine Tuberculosis Eradication Program.

Surveillance and Trace-Backs

In the United States, surveillance for bovine tuberculosis primarily revolves around the reporting of suspicious lesions found during postmortem inspection at slaughtering establishments. When a tuberculosis-lesioned carcass is discovered, the animal's movements are traced to locate the herd in which the disease originated. Once this is accomplished, all other movements from the infected herd are traced to find and eliminate any possible disease spread.

When a tuberculosis-infected steer is of Mexican origin, however, trace-back operations generally would be limited to (1) finding the feedlot or pasture that received the animal after its importation into this country, and (2) tracing movements (other than to slaughter) of exposed animals from the feedlot or pasture.

The proposed "M" brand would permit immediate identification of steers of Mexican origin. We believe, therefore, that this proposal will speed trace-backs in "lost eartag" instances, enabling the Department to focus manpower and funding along the most promising investigatory channels.

Miscellaneous

This document would also make certain nonsubstantive changes in the regulations for the purposes of clarity.

Executive Order 12291 and Regulatory Flexibility Act

This proposed rule has been reviewed in conformance with Executive Order 12291 and has been determined to be not a "major rule." The Department has determined that this action would not have an effect on the economy of $100 million or more; 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 have any 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.

This proposed rule requiring that certain Mexican steers be branded prior to their arrival at a United States port of entry should not increase or decrease the number of Mexican steers imported into the United States. Branding would involve a small additional cost for

Mexican ranchers and exporters, but this expenditure would not be significant—even for small entities—when measured against overall production and transportation costs. The Department also believes that the proposed branding requirement would not affect cattle or meat prices at either the wholesale or retail levels.

Under the circumstances explained above, 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 the provisions of 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 92

Animal diseases, Canada, Imports, Livestock and livestock products, Mexico, Poultry and poultry products, Quarantine, Transportation, Wildlife.

PART 92—IMPORTATION OF CERTAIN ANIMALS AND POULTRY AND CERTAIN ANIMAL AND POULTRY PRODUCTS; INSPECTION AND OTHER REQUIREMENTS FOR CERTAIN MEANS OF CONVEYANCE AND SHIPPING CONTAINERS THEREON

Accordingly, it is proposed to amend regulations contained in 9 CFR Part 92 as follows:

1. The authority citation for Part 92 would continue to read as follows:

Authority: 7 U.S.C. 1622; 19 U.S.C. 1306; 21 U.S.C. 102–105, 111, 134a, 134b, 134c, 134d, 134f, and 135; 7 CFR 2.17, 2.51, and 371.2(d).

2. The definitions in § 92.1 would be placed in alphabetical order, and the paragraph designations would be deleted.

3. Section 92.1 would be amended by adding, in alphabetical order, the following new definition:

§ 92.1 Definitions.

* * * * *

United States. All of the States of the United States, the District of Columbia, Guam, Northern Mariana Islands, Puerto Rico, the Virgin Islands of the United States, and all other Territories and Possessions of the United States.

* * * * *

4. In § 92.35, current paragraphs (c)(2) and (c)(3) would be renumbered (c)(3) and (c)(4), respectively.

5. In § 92.35 a new paragraph (c)(2) would be added to read as follows:

§ 92.35 Cattle from Mexico

* * * * *

(c) * * *

(2) Each steer imported into the United States from Mexico shall be branded with the letter "M," prior to arrival at a port of entry, unless the steer is imported for slaughter in accordance with § 92.40 of this part. The "M" brand shall be not less than 2 inches, nor more than 3 inches high, and shall be applied to each steer's right jaw with a hot iron.

* * * * *

Done at Washington, DC, this 7th day of November 1986.

B.G. Johnson,

Deputy Administrator Veterinary Services.

[FR Doc. 86–25634 Filed 11–12–86; 8:45 am]

BILLING CODE 3410–34–M

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 106, 9001, 9002, 9003, 9004, 9005, 9006, 9007, 9031, 9032, 9033, 9034, 9035, 9036, 9037, 9038, 9039

[Notice 1986–10]

Public Financing of Presidential Primary and General Election Candidates

AGENCY: Federal Election Commission.

ACTION: Announcement of hearing date.

SUMMARY: On August 5, 1986, the Federal Election Commission published a Notice of Proposed Rulemaking on regulations governing the public financing of Presidential primary and general election candidates (51 FR 28154). One commenter on the proposed rules has submitted a request to testify before the Commission regarding certain of these proposals. The Commission has therefore decided to hold a public hearing on the proposed rules governing public financing of Presidential primary and general election campaigns. The hearing will be held on December 3, 1986, at 10:00 a.m., in the Commission's 9th Floor hearing room, 999 E Street, NW., Washington, DC.

Although the August notice also raised issues regarding bank loans to candidates and political committees, the Commission intends to concentrate on the public financing issues in the hearing being announced today. The Commission will determine at a later point whether to hold hearings to specifically address the bank loan proposals.

Persons wishing to testify at the December 3 hearing must so notify the Commission in writing on or before November 21, 1986. Further, any person requesting to testify must submit written comments on the proposed rules on or before November 21, 1986.

DATES: A public hearing on the proposed rules governing public financing of Presidential campaigns will be held on December 3, 1986, at 10:00 a.m. Requests to appear and comments on the proposed rules must be submitted in writing on or before November 21, 1986.

ADDRESS: Requests to appear and comments on the proposed rules must be addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463.

FOR FURTHER INFORMATION CONTACT: Susan E. Propper, Assistant General Counsel (202) 376–5690 or (800) 424–9530.

Dated: November 10, 1986.

Joan D. Aikens,

Chairman, Federal Election Commission.

[FR Doc. 86–25749 Filed 11–12–86; 8:45 am]

BILLING CODE 6715–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 86–CE–56–AD]

Airworthiness Directives; British Aerospace (BAe) Models HP 137 MK I, Jetstream 200 and Jetstream 3101 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This Notice proposes to adopt a new Airworthiness Directive (AD), applicable to British Aerospace (BAe) Models HP 137 MK I Series, Jetstream 200 Series and certain Jetstream 3101 Series airplanes incorporating certain nose landing gears where would introduce a recurring torque loading check on the nose landing gear top cap securing bolts. Three incidents have occurred in service, which the bolts securing the top cap to the steering tube on the nose landing gear have been found fractured and loose. These defects may cause loss of control of the aircraft.

DATES: Comments must be received on or before February 16, 1987.

ADDRESSES: British Aerospace (BAe), CAA Mandatory Service Bulletin (MSB) No. 32-JA840827 dated January 16, 1986, revised February 4, 1986, February 7, 1986. BAe Airweapons Division Service Bulletin (S/B) No. 32-12 dated November 29, 1985, BAe S/B No. 32-JA860331 dated September 1, 1986, and BAe Airweapons Division S/B No. 32-20 dated March 4, 1986, applicable to this AD may be obtained from British Aerospace PLC., Manager, Product Support Civil Aircraft Division, Prestwick Airport, Ayrshire, KA9 2RW, Scotland; or British Aerospace, Inc., Librarian, Post Office Box 17414, Dulles International Airport, Washington, DC 20041; or the Rules Docket at the address below. Send comments on the proposal in duplicate to Federal Aviation Administration, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 86-CE-AD, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

FOR FURTHER INFORMATION CONTACT: Mr. Ted Ebina, Aircraft Staff, AEU-100, Europe, Africa and Middle East Office, FAA, c/o American Embassy, B-1000 Brussels, Belgium; Telephone (322) 513.38.30; or Mr. Harvey A. Chimerine, FAA, Project Support Staff Foreign, ACE-109, 601 East 12th Street, Kansas City, Missouri 64106; Telephone (316) 374-6932.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 86-CE-AD, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

Discussion

Three incidents have occurred in service on British Aerospace (BAe) Air Weapons Division (AWD) manufactured nose landing gear units, where the bolts securing the top cap to the steering tube on the nose landing gear have been found fractured and loose. As a result, British Aerospace has issued BAe CAA MSB No. 32-JA840827 dated January 16, 1986, revised February 4, 1986, February 7, 1986, BAe AWD S/B No. 32-12 dated November 29, 1985, which introduces a recurring torque loading check for the proper torque of 26-28 ft-lbs on the nose landing gear top cap securing bolts of aircraft in service. Subsequently, BAe issued S/B No. 32-JA860331 dated September 1, 1986, and BAe AWD S/B No. 32-20 dated March 4, 1986, which introduces a modification by replacing the existing top cap and bolts and installing a reinforced top cap, new bolts with larger clamping area, dowel retaining plate and spirol pins. The Civil Airworthiness Authority United Kingdom (CAA-UK) which has responsibility and authority to maintain the continuing airworthiness of these airplanes in the United Kingdom has classified this BAe, CAA MSB No. 32-JA840827 dated January 16, 1986, revised February 4, 1986, February 7, 1986, and the actions recommended therein by the manufacturer as mandatory to assure the continued airworthiness of the affected airplanes. On airplanes operated under United Kingdom registration, this action has the same effect as an AD on airplanes certified for operation in the United States. The FAA relies upon the certification of the CAA-UK combined with FAA review of pertinent documentation in finding compliance of the design of these airplanes with the applicable United States airworthiness requirements and the airworthiness conformity of products of this type design certificated for operation in the United States. The FAA has examined the available information related to the issuance of British Aerospace (BAe), CAA MSB No. 32-JA840827 dated January 16, 1986, revised February 4, 1986, February 7, 1986, BAe AWD S/B No. 32-12 dated November 29, 1985, BAe S/B No. 32-JA860-331 dated September 1, 1986, and BAe AWD S/B No. 32-20 dated March 4, 1986, and the mandatory classification of this British Aerospace (BAe), CAA MSB No. 32-JA840827 dated January 16, 1986, revised February 4, 1986, and February 7, 1986, by the CAA-UK. Based on the foregoing, the FAA believes that the condition addressed by the British documentation is an unsafe condition that may exist on other products of this type design certificated for operation in the United States. Consequently, the proposed AD would require British Aerospace (BAe) Model HP 137 MK I Series, Jetstream 200 Series and certain Jetstream 3101 Series airplanes incorporating certain nose landing gears to introduce a repetitive torque loading check for the proper torque of 26-28 ft-lbs on the nose landing gear top cap securing bolts. The proposed AD permits the one-time modification of the nose landing gear by removing and discarding the existing top cap and bolts, installing a new reinforced top cap per BAe S/B No 32-JA860331 complete with additional spirol pins, new top cap bolts part numbers, and a dowel retaining plate.

The FAA has determined there are approximately 75 airplanes affected by the proposed AD. The cost of inspecting and retorquing is estimated to be $120 per airplane. The total cost is estimated to be $9,000 to the private sector.

The cost of compliance with the proposed AD is so small that the expense of compliance will not be a significant financial impact on any small entities operating these airplanes.

Therefore, I certify that this action (1) is not a major rule under the provisions of Executive Order 12291, (2) is not a significant rule under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and (3) if promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the public docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES".

List of Subjects in 14 CFR Part 39

Air transportation, Aviation safety, Aircraft, Safety.

The Proposed Amendment

PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator,

the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the FAR as follows:

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

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

§ 39.13 [Amended]

2. By adding the following new AD:

British Aerospace: Applies to British Aerospace Models HP 137 MK I and Jetstream 200 Series (all serial numbers) and Model Jetstream 3101 airplanes as follows:

1. Serial Numbers 601 to 606 inclusive, incorporating nose landing gear BAe type numbers 1863, 1873/2A or 1873/3A, and;

2. Serial numbers 607 and subsequent, incorporating nose landing gear BAe type B09A702852A with "strike off" numbers 1, 2, 3 or 4.

Compliance: Required as indicated after the effective date of this AD, unless already accomplished.

To prevent the failure and loosening of the nose landing gear top cap securing bolts and possible loss of control of the aircraft, accomplish the following:

(a) Within the next 200 landings after the effective date of this AD, visually inspect the nose landing gear top cap securing bolts in accordance with Section 2. "ACCOMPLISHMENT INSTRUCTIONS" in British Aerospace Air Weapons Division Service Bulletin (S/B) No. 32-JA840827 dated January 16, 1986, revised February 4, 1986 and February 7, 1986.

(1) If a cracked or loose nut is found, before further flight, remove, replace, lubricate, and retorque the top cap securing bolts in accordance with BAe Air Weapons Division S/B No. 32-12 and repeat the inspection of paragraph (a) of this Airworthiness Directive (AD) before the next 1,000 landings, and every 1,000 landings thereafter, or modify the nose landing gear in accordance with paragraph (b) of this AD.

(2) If no defect is found, repeat the inspection of paragraph (a) of this Ad before the next 1,000 landings, and every 1,000 landings thereafter, or modify the nose landing gear in accordance with paragraph (b) of this AD. Note: If landings are not recorded, substitute one landing for each ½ hour of flight time.

(b) The repetitive inspection required by paragraph (a) of this AD may be discontinued when the nose landing gear is modified in accordance wtih BAe S/B No. 32-JA860331 dated September 1, 1986, and BAe Air Weapons Division S/B No. 32-20 dated March 4, 1986, by replacing the existing top cap and bolts and installing new reinforced top cap, new bolts with larger clamping area, dowel retaining plate and spiral pins.

(c) Aircraft may be flown in accordance with Federal Aviation Regulations 21.197 to a location where this AD can be accomplished.

(d) An equivalent means of compliance with this AD may be used if approved by the Manager, Aircraft Certification Staff, AEU-100, Europe, Africa and Middle East Office, FAA, c/o American Embassy, B-1000 Brussels, Belgium.

All persons affected by this directive may obtain copies of the documents referred to herein upon request to British Aerospace PLC., Manager, Product Support Civil Aircraft Division, Prestwick Airport, Ayrshire, KA9 2RW, Scotland; or British Aerospace, Inc., Librarian, Post Office Box 17414, Dulles International Airport, Washington, DC 20041; or FAA Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on November 3, 1986.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 86-25531 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 86-CE-02-AD]

Airworthiness Directives; Cessna 150, A150, F150, FA150, FRA150, 152, F152, FA152, A152, 170, 172, F172, FR172, P172, R172, 175, 177, 177RG, F177RG, 180, 182, F182, FR182, R182, TR182, 185, A185, 188, A188, T188, 190, 195, 205, 206, P206, U206, TU206, TP206, 207, T207, 210, P210, T210, 336, 337, F337, FP337, P337, T337, and T303 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Withdrawal of Notice of Proposed rulemaking (NPRM).

SUMMARY: This action withdraws the Notice of Proposed Rulemaking (NPRM) Docket 86-CE-02-AD, published in the **Federal Register** on January 31, 1986 (51 FR 3985). The NPRM proposed to adopt an Airworthiness Directive (AD), that would require relocation of seat stops on certain models, installation of a warning placard concerning proper locking of the seats on all models, and inspection of seat rails and locking mechanisms on all models. Subsequent evaluations of public comments to the NPRM indicates strong opposition to the proposed AD. The opposition is based primarily on the following three concerns: (1) An unsafe condition may be created for some pilots if the seat stops were relocated, (2) the information on the proposed placard is already a preflight checklist item, and (3) the seat rail and locking mechanism inspections are already a part of normal required maintenance. Based upon the public comments and a complete technical reevaluation of the proposal, the FAA is withdrawing this NPRM and is preparing a new AD which will require a more thorough inspection of the seats, seat rails, and seat lock mechanisms.

FOR FURTHER INFORMATION CONTACT: Mr. Douglas W. Haig, Airframe Branch, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; Telephone (316) 946-4409.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an AD, requiring: (1) Relocation of seat stops on certain applicable models, (2) installation of a warning placard on all models addressing proper locking of the seats, and (3) inspection of the seat rails and locking mechanisms on all models, was published in the **Federal Register** on January 31, 1986 (51 FR 3985). Interested persons, including registered owners/operators of some 145,000 affected aircraft, were afforded an opportunity to comment on the proposed AD. Four hundred and twenty-two comments (including comments from representatives of several major owner and user groups) were received, of which 31 were in favor of adopting the amendment, 334 were opposed, 43 were in favor of adopting the amendment in part, and 14 offered neutral comments.

In addition to objecting, two commenters recommended that their Supplemental Type Certificates (STCs) be incorporated into the proposed AD and another recommended the installation of a secondary stop fabricated out of wood. Three commentors recommended the use of stronger materials and a redesign of the seat lock mechanism. Incorporation of any of these modifications will increase the total cost of the proposed AD as none of these alterations would eliminate the proposed inspection requirements.

Another commenter recommended that all the seats and related structure of all affected airplanes be redesigned to meet crash dynamic criteria. This recommendation is beyond certification requirements and would not be economically feasible.

Two commenters submitted studies concluding that the seat problems are related to usage and wear making this strictly a usage/maintenance issue. According to these studies, everytime the airplane is flown, the seat is expected to be moved four times. In the case of an airplane used in training, 400 hours a year flying time is typical. Such airplanes may experience 1600 seat movements a year. The FAA recognized that adequate integrity of a seat system subjected to high frequency usage can best be assured by dedication of the operators to an adequate maintenance program.

Seven commentors were in favor of relocation of the seat stops; whereas, 48 were opposed, based upon a decrease in safety. Those opposing the seat stop relocation contend that limiting forward travel of the seat creates an unsafe condition for short people, i.e., they cannot reach the rudder pedals and other controls. The FAA concurs that repositioning of the seat stops can create an unsafe condition for pilots with certain physiques and should not be a requirement of the AD.

Fifteen commentors were in favor of the warning placard; whereas, 195 were opposed. Those opposing this placard contend that it is unnecessary since the instructions are already a checklist item and that instrument panel placards should contain only information which is essential to flight. Most consider the panel already overly crowded with placards. The FAA agrees that the placard information is already available as a checklist item, and the placard should not be a requirement of the AD.

Six commentors were in favor of the seat rail and locking mechanism inspections; whereas, 216 were opposed to the inspections as proposed. Those opposing the inspection aspects of the proposed AD maintain these inspections are already specified at 100 hour intervals for FAR 135 operators and at annual inspections for FAR 91 operations. The FAA concurs that these inspections are called out but considers the current inspections inadequate. In addition, the crack criteria called out in Cessna Single Engine Service Information Letter SE83-6, dated March 11, 1983, does not directly relate to the seat slipping problem. Therefore, additional maintenance and inspection requirements are necessary to prevent possible seat slippage and will be addressed in a new proposed AD action.

One hundred and two commentors addressed cost as a factor in their decision; 100 felt the economic impact to be excessive. No comments were received which would change the cost estimates for the actions proposed in the NPRM.

From the public comments and a complete technical reevaluation of the proposal, the FAA is withdrawing this NPRM and is preparing a new AD action which will require a more thorough inspection of the seats, seat rails and seat lock mechanisms.

Withdrawal of Proposed Amendment

PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration deletes a proposal to amend § 39.13 of the FAR as follows:

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

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

2. NPRM Docket No. 86-CE-02-AD, published in the **Federal Register** on January 31, 1986 (51 FR 3985), is withdrawn.

Issued in Kansas City, Missouri, on November 3, 1986.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 86-25532 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 86-CE-52-AD]

Airworthiness Directives; Champion Aircraft Company, Inc., Models 7 and 8 Airplanes

AGENCY: Federal Aviation Adminstration (FAA), DOT.

ACTION: Notice of Proposed rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new Airworthiness Directive (AD) that would require an inspection of the front and rear wing spars for compression failures on the Champion (Bellanca) Models 7 and 8 airplanes. Two accidents have occurred since 1985 where compression failures were found to have contributed to the accidents. The inspection is necessary to detect said condition in the spars and preclude inflight structural failure of the wing.

DATES: Comments must be received on or before December 10, 1986.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 86-CE-52-AD, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

FOR FURTHER INFORMATION CONTACT: Efrain Esparza, Airplane Certification Branch, ASW-150, Aircraft Certification Division, Southwest Region, Federal Aviation Administration, Post Office Box 1689, Fort Worth, Texas 76101; Telephone (817) 624-5156.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRMs.

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 86-CE-52-AD, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

Discussion: The FAA has determined that there have been two accidents as a result of in-flight structural failure of the wing on Champion (Bellanca) Model 8GCBC airplanes for which compression failure in the wing's main spar were contributing factors. In addition, the FAA has received a report of a Champion (Bellanca) Model 7KCAB airplane with compression failures in the rear spar at the strut fitting attach area. Compression failures are failures of wood fibers on a plane perpendicular to the wood fiber longitudinal axis. Failures can occur during flight when the structural limits of the airplane wings are exceeded during a flight maneuver. If this condition goes undetected, it can result in in-flight structural failure of the wing with loss of the airplane. Therefore, an inspection of the wings' spars to detect compression failures is necessary to preclude in-flight structural failure of the wing.

On October 17, 1985, the FAA issued a General Aviation Airworthiness Alert, AC 43-16, "Bellanca Aircraft Possible Wing Failure, Model 7 and 8 Series," to recommend an inspection of the wings' spars for compression failures for the Model 7 and 8 series airplanes. However, the level of response to this AC has been very low considering the

nature of the problem and the number of airplanes involved.

Since this condition is likely to exist or develop on other airplanes of the same/similar type design, the proposed AD would make compliance with the instructions in AC 43-16 dated October 17, 1985, mandatory for all Champion (Bellanca) Model 7 and 8 airplanes. The FAA has determined that approximately 8,200 airplanes will be affected by this proposal. The estimated cost per airplane for the initial inspection will depend on the fuel system of the airplane. Airplanes with a 70 gallon fuel system will have nine rib bay areas per wing to inspect while those with a 36 or 26 gallon fuel system will have 13 rib bay areas. Therefore, the estimated cost per airplane for the initial inspection will range from $1,260 to $1,820 and between $10,332,000 and $14,924,000 for the fleet. In addition, the AD will require a re-inspection of the wings spars if the airplane is overturned or suffers structural wing damage after the initial inspection and/or if the airplane is in the acrobatic category. The cost of the re-inspection is expected to be the same as the initial inspection. Few, if any, small entities operate the affected airplane and any that may would operate only one airplane.

Therefore, I certify that this action (1) is not a major rule under the provision of Executive Order 12291, (2) is not a significant rule under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and (3) if promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation has been prepared for this action and has been placed in the public docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES".

List of Subjects in 14 CFR Part 39

Air transportation, Aviation safety, Aircraft, Safety.

The Proposed Amendment

PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the FAA proposes to amend § 39.13 of Part 39 of the FAR as follows:

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

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

2. By adding the following new AD:

Champion Aircraft Company, Inc. Applies to Models 7 and 8 airplanes (all serial numbers) certificated in any category.

Compliance: Required as indicated in the body of the AD unless already accomplished.

To preclude in-flight structural failure of the wing, accomplish the following:

(a) Within the next 75 hours time-in-service (TIS) after the effective date of this AD, unless already accomplished, inspect the wing spars for compression failures as follows:

(1) For the spar, make rectangular C-shaped cutouts just aft of the front spar with the longside parallel to the spar so that the fabric peels away from the spar. The cutout should be large enough to allow visual inspection of the spar. Do this for all rib bay areas outboard of the fuel tank outboard rib. If an inspection hole already exists in a particular rib bay area, use this in lieu of making the rectangular cutout if it allows for visual inspection of the spar. For the rear spar, the rectangular cutout should be made just forward of the rear spar so that it peels away from the spar.

(2) Look along the side surface of the spar (front/rear) with a light striking along the grain at an angle of about 20° with the surface. The point of view should be varied between 45° and the vertical (with respect to the spar side surface) on the same side as the light source. Other angles of light and vision should be tried.

(3) If any compression failure is found, prior to further flight, repair or replace the spar.

Note (1).—When viewed in the manner described in paragraph (a)(2), a failure appears as an irregular line extending across the grain. When a 10X hand lens or microscope is used, the same arrangement with respect to the light source is recommended except that it is best to keep the point of view at vertical angle, due to distortion of the field when any other position is used.

A good hand lens is of assistance when the failures are minute or when only a small area is to be examined. When examining the spar with a hand lens, care must be taken not to mistake minute breaks in the surface fibers, that are sometimes caused by chafing, for compression failures. These surface breaks can be removed with a sharp knife, whereas a compression failure is usually still visible after a thin shaving has been taken off. The knife must be sharp so that a very thin shaving can be removed without crushing the remaining fibers and thereby obscuring a compression failure if present.

Note (2).—An area requiring special attention is the wing strut fitting area. Other conditions such a loose/missing rib nails should be looked for, and unsatisfactory conditions should be repaired. After the wing spar inspection has been accomplished, wing fabric cutouts must be repaired or reinstalled.

(b) After wing spar inspection is completed repair wing fabric cutouts or reinstall covers.

(c) If at any time, subsequent to the effective date of this AD, the aircraft is involved in an accident that may have resulted in structural damage to the wings, before further flight reinspect the wing spars in accordance with this AD.

(d) Reinspect aircraft in the acrobatic category at every 100-flight hour interval after the inspection conducted per paragraph (a) above.

(e) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(f) The intervals between repetitive inspections required by this AD may be adjusted up to 10 percent of the specified interval to allow accomplishing these inspections concurrent with other scheduled maintenance of the airplane.

(g) An equivalent method of compliance with the AD may be used if approved by the Manager, Airplane Certification Branch, ASW-150, Federal Aviation Administration, Southwest Regional Office, Fort Worth, Texas 76101.

All persons affected by this directive may obtain copies of the document(s) referred to herein upon request to the FAA, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on October 24, 1986.

Barry D. Clements,

Acting Director, Central Region.

[FR Doc. 86-25534 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 73

[Airspace Docket No. 86-ASO-16]

Proposed Alteration of Restricted Areas

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to change the times of designation for Restricted Areas R-3002A, B, C, D, E and F, Fort Benning, GA; R-4404A, B and C, Macon, MS, and R-5314A, B, C, D, E, F, G, H and J, Dare County, NC. The times of designation are being altered from a continuous basis to specific times so as to provide for better real time management of the nation's airspace, reflect more accurately the actual usage of the airspace, and return unused airspace for public use.

DATE: Comments must be received on or before December 29, 1986.

ADDRESSES: Send comments on the proposal in triplicate to: Director, FAA, Southern Region, Attention: Manager, Air Traffic Division, Docket No. 86-ASO-16, Federal Aviation Administration, P.O. Box 20636, Atlanta, GA 30320.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is

located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Ronald C. Montague, Airspace and Aeronautical Information Requirements Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC. 20591; telephone: (202) 267-9247.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 86-ASO-16." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments.A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry 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 a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2 which describes the application procedure.

The Proposal

The FAA is considering an amendment to Part 73 of the Federal Aviation Regulations (14 CFR Part 73) to change the times of designation for Restricted Areas R-3002A, B, C, D, E and F, Fort Benning, GA; R-4404A, B and C, Macon, MS, and R-5314A, B, C, D, E, F, G, H and J, Dare County, NC. The times of designation are being altered from a continuous basis to specific times so as to provide for better real time management of the nation's airspace, reflect more accurately the actual usage of the airspace, and return unused airspace for public use.

These actions were prompted by a review of the annual utilization reports that are submitted annually to the FAA by the using agencies. The review reveal that certain restricted areas designated as "continuous" were only in use during a portion of the day. Southern Region military representatives and FAA controlling agencies in the Southern Region were ask to provide time blocks that more accurately reflected real time usage information. The revised times of designation were developed from the information received. Sections 73.30, 73.44 and 73.53 of Part 73 of the Federal Aviation Regulations were republished in Handbook 7400.6B dated January 2, 1986.

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

List of Subjects in 14 CFR Part 73

Aviation safety, Restricted areas.

PART 73—[AMENDED]

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 73 of the Federal Aviation Regulations (14 CFR Part 73) as follows:

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510, 1522; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

2. Section 73.30 is amended as follows:

R-3002A, B and D Fort Benning, GA [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0600-2000 local time, daily; other times by NOTAM 6 hours in advance.

R-3002C, E, and F Fort Benning, GA [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent by NOTAM 6 hours in advance.

3. Section 73.44 is amended as follows:

R-4404A, B, and C Macon, MS [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0700-1800 local time, daily; other times by NOTAM 24 hours in advance.

4. Section 73.53 is amended as follows:

R-5314A, B, C, D, E, F, G, H and J Dare County, NC [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0600-2400 local time, Monday-Friday; 0800-1800 local time Saturday-Sunday; other times by NOTAM 6 hours in advance.

Issued in Washington, DC, on November 5, 1986.

Daniel J. Peterson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86-25536 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 73

[Airspace Docket No. 86-ASO-3]

Proposed Alteration of Restricted Areas

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to change the times of designation for Restricted Areas R-2102A, B and C, Fort McClellan, AL; R-2104A and C Huntsville, AL; R-2901A, B, C, D, E, F, G, H and I, Avon Park, FL; R-2906 Rodman, FL; R-2907A and B, Lake George, FL; R-2908 Pensacola, FL; R-2910 Pinecastle, FL, and R-7104 Vieques Island, PR. The times of designation are being altered from a continuous basis to specific times so as to provide for better real time management of the nation's airspace, reflect more accurately the actual usage of the airspace, and return unused airspace for public use.

DATES: Comments must be received on or before December 29, 1986.

ADDRESSES: Send comments on the proposal in triplicate to: Director, FAA, Southern Region, Attention: Manager, Air Traffic Division, Docket No. 86-ASO-3, Federal Aviation Administration, P.O. Box 20636, Atlanta, GA 30320.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Ronald C. Montague, Airspace and Aeronautical Information Requirements Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operatives Service, Federal Aviation administration, 800 Independence Avenue, SW., Washington, DC 20591; (202) 267-9247.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, enviromental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 86-ASO-3." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry 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 a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2 which describes the application procedure.

The Proposal

The FAA is considering an amendment to Part 73 of the Federal Aviation Regulations (14 CFR Part 73) to change the times of designation for Restricted Areas R-2102A, B and C, Fort McClellan, AL; R-2104A and C, Huntsville, AL; R-2901A, B, C, D, E, F, G, H and I, Avon Park, FL; R-2906 Rodman, FL; R-2907A and B Lake George, FL; R-2908 Pensacola, FL; R-2910 Pinecastle, FL, and R-7104 Vieques Island, PR. The times of designation are being altered from a continuous basis to specific times so as to provide for better real time management of the nations's airspace, reflect more accurately the actual usage of the airspace, and return unused airspace for public use.

These actions were prompted by a review of the annual utilization reports that are submitted annually to the FAA by the using agencies. The review revealed that certain restricted areas designated as "continuous" were only in use during a portion of the day. Southern Region military representatives and FAA controlling agencies in the Southern Region were asked to provide time blocks that more accurately reflected real time usage information. The revised times of designation were developed from the information received. Sections 73.21, 73.29 and 73.71 of Part 73 of the Federal Aviation Regulations were republished in Handbook 7400.6B dated January 2, 1986.

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

List of Subjects in 14 CFR Part 73

Aviation safety, Restricted areas.

PART 73—[AMENDED]

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 73 of the Federal Aviation Regulations (14 CFR Part 73) as follows:

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

Authority. 49 U.S.C. 1348(a), 1354(a), 1510, 1522; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

2. Section 73.21 is amended as follows:

R-2102A, B and C Fort McClellan, AL [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0600-

2200 local time, daily; other times by NOTAM 6 hours in advance.

R-2104A and C Huntsville, AL [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0600-2000 local time, Monday-Saturday; other times by NOTAM 6 hours in advance.

3. Section 73.29 is amended as follows:

R-2901A, B, C, D, E, F, G, H and I Avon Park, FL [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0600-2400 local time, Monday-Friday; 0800-1800 local time, Saturday-Sunday; other times by NOTAM 6 hours in advance.

R-2906 Rodman, FL [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0500-0100 local time, daily; other times by NOTAM 6 hours in advance.

R-2907A and B Lake George, FL [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0500-0100 local time, daily; other times by NOTAM 6 hours in advance.

R-2908 Pensacola, FL [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, sunrise-sunset, daily; other times by NOTAM 24 hours in advance.

R-2910 Pinecastle, FL [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0500-0100 local time, daily; other times by NOTAM 6 hours in advance.

4. Section 73.71 is amended as follows:

R-7104 Vieques Island, PR [Amended]

By removing the present time of designation and substituting the following:

Time of designation. Intermittent, 0600-2300 local time, daily; other times by NOTAM 24 hours in advance.

Issued in Washington, DC, on November 5, 1986.

Daniel J. Peterson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 25537 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-13-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1 and 33

Cross-Margining of Commodity Futures, Commodity Options, and Securities Options; Request for Comments on Petition of Rulemaking

AGENCY: Commodity Futures Trading Commission.

ACTION: Request for comment.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is seeking comments on a petition for rulemaking submitted by the Intermarket Clearing Corporation ("ICC"). The petition seeks to have the Commission issue a rule of general applicability that would permit the cross-margining of positions in commodity futures, commodity options, and securities options relating to the same underlying assets. The text of ICC's rule proposal is being published as part of this request for comment. Copies of the accompanying petition are available from the Secretary of the Commission at the address and telephone number set forth below.

DATE: Comments must be submitted by February 11, 1987.

ADDRESS: Written comments must be submitted to and copies of the petition for rulemaking may be obtained from: Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581 (Attention: Jean A. Webb, Secretary). Telephone: (202) 254-6314.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Rosenzweig, Associate Director, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Telephone: (202) 254-8955.

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated January 31, 1986, the Intermarket Clearing Corporation submitted to the Commission a petition for rulemaking in which ICC requested that the Commission issue a rule which, notwithstanding the provisions of other of the Commission's regulations, would permit the "cross-margining" of positions in commodity futures, commodity options, and non-commodity options, including options on stock indices, government securities, and foreign currencies, where such options are traded on a national securities exchange ("securities options"). In support of its petition, ICC states that the economic similarities between furtures, commodity options, and securities options have created opportunities for intermarket hedging and arbitrage.[1] For example, while the risk of some short call positions in stock index options traded on a national securities exchange can be substantially diminished by a long futures position on the same or a related index, each such position must be margined separately at the respective clearing organizations for those contracts. ICC states that as a result, persons with intermarket spread positions and their clearing firms must meet substantially higher margin requirements than are warranted by the "net risk" posed by those positions.

ICC therefore has proposed that the Commission adopt a rule which would authorize a clearing organization of a contract market that is also registered with the Securities and Exchange Commission as a clearing agency [2] to carry all legs of such a spread position. ICC represents that this would allow it (and, presumably, and similarly situated clearing organization) to recognize the reduced risk level associated with combined positions and to set its margin requirement accordingly. ICC contends that such a system of cross-margining would eliminate a deterrent to intermarket spreading and arbitrage, facilitate the unified net capital treatment of such intermarket positions, and eliminate potential settlement problems associated with the maintenance of large intermarket spread positions.

ICC further maintains in suppport of its proposal that cross-margining would facilitate financial surveillance by increasing participating clearing organizations' awareness of the positions that ordinarily would be held by their members with other clearing

[1] Although characterized in the ICC petition as "intermarket hedge positions," positions consisting of commodity futures, commodity options, and securities options would not qualify as hedging under the Commission's regulations and are, therefore, hereinafter referred to as spread positions.

[2] *See* Section 17A of the Securities Exchange Act of 1934, 15 U.S.C. 78q-1. ICC, which is not presently registered as a securities clearing agency, is a subsidiary of the Options Clearing Corporation, which serves as the quarantor and clearinghouse of standardized securities options. ICC has indicated that it would register as such a clearing agency.

organizations. Finally, ICC believes that concentrating all legs of an intermarket spread position with a single clearing organization through cross-margining will improve the safety of commodity and securities clearing systems. In this regard, ICC notes that the margin systems used by clearing organizations typically require their members to deposit cash or cash-equivalent assets to compensate for the risk of obligations whose liquidation cost may be highly volatile. In contrast, ICC states that where the risk of an obligation is reduced by a position on the other side of the market, any increase in the cost of liquidating one obligation should be offset by a corresponding increase in the value of the other.

The Commission has set forth below a synopsis of the mechanics of the cross-margining system proposed by ICC. The Commission notes, however, that certain facets of ICC's proposal do not appear to be essential or universal attributes of a cross-margining system. Similarly, the text of the rule proposed by ICC (and which is being published as Part III of this **Federal Register** notice) may in certain respects be reflective of ICC's unique situation.[3] The Commission therefore believes that it would be most appropriate for persons commenting on the ICC petition to concentrate their remarks on the issues raised generally by such a proposal. Thus, although the Commission is making ICC's petition available upon request and welcomes comments upon the particulars of that petition, the Commission asks that commentors endeavor specifically to address the questions identified by the Commission in this **Federal Register** notice.

II. Mechanics of the Proposed Cross-Margining System

ICC's cross-margining proposal would permit ICC clearing members to carry positions in commodity futures, commodity options, and securties options in integrated accounts with ICC. The ICC petition therefore contemplates that positions in related markets, such as a short futures contract in a foreign currency, a short call option on that futures contract, and a long put option on that currency traded on a national securities exchange, could be assigned an aggregate margin amount which would be reflective of the combined risk of those positions.

A clearing member's house account would be eligible for cross-margining, as would an account of a consenting customer specially designated by the clearing member.[4] ICC indicates that although cross-margining treatment would be available equally to all customers, it anticipates that FCMs ordinarily would offer this alternative only to those market professionals and large customers whose intermarket trading was of sufficient size and frequency as to offset the administrative costs associated with maintaining special cross-margining accounts on behalf of those customers.

Specifically, under ICC's proposal, FCMs generally would be required to open a special cross-margining account for each customer. These separate accounts would be required to be maintained at both the clearing member and clearinghouse levels. Although ICC would net margin these accounts at the clearinghouse level (*i.e.*, all cross-margining accounts would be aggregated for purposes of determining the amount of original margin required to be paid by the clearing member to ICC), clearing members would be required to collect customer margins on a gross basis (*i.e.*, each customer's margin obligations would be determined independently, without regard to the positions held by that customer in any other account and without regard to the positions held by any other customer).[5] ICC would have a lien on the positions and assets carried in each cross-margining account to secure the clearing member's obligations with respect to that account only, but not with respect to any other account of the clearing member.

ICC contemplates that is would enter into an agreement with OCC, which would remain the exclusive issuer of, and the exclusive clearing agency for, standardized securities options. Securities option positions qualifying for cross-margining treatment would, therefore, be carried in accounts at OCC. Securities option positions subject to cross-margining, however, would be assigned to ICC, where they would in turn be assigned to particular accounts and afforded cross-margining treatment. ICC clearing members for whom accounts are maintained at OCC would be permitted to exercise control over those accounts—*i.e.*, to clear opening and closing trades through the account, to exercise options carried in the account, and to effect premium and exercise settlements—as though the account has not been assigned to ICC. As is the case with margin payments, ICC—and not the individual clearing member—would be ultimately responsible to OCC for settlements in these assigned accounts.

ICC would rely upon its margin and clearing fund requirements to guarantee performance with respect to cross-margined accounts of OCC. ICC clearing members would make margin payments for these accounts solely to ICC and would contribute to the ICC clearing fund. Accordingly, ICC clearing members would not be required to deposit margin with OCC in respect of short securities options nor would positions carried in assigned accounts be counted towards the base used for calculation of OCC's clearing fund requirements. ICC explains that it would need the margin it would collect from its clearing members for its own protection, so that there would be no surplus to pay over to OCC. OCC would instead rely on ICC's system of safeguards (including ICC's margin requirements and clearing fund) to prevent a default by ICC. For similar reasons, securities option positions carried in cross-margining accounts of ICC would be included in OCC's determination of its clearing fund requirements, but would instead be applied to the calculation of ICC's own clearing fund requirements.

Where commodity futures or commodity options eligible for cross-

[3] As noted earlier, ICC is a subsidiary of the Options Clearing Corporation ("OCC"), which is the issuer of standardized securities options traded on national securities exchanges. In addition, ICC acts as the clearing organization for three contract markets, the Amex Commodities Corporation, the Philadelphia Board of Trade, and the New York Futures Exchange, Inc.

[4] A clearing member carrying accounts for commodity customers or commodity option customers would of course have to register as a futures commission merchant ("FCM"). ICC observes in its petition that a clearing member might also find it necessary or desirable to register as a broker-dealer under the Securities Exchange Act of 1934 and that such registration "might buttress a firm's claim to 'stockbroker' status under the Bankruptcy Code, which would afford protection against the Code's automatic stay and avoidance provisions in the event of a customer bankruptcy." The Commission notes that an FCM would have similar protections. *See* 11 U.S.C. 362(b)(6), 556.

By letter dated August 6, 1986, ICC separately filed with the Commission, pursuant to the provisions of Section 5a(12) of the Act and Commission Regulation 1.41(b), proposed rule changes which ICC represented would allow it to implement, with respect to proprietary accounts only, the system of cross-margining that is described in its January 31, 1986 petition. That latter filing was remitted to ICC, in accordance with the provisions of Commission Regulation 1.41a(a)(4), on October 20, 1986.

[5] Under the ICC proposal, "market professionals" could agree to have their positions combined in a single account. As would be the case with any other cross-margining account, a clearing member would be required to charge margin to the customers in a combined account without regard to the positions of any other customer. Positions in combined accounts similarly would be carried on a gross basis at ICC. Thus, if one "market professional" were long a particular future or option and another were short the same contract, the clearing member would be shown on ICC's books as carrying both positions.

margining were traded on contract markets already cleared by ICC, ICC clearing members would obtain cross-margining treatment by directing trades in eligible contracts to their cross-margining accounts at ICC. In other cases, where the commodity future or commodity option that would be subject to cross-margining treatment is traded on a contract market whose clearing organization is other than ICC, ICC proposes to act as an "auxiliary clearing organization." In such a case, trades matched by the exchange or its clearing organization would be directed to accounts with ICC as if ICC were itself the clearing member responsible for those trades. ICC would in turn post the trades to the clearing members' accounts. Each clearing organization, therefore, would maintain positions with the other and would be required to make daily variation payments and margin settlements with the other. ICC contemplates, however, that neither clearing organization would be required to deposit original margin with the other or to contribute to the other's clearing or guarantee fund.

III. ICC's Rule Proposal

The verbatim text of ICC's rule proposal, as submitted in conjunction with the January 31, 1986 petition for rulemaking, is set forth below:

Section 1.80 Cross-Margining of Intermarket Positions.

(a) *Definitions.* As used in this Section, the following terms shall have the meanings ascribed to them below.

(1) "Non-commodity options" shall mean standardized option contracts traded on a national securities exchange or under the rules of registered national securities association.

(2) "Cross-margining" shall mean fixing margin requirements for mixed positions in commodity futures contracts, commodity options, and non-commodity options on the basis of the net risk of such positions taken as a whole to the recipient of the margin.

(3) "Exchange Act" shall mean the Securities Exchange Act of 1934, as amended from time to time.

(4) "SIPA" shall mean the Securities Investor Protection Act of 1970, as amended from time to time.

(5) "Qualified clearing organization" shall mean a clearing organization registered as a clearing agency under the Exchange Act that carries positions in non-commodity options as well as in commodity futures contracts and commodity options.

(6) "Eligible FCM" shall mean a futures commission merchant that is a member of a qualified clearing organization.

(7) "Consenting customer" shall mean a customer of an eligible FCM who has:

(A) Requested in writing that positions in commodity futures contracts, commodity options, and non-commodity options relating to specified underlying assets carried for his account by the eligible FCM be carried in a cross-margining account as provided below, and

(B) Agreed in writing that in the event of the bankruptcy or liquidation of the eligible FCM, all cash, securities (including non-commodity options), and other property carried for his account in such cross-margining account shall be administered under Part 190 of this chapter, and shall not be deemed to be "customer property" for the purposes of SIPA or give rise to any claim thereunder.

(8) "Market professional" shall mean a consenting customer who is registered as a futures commission merchant or a floor broker under the Act or as a broker-dealer under the Exchange Act.

(9) "Self-regulatory organization" shall mean a self-regulatory organization as defined either in Section 1.3 of this Part or in Section 3(a) of the Exchange Act.

(b) *Cross-Margining Accounts.* Subject to applicable rules of self-regulatory organizations, an eligible FCM may establish and maintain cross-margining accounts for consenting customers. For each such account, the eligible FCM shall maintain a corresponding account with a qualified clearing organization. Each cross-margining account shall be confined to the positions of a single customer, provided that combined accounts may be maintained for groups of market professionals who agree in writing that their combined positions may be margined on a net basis at the clearing organization.

(c) *Cross-Margining.* Anything else in this Part to the contrary notwithstanding, a qualified clearing organization, and, subject to applicable rules of self-regulatory organizations, an eligible FCM, may cross-margin positions in commodity futures, commodity options, and non-commodity options carried in cross-margining accounts, and, in so doing, may use the customer funds in such accounts to carry positions in non-commodity options, as well as in commodity futures and commodity options, therein. Customer funds held by a qualified clearing organization or an eligible FCM in a cross-margining account shall not be excluded from segregated funds solely because such funds are or may be used to margin or secure positions in non-commodity options.

(d) *Customer Protection.* Money, securities, and property received by an eligible FCM in connection with positions in non-commodity options carried in cross-margining accounts shall be separately accounted for and dealt with as belonging to the customers of such eligible FCM, provided that if the eligible FCM is registered as a broker-dealer under the Exchange Act, this requirement shall be deemed to be satisfied by compliance with applicable customer protection rules under that Act. Customer funds held by an eligible FCM for the account of a market professional participating in a combined account shall not be used to secure or guarantee the trades, contracts, commodity options, or non-commodity options, or to secure or extend the credit, of any person other than the one for whom such funds are held, provided that such funds may be deposited with the qualified clearing organization with which the combined account is carried to secure or guarantee the eligible FCM's obligations to such clearing organization in respect of that account in accordance with the rules of such clearing organization.

IV. Request for Comments

1. Should the Commission approve the concept of cross-margining of commodity futures and commodity options with securities options? What regulatory, economic, and policy issues must be resolved in making such a determination?

2. ICC has stated in its petition that cross-margining would result in numerous benefits, such as the reduction of risk to commodities and securities clearing systems and improved efficiency of the futures and option markets. The Commission requests comments as to the conditions necessary to yield the anticipated benefits suggested by ICC. Are there benefits for cross-margining in addition to those which are described in the ICC petition?

3. ICC contends that cross-margining would improve the safety of the commodity and securities clearing systems. The Commission requests comments as to whether cross-margining would increase the risk to those systems by, *inter alia*, increasing the complexity of the actual clearing process (under the proposal, trades would be compared either by ICC or by other clearing organizations), by concentrating in one place positions that would otherwise be held by different commodities or securities clearing

organizations, and by reducing overall the level of funds that is required to sustain futures, commodity option and securities option positions.

4. ICC has indicated that it presently contemplates offering cross-margining for products based on stock indices, foreign currencies, and government securities. What restrictions, if any, should be established on the types of commodity futures, commodity options, and securities options that can be the subject of cross-margining?

5. The ICC petition contemplates that cross-margining would be made available only to large institutional customers and "market professionals" whose intermarket trades were of sufficient size and frequency to cover the associated administrative costs. The Commission asks that commentors identify and quantify these costs. What type of bookkeeping and data processing entries would be required to balance clearing members' accounts? Is it realistic to expect that clearing members will be willing to maintain separate accounts at the clearing organization on behalf of each of their cross-margining customers? Persons responding to this question are urged to provide detailed examples of any operational or other impediments to the ICC proposal.

6. The ICC petition defined "market professional" to include registered FCMs, floor brokers, and broker-dealers. The Commission requests comments as to whether cross-margining should be available equally to any "member of a contract market" (as that term is defined in Commission Regulation 1.3(q)), which would also include, *inter alia*, floor traders and persons not required to register as futures commission merchants in accordance with the provisions of Commission Regulation 3.10(c). What restrictions, if any, should be imposed on the availability of cross-margining to different classes of market participants? Under what circumstances should "public customers" be allowed to cross-margin?

7. As noted earlier, the ICC petition is predicated in certain significant respects upon the relationship existing between ICC and its parent, the Options Clearing Corporation. The Commission particularly invites comments from other contract markets and clearing organizations as to the extent they would be willing to consider an arrangement of the type described by the ICC petition wherein other clearing organizations would share the clearing of trades with ICC. What practical problems, if any, would be presented by such arrangements?

8. The ICC petition suggests that cross-margining would facilitate improvements in the net capital treatment afforded intermarket spread positions. The Commission requests comments on the extent to which that result can be expected. In the alternative, the Commission requests comment on the circumstances, if any, in which cross-margining might be expected to diminish the safeguards afforded by the current net capital treatment of such positions.

9. What disclosure requirements, if any, should be established in connection with cross-margining? Should customers be required specifically to acknowledge or consent to the cross-margining of their positions?

10. The Commission recognizes that certain amendments to its regulations may be necessary if cross-margining were to be permitted. (In the alternative, the Commission could adopt the approach suggested by ICC, which would have the Commission adopt a single regulation which supersedes other Commission rules to the extent those rules were inconsistent with the new regulation.) In either event, the Commission will have to evaluate the effect of cross-margining on existing regulatory safeguards and standards and therefore requests comments as to whether it would be appropriate to amend or supersede the following rules:

(a) Commission Regulations, 1.20, 1.21, 1.22 and 1.24, relating to the segregation of customer funds;

(b) Commission Regulation 1.36, relating to the recording by futures commission merchants and clearing organizations of securities and property received from customers;

(c) Commission Regulation 1.17, relating to minimum financial requirements for futures commission merchants (including the definition of "cover" contained in § 1.17(j));

(d) Part 190 of the Commission's regulations, relating to the bankruptcy of commodity brokers:

(e) Commission Regulation 1.58, relating to the gross collection by futures commission merchants of initial and maintenance margin;

(f) Commission Regulation 33.4(a)(2), relating to the full payment of commodity option premiums;

(g) Commission Regulation 1.19, relating to the assumption by the futures commission merchant of financial liability for the performance of a commodity option;

(h) Commission Regulation 1.46, relating to the offsetting of existing positions in the same account; and

(i) Commission Regulation 1.33, relating to monthly and confirmation statements.

The Commission additionally invites comments on whether it would be appropriate or necessary to amend other Commission regulations to accommodate cross-margining.

11. The ICC petition contemplates that ICC would have a line on the positions and assets carried in each individual customer's account or in each combined account. Such liens would be to secure the clearing member's obligations to ICC with respect to that account only. Thus, ICC could not use the assets in one customer's account to margin, guarantee, or secure the positions of other customer accounts in the event a clearing member fails to make required payments to ICC in respect of such an account. ICC also could not use the assets in another account of a customer to margin, guarantee, or secure the positions in a cross-margined account of that customer. The Commission notes, however, that clearing organizations typically reserve unto themselves the right to apply margin deposits of a defaulting clearing member to satisfy the obligations of that firm's customers.[6] The Commission therefore requests comments on whether the arrangement proposed by ICC would pose undue risks to a clearing organization. The Commission additionally requests comments as to whether this aspects of ICC's proposal could have the effect of disadvantaging customers not engaged in cross-margining transactions if the equity in their accounts could be applied to secure the positions of defaulting commodity futures or commodity option customers while the positions of cross-margining customers would not be subject to such treatment.

12. Section 4d of the Act generally requires money, securities, and proprety received by a FCM to margin, guarantee, or secure the trades or contracts of any customer, or accruing to the account of any customer, to be separately accounted for and not be used to margin or garantee the trades or contracts, or secure or extend the credit, of any customer or person other than the one for whom that money, securities, or property is held. The ICC proposal would require an FCM engaging in cross-margining to account separately for money, securities, and property received in connection with securities options but would allow that requirement to be met, in cases where

[6] That right is not unlimited. *See, e.g.*, Office of General Counsel Interpretive Letter 85-3, Comm. Fut. L. Rep. (CCH) ¶ 22,703 (August 12, 1985).

the FCM also was registered as a broker-dealer, by compliance with Securities and Exchange Commission ("SEC") Rule 15c3–3 (17 CFR 240.15c3–3) which provides, *inter alia*, for the establishment ofa special reserve bank account for the exclusive benefit of customers. The Commission requests comments as to whether such an arrangement would create regulatory or operational problems, including in the event of a bankruptcy of a clearing FCM/broker-dealer. The Commission additionally notes that Rule 15c3–3 permits a brokerdealer, in computing the amount required to be maintained in such a account, to offset customer credits and debits to the extent permitted by Exhibit A to that Rule (17 CFR 240.15c3–3a). The Commission therefore requests comments as to how compliance with Rule 15c3–3 could be a satisfactory alternative to segregation under the Commodity Exchange Act and the Commission's regulations thereunder.

(13) The ICC petition would require a customer to agree, as a condition of obtaining cross-margining treatment, that in the event of the bankruptcy or liquidation of his FCM, all assets (including securities options) carried in his cross-margining account would be subject to administration under the Commission's bankruptcy rules (17 CFR Part 190) and would not be deemed to be "customer property" for the purpose of the Securities Investor Protection Act of 1970 ("SIPA") or give rise to any claim thereunder. ICC explains that this requirement is intended to obviate the possibility that some or all of the assets in a cross-margining account might be found to constitute "customer property" for purposes of the commodity broker liquidation provisions of the Bankruptcy Code as well as for SIPA and thus be subject to two conflicting schemes of distribution.[7]

ICC further observes that a customer's agreement to have his crossmargining account administered under the Part 190 rules would not, by itself, be binding on a bankruptcy trustee or on creditors of the bankrupt firm, such as securities customers. However, Section 20 of the Act gives the Commission the authority, "[n]otwithstanding title 11 of the United States Code, [to] provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11 of the United States Code by rule or regulation—

(1) that certain cash, securities, other property, or commodity contracts are to be included in or excluded from customer property or member property; [and] . . . (5) how the net equity of a customer is to be determined."

ICC therefore maintains that the Commission could use that authority to buttress customers' agreements by amending the Part 190 rules to define "customer property" to include assets held in cross-margining accounts (and "member property" to include assets held in proprietary cross-margining accounts). ICC acknowledges that such rules might overlap the definition of "customer property" in SIPA, inasmuch as SIPA is not part of the Bankruptcy Code. ICC concludes, however, that given the need for a rational scheme of distribution for property of cross-margining customers (which ICC believes the Part 190 rules could provide, but SIPA would not), the problems as to availability of the SIPA fund that would arise if cross-margining accounts were administered under SIPA, and the express consent of the customers most directly involved, provisions in the part 190 rules dealing specifically with cross-margining accounts should be controlling.

The Commission requests comments as to whether it is reasonable to assume that amending the definitions of "customer property" (as specified in Commission Regulations 190.01(n) and 190.08(a)) and "member property" (as specified in Commission Regulation 190.09), when coupled with the express consent of cross-margining customers, is sufficient to result in a waiver of SIPA coverage and to defeat the claims of a trustee in bankruptcy or other securities customers. The Commission further requests comments as to how ICC's analysis would be affected where the clearing member is also a broker-dealer who has elected, as provided under the ICC petition, to meet applicable segregation requirements by compliance with SEC Rule 15c3–3.

The foregoing list of questions is not intended to be exclusive and commentors are encouraged to address such other matters as they deem appropriate. The Commission asks, however, that persons responding to any of the questions set forth above identify by number the particular matters upon which they are providing comments.

Issued in Washington, DC on November 6, 1986, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 86–25545 Filed 11–2–86; 8:45 am]

BILLING CODE 6351-01-M

[7] Section 742 of the Bankruptcy Code provides, in essence, that application for a protective decree by the Securities Investor Protection Corporation ("SIPC"), as provided under 15 U.S.C. 78eee(a)(1), stays all proceeding under Chapter 7 (the commodity broker and stockbroker provisions) of that Code. (The Securities and Exchange Commission may apply to a United States district court for an order compelling SIPC to discharge its obligations under SIPA if SIPC fails to apply for such an order. 15 U.S.C. 78ggg(b).) As a result, the Commission's ability to order the transfer of customer positions and of the equity supporting those positions, as provided under 11 U.S.C. 764(b) and Commission Regulation 190.06, may be impeded by application for a protective decree under SIPA.

DEPARTMENT OF DEFENSE

Department of the Air Force

32 CFR Part 855

Use of United States Air Force Installations by Other Than United States Department of Defense Aircraft

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Proposed rule.

SUMMARY: The Department of the Air Force is revising Part 855 of Chapter VII, Title 32, of the Code of Federal Regulations, which establishes the responsibilities and describes the procedures for the use of United States Air Force installations by aircraft other than U.S. Department of Defense aircraft. This revision clarifies requirements and responsibilities and provides more latitude for decisionmaking at lower levels.

DATE: Comments must be received by December 15, 1986.

ADDRESS: HQ USAF/PRPJ, Washington, DC 20330–5000.

FOR FURTHER INFORMATION CONTACT: Ms. R.A. Young, HQ USAF/PRPJ, Washington, DC 20330–5000, telephone (202) 697–1796.

SUPPLEMENTARY INFORMATION: This revision establishes HQ U.S. Air Force as office of primary responsibility in requesting FAA certification of a U.S. Air Force airfield; adds and expands terms explained; provides new forms for permit application; includes exemption for aircraft owned by a municipality, county, or other political subdivision operated on official government business; adds exemption for foreign government-owned aircraft covered under reciprocal use agreements; adds exemption for aircraft being delivered to U.S. Air Force museums; reorganizes and expands section on unauthorized landings; adds procedures for civil aircraft fly-ins; expands and reorganizes types of civil use; expands MAJCOM/SOA and installation commander approval authority; expands HQ AAC approval authority; authorizes approval by HQ PACAF for aircraft transiting Wake Island; authorizes approval by

HQ AFSPACECOM for aircraft transiting Sondrestrom; permits approval of landing rights for up to 2 years; adds instructions for permit renewal; adds ferry flights to part A and increases minimum insurance requirements (table 1); links time the aircraft remains on an installation to type of use authorized and revises user fees; and expands joint-use section.

The Department of the Air Force has determined that this regulation is not a major rule as defined by Executive Order 12291 and is not subject to the relevant provisions of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354). DD Forms 2400, 2401 and 2402 contain reporting or recordkeeping requirements under the criteria of the Paperwork Reduction Act of 1980 (Pub L. 96-511), and have been approved by the Office of Management and Budget (OMB) under control number 0701-0050.

List of Subjects in 32 CFR Part 855

Aircraft Federal buildings and facilities.

The revised Part 855 is proposed to read as follows:

PART 855—USE OF UNITED STATES AIR FORCE INSTALLATIONS BY OTHER THAN UNITED STATES DEPARTMENT OF DEFENSE AIRCRAFT

Sec.
855.0 Purpose.

Subpart A—General Provisions

855.1 U.S. Air Force policy.
855.2 Definitions.
855.3 Aircraft exempt from the requirement for a civil aircraft landing permit or aircraft landing authorization number.

Subpart B—Unauthorized Landings

855.4 Unauthorized landings.
855.5 Emergency landings.
855.6 Inadvertent unauthorized landings.
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Subpart C—Civil Fly-In Procedures

855.8 Civil fly-ins.
855.9 Civil fly-in procedures.

Subpart D—Civil Aircraft

855.10 Conditions for use of U.S. Air Force installations.
855.11 Types of civil use.
855.12 Approving authority.
855.13 Application procedures.
855.14 Processing procedures.
855.15 Insurance requirements.
855.16 Landing, parking, and storage fees.
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855.19 General information.
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855.21 Processing procedures.
855.22 Approving authority.
855.23 Aviation fuel and oil purchases.
855.24 Foreign military sales (FMS) cargo.
855.25 Supply and service charges.
855.26 Landing, parking, and storage fees.
855.27 Waiver authority.

Subpart F—Joint-Use of a U.S. Air Force Installation

855.28 U.S. Air Force joint-use policy.
855.29 Procedures for sponsor.
855.30 Procedures for U.S. Air Force.

Authority: 10 U.S.C. 8012, 49 U.S.C. 1507.

§ 855.0 Purpose.

This part establishes the responsibilities and describes the procedures for the use of United States (U.S.) Air Force installations by aircraft other than U.S. Department of Defense (DOD) aircraft pursuant to section 1107 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1507). This part applies to all regular U.S. Air Force, Air National Guard, and U.S. Air Force Reserve installations with airfields. Major commands (MAJCOM) or separate operating agencies (SOA) may issue supplements to establish command-unique procedures permitted by and consistent with this part.

Subpart A—General Provisions

§ 855.1 U.S. Air Force policy.

U.S. Air Force policy is to permit civil aircraft use of U.S. Air Force airfields to the maximum extent feasible on an equitable basis. However, U.S. Air Force installations are established to facilitate the training required to maintain defense readiness and to provide the operational capacity necessary to defend the U.S.; therefore, careful consideration must be given to those external influences which could impair operational capabilities. U.S. Air Force requirements will take precedence over authorized civil aircraft use. This part carries the force of U.S. law, and exceptions are not authorized without prior approval of HQ USAF/PRPJ. Any proposed exception or waiver will be evaluated as to current and future impact on U.S. Air Force policy and operations.

(a) The U.S. Air Force:

(1) Determines whether civil aircraft use of U.S. Air Force installations is compatible with current or future military activities.

(2) Normally authorizes civil aircraft use of U.S. Air Force installations only for flights operating in conjunction with official government business or where a formal joint-use agreement exists (Subpart F). However, if exceptional circumstances warrant, other types of use may be authorized. Federal Aviation Administration (FAA) certification is required for airfields used by carriers certified under Federal Aviation Regulation (FAR), Part 121 (passenger aircraft which exceed 30 passenger seats or cargo aircraft with a maximum certified takeoff weight over 12,500 pounds). HQ USAF/PRPJ will request that FAA issue an airport operating certificate under FAR, Part 139, as necessary. Exceptions to the requirement for certification are U.S. Air Force airfields used for:

(i) Emergencies.

(ii) Weather alternates.

(iii) Air taxi operations under FAR, Part 135.

(iv) Air carrier operations in support of contract flights exclusively for the DOD.

(3) Subject to the laws and regulations of the U.S., or to applicable international agreements with the country in which the U.S. Air Force installation is located, acts as clearing authority for civil aircraft use of U.S. Air Force installations.

(4) Reserves the right to suspend any operation which is inconsistent with national defense interests or deemed not in the best interests of the U.S. Air Force.

(5) Will terminate authorization to use a U.S. Air Force installation if the:

(i) User's liability insurance is cancelled.

(ii) User is reported as operating for other than the approved purpose, or otherwise in violation of this regulation or clearances and directives hereunder.

(6) Will not authorize civil use of U.S. Air Force installations:

(i) In substantial competition with civil airports by providing services or facilities which are already available in the private sector.

(ii) Solely for the convenience of passengers or aircraft operator.

(iii) Solely for transient aircraft servicing.

(iv) For private enterprise which promotes, benefits, or favors a specific commercial venture.

(v) For unsolicited proposals in procuring government business or contracts.

(vi) Solely for customs handling purposes.

(7) Will not authorize civil aircraft to operate at a closed U.S. Air Force airfield.

(8) Will not authorize civil aircraft use of U.S. Air Force ramps located on civil airfields. This paragraph does not apply to use of U.S. Air Force aero club facilities located on civil airfields (§ 855.11(i) of this part) or civil aircraft chartered by DOD and authorized use of loading or unloading facilities on the Air

Force ramp (§ 855.11 (k) and (n) of this part).

(b) All civil aircraft operators must:

(1) Obtain prior authorization to land at U.S. Air Force installations, except in an emergency or at bases specifically exempted by joint-use or international agreements.

(2) Ensure that pavement load-bearing capacity at installations requested for use will support aircraft to be operated.

(3) Have aircraft equipped with operating two-way radio equipment to obtain landing clearance from the air traffic control tower.

(4) Not assume that landing clearance granted by an air traffic control tower facility constitutes prior authorization.

(5) Obtain required diplomatic or overflight clearance.

(6) Pay applicable costs.

(7) File a flight plan before departing the U.S. Air Force installation.

(c) The installation commander:

(1) Exercises administrative and security control over both the aircraft and passengers while on the installation.

(2) May require civil users to delay, reschedule, or reroute arrivals or departures to preclude interference with military activities.

(3) Cooperates with customs, immigration, health, and other public authorities in connection with aircraft arrival and departure.

§ 855.2 Definitions.

(a) Aircraft. Any contrivance now known or hereafter invented, used, or designated for navigation of or flight in navigable airspace as defined in the Federal Aviation Act.

(b) Airfield facilities. Runways, taxiways, parking and servicing areas, air traffic control facilities, base operations, navigation aids, aircraft fire suppression and rescue services, and airfield lighting and aircraft arresting systems.

(c) Authorized credit letter. A letter of agreement which qualified operators must file with the U.S. Air Force to purchase U.S. Air Force aviation fuel and oil on a credit basis under the provisions of AFR 144-9.

(d) Civil aircraft. Any U.S. or foreign-registered aircraft owned by private individuals or corporations, and foreign government-owned aircraft which are operated for commercial purposes.

(e) Civil aviation. All flying activity by civil aircraft of any national registry, including:

(1) Commercial aviation. Civil aviation involving transportation of passengers or cargo for hire.

(2) General aviation. Civil aviation not involving the transportation of passengers or cargo for hire.

(f) Civil fly-in. Civil aircraft participation in U.S. Air Force sponsored or funded events such as, but not limited to, an open house or a safety seminar.

(g) Closed airfield. An airfield which is restricted from use by all aircraft.

(h) DD Form 2400, Civil Aircraft Certificate of Insurance. A certificate which states the amount of thirdparty liability insurance carried by the user and assures the U.S. government of advance notice of changes in the terms of coverage or policy cancellation.

(i) DD Form 2401, Civil Aircraft Landing Permit. An application which, when validated by a U.S. Air Force approving authority, authorizes the civil operator to use the installation under the terms of this regulation.

(j) DD Form 2402, Civil Aircraft Hold Harmless Agreement. An agreement, executed by the user, which releases the U.S. government from all liabilities incurred in connection with civil aircraft use of U.S. Air Force installations.

(k) Government aircraft. Aircraft owned, operated, or controlled for exclusive, long-term use by any department or agency of either the U.S. or a foreign government; and aircraft owned by any U.S. state, county, municipality or other political subdivision; or any aircraft for which a government has the liability responsibility. In the context of this regulation, this also includes foreign registered aircraft, which are normally commercially operated, that have been wholly chartered for use by foreign government heads of state for official state visits.

(l) Government furnished or bailed aircraft. U.S. government-owned aircraft provided to a government contractor for use in conjunction with a specific contractual requirement.

(m) Installation commander. An officer who commands a host support unit, host wing, or higher level host unit and has been identified by administrative order or command directive as "installation commander." He or she discharges the duties directed by U.S. statutes or U.S. Air Force directives to be performed by the "installation commander."

(n) Joint-use installation. A U.S. Air Force installation where a specific written agreement exists between the U.S. Air Force and a local U.S. or foreign government agency for civil aviation use of U.S. Air Force controlled runways, taxiways, and other necessary facilities.

(o) Loaned aircraft. U.S. government-owned aircraft made available for use by another U.S. government agency or to a U.S. Air Force aero club. This does not include aircraft leased or loaned to nongovernmental entities which are treated as civil aircraft for purposes of this regulation.

(p) Military aircraft. Aircraft used exclusively in the military services of the U.S. or a foreign government and bearing appropriate military and national markings or carrying appropriate identification.

(q) Official government business. Activity in support of U.S. federal agencies located at or in the immediate vicinity of a U.S. Air Force installation, including nonappropriated fund activities. For elected or appointed federal, state, and local officeholders, official business is activity performed in fulfilling duties as a public official.

(r) Public agency. A state, or agency of a state, a municipality, or other political subdivision of a state, a tax supported organization, or Indian tribe or pueblo.

(s) Unauthorized landing. A landing at a U.S. Air Force installation by a civil aircraft operator, including both general and commercial aviation, who has not received prior authorization as required in § 855.10 of this part.

(t) U.S. Air Force installation. A defined area of real property for which the U.S. Air Force has operational jurisdiction and exclusive use of the airfield facility either by ownership, lease, or international agreement.

(u) User. The person, corporation, or other responsible entity operating civil aircraft at U.S. Air Force installations.

(v) Weather alternate airport. A U.S. Air Force installation used as a weather alternate airport as prescribed by Federal Aviation Regulations (FAR), international agreement, or other directives.

(The reporting and recordkeeping requirements in paragraphs (h), (i), and (j) approved by the Office of Management and Budget under control number 0701-0050)

§ 855.3 Aircraft exempt from the requirement for a civil aircraft landing permit or aircraft landing authorization number.

(a) Any aircraft owned and operated by:

(1) Any other U.S. government agency.

(2) U.S. Air Force aero clubs established as prescribed in AFR 215-12.

(3) Aero clubs of other U.S. military services.

(4) A U.S. state, county, municipality, or other political subdivision, when operated to support official business at any level of government.

(b) Any civil aircraft under:

(1) Lease or contractual agreement for exclusive U.S. government use on a long-term basis and operated on official business by or for a U.S. government agency; for example, the FAA, Department of Interior, or Department of Energy. (The government normally holds liability responsibility for the aircraft.)

(2) Lease or contractual agreement to the U.S. Air Force for U.S. Air Force Civil Air Patrol (CAP) liaison purposes and operated by a U.S. Air Force CAP liaison officer on official U.S. Air Force business.

(3) CAP control for a specific mission directed by the U.S. Air Force.

(4) Contractual agreement to any U.S., state, or local government agency in support of operations involving safety of life or property as a result of a disaster.

(5) Government furnished property or bailment contract for use by a contractor, provided the federal, state, or local government has retained liability responsibilities.

(c) Civil aircraft transporting critically ill or injured individuals to or from a U.S. Air Force installation.

(d) Foreign government-owned aircraft falling within the purview of international reciprocal use agreements.

(e) Historic aircraft delivered to U.S. Air Force museums under the provisions of AFR 210–4.

Subpart B—Unauthorized landings

§ 855.4 Unauthorized landings.

The installation commander will identify an unauthorized landing as either an emergency landing, an inadvertent landing, or an intentional landing. An unauthorized landing may be designated as inadvertent or intentional whether or not the operator has knowledge of the provisions of this regulation and whether or not the operator filed a flight plan identifying the installation as a destination. On all unauthorized landings, the aircraft should be allowed minimum ground time and the installation commander:

(a) Briefs the operator on this part and the FAA requirement for reporting the incident.

(b) Has the operator prepare a circumstantial report, sign DD Form 2402, and pay applicable charges. (In some instances, it may be necessary to arrange to bill the user for the appropriate charges.) DD Form 2402 need not be completed for commercial carriers if it is known the form is already on file at HQ USAF/PRPJ.

(c) After compliance with preceding requirements, directs the operator to depart the installation.

(d) In the U.S. or its possessions, notifies the nearest FAA general aviation district office for incidents involving general aviation and the air carrier district office for incidents involving air carriers.

(e) Within a foreign country, notifies appropriate U.S. Defense Attache Office (USDAO) in the country of aircraft registration. Provides an information copy of the report to the civil aviation authority of the country concerned.

(f) Prepares a report on the landing and submits the report with supporting documentation through channels to HQ USAF/PRPJ, Washington, DC 20330–5248.

§ 855.5 Emergency landings.

Any aircraft operator who experiences an inflight emergency may land at any U.S. Air Force installation without prior authorization. An inflight emergency is defined as a situation which makes continued flight hazardous.

(a) The U.S. Air Force will use any method or means to clear an aircraft or wreckage from the runway to preclude interference with essential military operations. Removal efforts should minimize damage to the aircraft or wreckage; however, military or other operational factors may be overriding.

(b) A user making an emergency landing:

(1) Is not charged a landing fee.

(2) Pays all costs for labor, material, parts, use of equipment, tools, and so forth, to include, but not limited to:

(i) Spreading foam on the runway.

(ii) Damage to runway, lighting, and navigation aids.

(iii) Rescue, crash, and fire control services.

(iv) Movement and storage of aircraft.

(v) Performance of minor maintenance.

(vi) Fuel or oil (AFR 144–9).

(3) Files a circumstantial landing report with the installation commander and completes DD Form 2402.

(c) The installation commander:

(1) Documents total cost incurred by the U.S. government. (Use Part 812 of this chapter for cost determination.)

(2) Collects payment of all charges incurred. (In some instances, it may be necessary to arrange to bill the user for the appropriate charges.)

(3) Prepares an emergency landing report if there are no survivors.

(4) Complies with appropriate portions of § 855.4 of this part.

(5) Handles an emergency landing by a foreign military or foreign government-owned aircraft in the same manner as for a U.S. government-owned aircraft.

§ 855.6 Inadvertent unauthorized landings.

(a) The installation commander may determine a landing to be inadvertent if the aircraft operator:

(1) Landed due to flight disorientation.

(2) Mistook the U.S. Air Force installation for a civil airport.

(b) Reporting procedures in § 855.4 of this part and normal landing fees (§ 855.16 of this part) are applicable. An unauthorized landing fee (§ 855.16 of this part) may be assessed to compensate the government for the added time, effort, and risk involved in an unauthorized landing. This unauthorized landing fee may be waived by the installation commander or a designated representative if, after interviewing the pilot-in-command and appropriate government personnel, it is determined that flying safety was not significantly impaired. The pilot-in-command may appeal the imposition of an unauthorized landing fee for an inadvertent landing to the MAJCOM, whose decision will be final. A subsequent inadvertent landing will be processed as an intentional unauthorized landing.

§ 855.7 Intentional unauthorized landings.

(a) The installation commander may categorize an unauthorized landing as intentional when substantial evidence demonstrates that the pilot knew the landing was unauthorized or the civil aircraft operator:

(1) Landed without an approved DD Form 2401 on board the aircraft.

(2) Landed for a purpose not approved on the DD Form 2401.

(3) Operated an aircraft not of a model or registration number on the approved DD Form 2401.

(4) Did not request or obtain the required final clearance from the installation commander or a designated representative at least 24 hours before aircraft arrival.

(5) Did not obtain landing clearance from the air traffic control tower.

(6) Landed with an expired DD Form 2401.

(7) Obtained landing authorization through fraudulent methods.

(8) Requested permission to land from any U.S. Air Force authority, including the control tower, and was denied.

(b) Reporting procedures in § 855.4 of this part and normal landing fees (§ 855.16 of this part) are applicable. Since intentional unauthorized landings increase reporting, processing, and staffing costs, the unauthorized landing fee (§ 855.16 of this part) for (1) through (6) of this section will be increased by 100 percent. The fee will be increased 200 percent for items (7) and (8) of this

section and when substantial evidence demonstrates the pilot knew the landing was unauthorized.

(c) Under the conditions described in paragraph (b) of this section, an installation commander in the U.S., its territories or its possessions may choose to detain the aircraft at the installation until:

(1) The unapproved landing has been reported to the appropriate civil aviation authority, HQ USAF/PRPJ, and the appropriate U.S. Attorney.

(2) The pilot or other competent authority of the owner has executed DD Form 2402 and prepared the circumstantial landing report.

(3) All applicable charges have been paid.

(d) The installation commander may, at his or her discretion, release the aircraft upon compliance with paragraphs (1) and (2) of this section and payment of the inadvertent unauthorized landing charge, if he or she wishes to investigate the matter further before determining whether the circumstances warrant higher fees. The aircraft must not be released without obtaining bond, promissory notes, or other security for payment of the highest charge that might be assessed.

(e) The pilot and passengers will not be detained longer than is necessary for identification, although they may be permitted to remain in a lounge or other waiting area on the base at their request for such period as the installation commander may determine (normally not to exceed close of business hours at the home office of the entity owning the aircraft, if the operator does not own the aircraft). No person will be detained involuntarily after identification is complete without coordination from the appropriate U.S. Attorney, the MAJCOM, and HQ USAF/PRPJ.

(f) The unauthorized landing may be prosecuted as a criminal trespass, especially if a debarment letter has been issued. Repeated intentional unauthorized landings prejudice the user's FAA operating authority and jeopardize future use of any U.S. Air Force installation.

Subpart C—Civil Fly-In Procedures

§ 855.8 Civil fly-ins.

Civil aircraft operators may be invited to participate in a U.S. Air Force fly-in for a base sponsored or funded activity being held at a specified U.S. Air Force installation. They will be authorized use only during the period of the event.

§ 855.9 Civil fly-in procedures.

(a) The installation commander:

(1) Requests approval from the MAJCOM or SOA.

(2) Provides HQ USAF/PRPJ/XOOR/XOOO and SAF/PAC with the date and purpose of the fly-in.

(3) Ensures that DD Form 2402 is completed by each user. DD Forms 2400 and 2401 are not required for fly-in participants.

(b) The MAJCOM or SOA ensures HQ USAF/PRPJ/XOOR/XOOO and SAF/PAC are advised of the approval or disapproval for the fly-in.

Note.—This section does not apply to civil aircraft aerobatic performance or demonstrations (Part 837 of this chapter), or transport-type (revenue or nonrevenue) flights.

Subpart D—Civil Aircraft

§ 855.10 Conditions for use of U.S. Air Force installations.

The U.S. Air Force authorizes use of its installations for a specific purpose by a named individual or company (not transferable to a second or third party) which does not extend to other types of civil aviation use. An approved landing permit does not obligate the U.S. Air Force to provide supplies, equipment, or facilities other than the landing, taxiing, and parking areas (§§ 855.17 and 18 of this part). Personnel on board are only authorized activities at the installation directly related to the type of use granted. All users are expected to submit their application (DD Forms 2400, 2401, and 2402) at least 30 days in advance of intended use and, except for weather alternate use, must contact the appropriate installation commander for final clearance at least 24 hours in advance of arrival. Failure to comply with either time limit may result in denied landing rights.

§ 855.11 Types of civil use.

Listed below are specific types of civil use the U.S. Air Force normally authorizes. Others may be considered if sufficient justification is provided. Application for each type of use must be made on a separate DD Form 2401. The letter following each type of use in paragraphs (a) through (p) of this section will be used when a landing permit number is assigned (§ 855.14(c) of this part).

(a) Contractor or subcontractor personnel (A). A U.S. or foreign contractor or subcontractor, operating corporate or personal aircraft, who uses a U.S. Air Force installation to fulfill the terms of a U.S. government contract.

Verification: The contractor or subcontractor must indicate on the DD Form 2401 the current government contract numbers; the U.S. Air Force installation required for each contract; a brief description of the work to be performed; and the name, telephone number, and address of the government contracting officer.

Note.—Potential contractors may not land at U.S. Air Force installations for the purpose of pursuing or presenting an unsolicited proposal for procurement of government business.

(b) Demonstration flights (B). Permits an aircraft or aircraft component manufacturer to display or demonstrate aircraft (nonaerobatic) or installed components to U.S. government representatives who have procurement interest or authority, or certification responsibilities.

Verification: Nonaerobatic demonstration or display must be a contractual provision or presented at the request of an authorized U.S. government representative. The name, address, and telephone number of the requesting government representative or contracting officer and contract number must be included on the DD Form 2401.

(c) Active duty U.S. military (C). Authorizes active duty U.S. military members, operating their own aircraft or aircraft leased at their own expense, to use any U.S. Air Force installation for official duty transportation (temporary duty (TDY), permanent change of station, etc.) or for private, nonrevenue flights. (Members of the U.S. Public Health Service are considered active duty U.S. military.)

Verification: Provide social security number in block 1 on DD Form 2401.

(d) Reserve Forces (D). Permits members of the U.S. Reserve Forces (including Reserve Officer Training Corps and National Guard) operating their own aircraft or aircraft leased at their own expense, to use a specific U.S. Air Force installation where their assigned unit is located to fulfill their official duty commitment or for TDY at other installations when on official travel orders.

Verification: Request routed through commander for an endorsement which validates military status and requirement for use of U.S. Air Force installations listed on permit application. When appropriate, travel orders must be on board the aircraft.

(e) Civilian employees of the U.S. government (E). Permits civilian employees of the U.S. government, operating their own aircraft or aircraft leased at their own expense, to use U.S. Air Force installations only for official government business travel.

Verification: A copy of current travel orders or other official travel

certification must be on board the aircraft.

(f) Special conveyance (F). Permits government personnel to use a chartered aircraft for single flights between two or more points for official business only. The official directing the travel must authorize use of special conveyance and arrangements for hiring the aircraft must be made by a transportation office (AFR 75–8, volume I).

Verification: A copy of official orders citing the special conveyance authorization must be on board the aircraft.

(g) Retired U.S. military (G). (Includes Regular and Reserve personnel receiving retirement pay and an identification card authorizing use of the commissary, base exchange, and military medical facilities.) Permits retired U.S. military members, operating their own or leased aircraft, to use a U.S. Air Force installation in conjunction with activites related to retirement entitlements authorized by law or regulation.

Verification: A copy of retirement orders must be on file with the approving authority.

(h) Civil Air Patrol (CAP) (H). Permits aircraft owned and operated by the CAP or by a CAP member to use designated U.S. Air Force installations for official CAP activities.

Verification: Endorsement of the application by HO. CAP–USAF/DO, Maxwell AFB AL 36112–5572.

(i) Aero club member (I). Permits individuals to operate their own aircraft into and out of the U.S. Air Force airfield where they hold active aero club membership.

Verification: Written endorsement on the DD Form 2401 by the aero club manager which validates the individual's aero club membership. (Members using U.S. Air Force aero club facilities located on a civil airfield must provide the endorsement, and DD Forms 2400 and 2402 to the local commander. DD Form 2401 is not required.)

(j) Weather alternate airport (J). Permits scheduled air carriers to divert to a specified U.S. Air Force installation when weather conditions require a change from the original destination while in flight. Aircraft may not be dispatched from the point of departure to a U.S. Air Force airfield which has been designated as an approved weather alternate.

Verification: Actual use is predicated on weather conditions at scheduled destination. Scheduled route structure must encompass the U.S. Air Force airfield requested for use.

(k) Military Airlift Command (MAC) contract or charter (K). Permits an air carrier to use a U.S. Air Force installation under the terms of a MAC contract. Landing permits for this type of use are processed by HQ MAC/TRC.

Verification: International flights must have a MAC Form 8, Civil Aircraft Certificate, on board the aircraft. Domestic flights must have either a Certificate of LOGAIR Operations (U.S. Air Force—AFLC), a Certificate of QUICKTRANS (U.S. Navy), a Certificate of Courier Service Operations (MAC), or a Certificate of Intra-Alaska Operations (MAC) on board the aircraft.

(l) U.S. government contract or charter operator (L). Permits an air carrier to use a U.S. Air Force installation under the terms of a U.S. government contract or charter agreement by a U.S. government department or agency other than the DOD.

Verification: Carrier must identify the chartering agency and provide the name, address, and telephone number of the government official procuring the transportation. An official government document must be on board the aircraft to substantiate that the flight is operating for a U.S. government department or agency. (National Aeronautics and Space Administration charters are identified by SF 1169, U.S. Government Transportation Request. Army and Air Force Exchange Service (AAFES) charters are identified by AAFES Form 4150–1, AAFES Purchase and Delivery Order.)

(m) Contractor or subcontractor charter (M). An operator who uses a U.S. Air Force installation for the transportation of U.S. or foreign contractor or subcontractor personnel or cargo in support of a current U.S. government contract.

Verification: The contractor or subcontractor must provide written validation to the approving authority that the charter operator will be operating on their behalf in fulfilling the terms of a government contract, to include current government contract numbers and titles; the U.S. Air Force installations which are required; and the name, telephone number, and address of the government contracting officer.

(n) DOD charter (N). A civil aircraft operator who uses a U.S. Air Force installation for the official transportation of DOD personnel or cargo.

Verification: Tender of service approved by the Military Transportation Management Command (MTMC) and an SF 1169 or SF 1103, U.S. Government Bill of Lading, on the aircraft to validate the operation is for the DOD (AFM 75–2). (Passenger charters arranged by the MTMC are assigned a commercial air movement (CAM) or civil air freight movement (CAFM) number each time a trip is awarded. Installations will normally be notified by message at least 24 hours in advance of a pending CAM operation.)

(o) Media (O). Permits representatives of the media to gather information about a U.S. government operation or event. Use will be considered on a case-by-case basis; for example, if other forms of transportation would preclude meeting a production deadline or if use would be in the best interest of the U.S. government, authorization would be warranted. DD Forms 2400 and 2402 should be on file with HQ USAF/PRPJ to ensure prompt telephone approval for validated requests.

Verification: Concurrence of the installation commander, base operations officer, and public affairs officer.

(p) Other. Under certain circumstances, based on the justification provided, use of U.S. Air Force installations may be authorized for:

(1) Aircraft certification testing as required by FARs which does not involve use of Air Force testing hardware (P).

(2) Commercial development testing at Air Force flight test facilities (Part 835 of this chapter) (Q).

(3) Commercial charter operations (R).

(4) Commercial aircrew training flights (S).

(5) Private, nonrevenue producing flights (T).

(6) Temporary scheduled air service (U).

(7) Foreign government charter (V).

(8) Flights transporting foreign military sales (FMS) material (W). (Hazardous, oversized, or classified cargo only.)

Verification: Cargo information must be provided as specified in § 855.24 of this part. Application must also include the Department of Transportation exemption number when hazardous cargo is to be transported, if required.

(9) Certified flight record attempts (X).

(10) Political candidates (Y). (For security reasons only.) Aircraft either owned or chartered explicitly for a Presidential or Vice Presidential candidate, including not more than one accompanying overflow aircraft for the candidate's staff and press corps. Candidate must be a Presidential or Vice Presidential candidate who is being furnished protection by the U.S. Secret Service. Aircraft clearance is predicated on the Presidential or Vice Presidential candidate being aboard one of the aircraft (either on arrival or departure).

After normal duty hours, flight schedule changes must be reported through the HQ U.S. Air Force Operations Center. Normal landing fees will be charged. Fuel may be sold on a cash or credit basis (AFR 144–9). To reduce conflict with U.S. statutes and U.S. Air Force operational requirements, and to provide expeditious handling of aircraft and passengers, the following guidance applies for the installation commander:

(i) Minimum official (base officials) welcoming party.

(ii) No special facilities are to be provided.

(iii) No onbase political rallies or speeches.

(iv) No official transportation should be provided for unauthorized personnel (press, local populace, etc.). Verification: The Secret Service must confirm that use has been requested in support of their security responsibilities.

(11) Aircraft either owned or personally chartered for transportation of the President, Vice President, or a past President of the U.S.; the head of any U.S. federal department or agency; or a member of the Congress (Z). Use by other than the President or Vice-President must be for official government business. Any request received by MAJCOM or installation commanders from or for members of the Congress must be reported to the Director of Legislative Liaison (SAF/LL) as prescribed in AFR 11–7.

§ 855.12 Approving authority.

The authority to approve or disapprove civil aircraft use of U.S. Air Force installations is vested in:

(a) Directorate of Programs and Evaluation, Deputy Directorate for Bases and Units (HQ USAF/PRPJ). HQ USAF/PRPJ may act on any request for any type of civil aviation use; however, it reserves exclusive approval authority for the following:

(1) Use of multiple U.S. Air Force installations which are within the jurisdiction of multiple MAJCOMs or SOAs, except as delegated in paragraph (b) of this section.

(2) Those listed in § 855.11 (o) and (p) of this part except as specifically delegated to another approving authority.

(3) Joint-use (§ 855.28 of this part).

(4) Any unusual or unique use not specifically authorized by this regulation.

(b) MAJCOM, SOA, or installation commander. With the exception of those uses reserved for HQ U.S. Air Force and HQ MAC approval (paragraphs (a) and (d) of this section), MAJCOMs, SOAs, or installation commanders may approve or disapprove applications (DD Forms 2400, 2401, and 2402) for types of use described in § 855.11 of this part at installations under their jurisdiction. Additionally, they may give approval for one-time, official business operations which are in the best interest of the U.S. government and do not violate other provisions of this regulation. As a minimum, for one-time flights authorized under this paragraph, insurance verification and a completed DD Form 2402 must be provided before the aircraft operates into the U.S. Air Force airfield. Authority to approve civil aircraft use of U.S. Air Force airfields on foreign soil may be limited. Commanders outside the continental U.S. (CONUS) must be familiar with international agreements which may render inapplicable, in part or in whole, provisions of this regulation.

(c) Commander, Alaskan Air Command (AAC). In addition to paragraph (b) of this section, the Commander, AAC, may approve and disapprove landing permits for use under § 855.11(p)(3) and (5) at Alaskan airstrips within the jurisdiction of HQ Tactical Air Command (TAC) and HQ AAC, with the exception of Shemya AFB. All use of Shemya AFB will be approved by HQ USAF/PRPJ. HQ AAC must provide HQ TAC/DOO with a copy of all permits approved for use of TAC airfields.

(d) Commander, MAC. In addition to paragraph (b) of this section, the Commander, MAC, may approve use of U.S. Air Force installations worldwide for flights in support of MAC contracts.

(e) Commander, Pacific Air Forces (PACAF). In addition to paragraph (b) of this section, the Commander, PACAF, may approve private, nonrevenue flights transiting Wake Island for refueling purposes.

(f) Commander, Air Force Space Command (AFSPACECOM). In addition to paragraph (b) of this section, the Commander, AFSPACECOM, may approve civil flights transiting Sondrestrom AFS, Greenland, for refueling purposes.

(g) USDAO. The USDAO, acting on behalf of HQ USAF/ PRPJ, may approve a request for a one-time landing at a U.S. Air Force installation provided:

(1) The request is for official government business of either the U.S. or the country to which the USDAO is accredited.

(2) The U.S. Air Force installation is located within the country to which the USDAO is accredited.

(3) Approval will not violate any agreement with the host country.

(4) The installation commander concurs.

§ 855.13 Application procedures.

The prospective user can obtain a copy of this part (AFR 55–20) and the required forms from a U.S. Air Force installation or an approving authority. The user is responsible for reviewing the regulation and accurately completing the forms before submitting them to the approving authority (§ 855.12 of this part). The types of use normally authorized are specified in § 855.11 of this part. The verification required for each type of use must be included with the application. To allow time for processing, all documents and a self-addressed, stamped envelope should be submitted at least 30 days before the date of the first intended landing. The name of the user must be the same on all forms. Original handscribed signatures, not facsimile elements, are required on all forms. Prospective civil users of a U.S. Air Force installation must apply for authorization as follows:

(a) Have the insurance company or its authorized agent complete and sign DD Form 2400. The user name in item 3 of the DD Form 2400 must correspond with the user name in item 1 of DD Form 2401. All coverages must be stated in U.S. dollars. See table 1 for required minimum coverage. The DD Form 2400 is valid until 1 day before insurance expiration date. A DD Form 2400 with the statement "until cancelled" in lieu of a specific expiration date is valid for 2 years from the effective date. Upon expiration, the DD Form 2400 must be resubmitted along with DD Form 2401 for continued use of Air Force installations. The DD Form 2400 may be sent to the approving authority by either the user or insurer.

(b) Prepare and sign a separate set of DD Forms 2401 for each type of use requested. Submit DD Form 2401 in an original and two copies when HQ USAF/PRPJ is the approving authority, and an original and three copies for other approving authorities.

(1) Provide, in alphabetical order, the name and location of each U.S. Air Force installation requested for use. (The statement "Any U.S. Air Force Installation Worldwide" is acceptable for users performing MAC charters. "Any U.S. Air Force Installation Within the CONUS" is acceptable, if warranted by official government business, for other users.)

(2) Provide a brief explanation of purpose for use with verification for each type of use as specified in § 855.11 of this part. When the purpose for use does not correspond with the categories listed in § 855.11 of this part, it may be considered if sufficient justification is provided.

(3) Aircraft registration numbers are required unless the DD Form 2400 indicates coverage for "any aircraft of the listed model owned and or operated" in lieu of specific registration numbers (§ 855.15 of this part). All other aircraft information must be provided.

(4) The period of use is determined by the insurance expiration date shown on a completed DD Form 2400. Except where an earlier date of expiration is indicated on the permit, the landing permit will expire 1 day before the insurance coverage expiration date shown on DD Form 2400, or 2 years from the date the permit is issued when the insurance expiration date either exceeds 2 years or is indefinite (for example, "until cancelled").

(5) Once the DD Form 2401 has been approved and distributed, users may make no further entries or amendments without the consent of the approving authority.

(6) Upon expiration, resubmit DD Form 2401 along with DD Form 2400 for continued use of U.S. Air Force installations.

(c) Complete, sign, and send original DD Form 2402 to the approving authority. When the user is a corporation, the DD Form 2402 must be completed and signed by a second corporate officer (other than the officer executing DD Form 2402) to certify the signature of the first officer. As necessary, the U.S. Air Force also may require that the form be authenticated by an appropriately designated third official. Once the completed and signed DD Form 2402 has been accepted by an approving authority, and unless rescinded for cause, it is valid until obsolete, and need not be resubmitted to the same approving authority.

§ 855.14 Processing procedures.

Upon receipt of an application (DD Forms 2400, 2401, and 2402) for use of a U.S. Air Force installation, the approving authority:

(a) Determines the availability of the installation and its capability to accommodate the type of use requested.

(b) Determines the validity of the request and ensures all entries on DD Forms 2400, 2401, and 2402 are in conformance with this regulation.

(c) Approves DD Form 2401 (with conditions or limitations listed) by completing all items in the approving authority section. Installation commanders assign a permit number comprised of the last three letters of the installation's International Civil Aviation Organization (ICAO) code identifier, the last two digits of the calendar year, a four-digit number sequentially assigned, and a letter suffix (§ 855.11 of this part) indicating the type of use; such as ADW 86-0001C. MAJCOMs, SOAs, and USDAOs use a three-position organization abbreviation; such as MAC 86-0002K.

(d) Disapproves the request if:

(1) Use interferes with current operations, security, or safety.

(2) Adequate civil facilities are collocated or available in the proximity of the requested U.S. Air Force installation when use is not required for official government business (§ 855.1(a)(8)).

(3) Use could result in substantial competition with civil airports or air carriers.

(4) Civil user has not fully complied with this regulation.

(e) Distributes the approved DD Form 2401 before the first intended landing, when possible, and:

(1) Retains original.

(2) Returns two copies to the user.

(3) Provides a copy to HQ USAF/PRPJ, when the approving authority is other than HQ USAF/PRPJ. HQ USAF/PRPJ will provide a computer printout of current landing permits to the MAJCOMs. The MAJCOMs will make distribution to the appropriate installations.

§ 855.15 Insurance requirements.

Each user who applies for permission to land at a U.S. Air Force installation must present proof of third-party liability insurance on DD Form 2400, with the amounts stated in U.S. dollars. The policy number, effective date, and expiration date are required. The statement "until cancelled" may be used in lieu of a specific expiration date. The geographical area of coverage must include the area where the U.S. Air Force installation of proposed use is located. If several aircraft or aircraft types are included under the same policy, a statement such as "all aircraft owned," "all aircraft owned and or operated," or "all aircraft operated," may be used in lieu of aircraft registration numbers. To meet the insurance requirements, either Split Limit coverage for Bodily Injury, Property Damage, and Passengers or a Single Limit coverage is required. The coverage carried will be at the expense of the user with an insurance company acceptable to the U.S. Air Force and must be current during the period the U.S. Air Force installation will be used. The liability required is computed on the basis of aircraft maximum gross takeoff weight (MGTOW) and passenger or cargo configuration. Minimum coverage will not be less than the amount indicated in table 1.

TABLE 1.—AIRCRAFT LIABILITY COVERAGE REQUIREMENTS

[Stated in U.S. dollars]

	Bodily injury	Property damage	Passenger
(a) Civil aircraft without passenger seats			
12,500 pounds and under—			
Each person	$500,000		
Each accident	1,000,000	$500,000	
Over 12,500 pounds—			
Each person	500,000		
Each accident	5,000,000	3,000,000	
(b) Civil aircraft with passenger seats			
12,500 pounds and under—			
Each person	500,000		$500,000
Each accident	1,000,000	500,000	[1] 500,000
Over 12,500 pounds—			
Each person	500,000		500,000
Each accident	5,000,000	3,000,000	[2] 500,000

[1] Times number of passenger seats.
[2] Times 75 percent times number of passenger seats.

(a) Any insurance presented as a single limit of liability or a combination of primary and excess coverage will be an amount equal to or greater than the minimums required for bodily injury, property damage, and passengers for each accident as indicated in table 1.

(b) Each user's policy will specifically provide that:

(1) The insurer waives any right or subrogation they may have against the U.S. by reason of any payment made under the policy for injury, death, or property damage that might arise out of or in connection with the insured's use of any U.S. Air Force installation.

(2) The insurance afforded by the policy applies to the liability assumed by the insured under DD Form 2402.

(3) If the insurer or the insured cancels or reduces the amount of insurance afforded under the listed policy before the expiration date indicated on DD Form 2400, the insurer will send written notice of policy cancellation or coverage reduction to the approving authority at least 30 days before the effective date of the cancellation or reduction. (The policy must state that any cancellation or reduction will not be effective until at least 30 days after such notice is sent.)

§ 855.16 Landing, parking, and storage fees.

(a) *Fees.* All fees are normally due and collectable at time of use of any U.S. Air Force airfield and are deposited with the accounting and finance officer using DD Form 1131, Cash Collection Voucher. In some instances, it may be necessary to bill the user for charges incurred. Guidance and assistance may be obtained from the installation accounting and finance officer. The landing, parking, and storage fees (tables 2 and 3) are based on the aircraft

MGTOW. The installation commander may permit parking and storage on a nonexclusive, temporary, or intermittent basis, when compatible with military requirements. The time that an aircraft spends on an installation is at the discretion of the installation commander but should be linked to the type of use authorized. At those locations where there are U.S. Air Force aero clubs, parking and storage privileges may be permitted in the area designated for aero club use without regard for the type of use authorized, if consistent with aero club policies. Any such permission may be revoked upon notice, based on military needs and the installation commander's discretion.

(b) *Exceptions.* The landing, parking, and storage fees are not applicable for civil aircraft which are:

(1) Privately owned, leased, or operated by active duty military members, retired U.S. military members, CAP members, members of the Reserve Forces, or U.S. government civilian employees.

(2) Operated by aero club members (§ 855.11(i)).

(3) Operated in support of official government business, including those authorized use under § 855.11(b), or any use, the cost of which is subject to reimbursement by the U.S. government.

(4) Foreign government-owned aircraft as indicated in § 855.25.

(5) Foreign civil aircraft chartered for use by foreign heads of state on official state visits.

(6) Exempt from the requirement for a civil aircraft landing permit.

TABLE 2.—LANDING FEES

Aircraft max gross takeoff Wt (MGTOW)	Normal fee	Unauthorized fee	Intentional fee	Minimum fee	U.S. territories and possessions	Overseas
	$1.50/1,000 lb MGTOW or fraction thereof.			$20	X	
	$1.70/1,000 lb MGTOW or fraction thereof.			25		X
Up to and including 12,500 lb.		100			X	X
12,501 to 40,000 lb		300			X	X
Over 40,000 lb		600			X	X
			Increase unauthorized fee by 100% or 200%.		X	X

TABLE 3.—PARKING AND STORAGE FEES

Fee per aircraft for each 24-hour period or less	Minimum fee	Charge begins	Ramp	Hangar
$1.00/100,000 lb MGTOW or fraction thereof	$20	6 hours	X	
$2.00/100,000 lb MGTOW or fraction thereof	20	Immediately		X

§ 855.17 Aviation fuel and oil purchases.

When a user qualifies under the provisions of AFR 144–9, purchase of U.S. Air Force fuel and oil may be made on a cash basis, or on a credit basis after establishment of an Authorized Credit Letter (AFR 144–9, attachment 1). The Authorized Credit Letter must be submitted to HQ USAF/PRPJ and approved by SA–ALC/ACFMA, Kelly AFB TX 78241–5000, before products can be purchased on credit. Aviation fuel charges will be billed as prescribed in AFR 144–9 and AFM 67–1, volume I, part three, chapter 1.

§ 855.18 Supply and service charges.

Supplies and services furnished to a user will be charged for as prescribed in AFM 67–1, volume I, part one, chapter 10, section N, subsection 2, and AFR 177–102, paragraph 29.24. A personal check with appropriate identification, cashier's check, money order, or cash is an acceptable means of payment. Charges for handling FMS cargo are prescribed in AFR 170–3.

Subpart E—Foreign Government Aircraft

§ 855.19 General information

All foreign military or foreign government-owned, noncommercially operated aircraft (§ 855.2(k)) must have authorization before using U.S. Air Force installations. Where agreements do not exist between the U.S. and a foreign government or between the U.S. Air Force and a foreign air force for reciprocal use by military aircraft, the foreign government must specifically request permission for its aircraft to land at U.S. Air Force installations.

Note.—Permission to land at U.S. Air Force installations in the U.S. or foreign countries does not constitute nor take the place of diplomatic or other overflight clearance requirements.

§ 855.20 Application procedures.

Foreign government aircraft are not required to submit DD Forms 2400, 2401, and 2402 for permission to land at a U.S. Air Force installation. Instead, the foreign government must:

(a) Complete and send written request through its air attache to HQ USAF/CVAII, Washington, DC 20330–2006, a minimum of 72 hours, excluding Saturday, Sunday, and U.S. holidays, before first intended landing. (For use of U.S. Air Force installations in the Canal Zone, all Latin American countries are authorized to submit their requests direct to Commander, Southern Air Division (USAFSO), APO Miami 34001–5000. Requests must be submitted at least 24 hours in advance.)

(b) Submit a request for diplomatic clearance to the Department of State, if flight to U.S. territory is desired, unless flight in U.S. airspace is already authorized by an appropriate agreement

(c) Submit a request for diplomatic or other required clearance to each appropriate foreign country which is to be overflown or in which a landing is to be made, when use of a U.S. Air Force installation in a foreign country is desired.

§ 855.21 Processing procedures.

When an application is received, the approving authority:

(a) Determines the availability of the installation and its capability to accommodate the user request.

(b) Ensures that the prospective foreign government user has a valid requirement.

§ 855.22 Approving authority.

(a) *Assistant Vice Chief of Staff, International Affairs Division (HQ USAF/CVAII).* HQ USAF/CVAII acts on all requests for use of a U.S. Air Force installation by foreign government aircraft except those specifically delegated to another approving authority. An aircraft landing authorization number (ALAN) is assigned each request approved for foreign government aircraft. HQ USAF/CVAII will obtain telephonic clearance from the consolidated command post at Howard AFB, Panama, before issuing an ALAN to any country whose aircraft are transiting Howard while en route to or from the U.S. Appropriate U.S. Air Force installations, MAJCOMs, and Air Staff offices will be notified by message.

(b) *Commander, USAFSO.* Commander, USAFSO may act on requests from any Latin American country for the country's military

aircraft, or other government-owned aircraft not engaged in commercial operations, to use U.S. Air Force installations under USAFSO control, ensuring all authorizations are consistent with current directives. USAFSO will provide appropriate billing instructions and flight information in a landing authorization message.

§ 855.23 Aviation fuel and oil purchases.

U.S. Air Force aviation fuel and oil may be purchased for foreign government aircraft as authorized by separate agreement or as stated in the notification message. Aviation fuel and oil charges will be billed as prescribed in AFM 67-1, volume I, chapter 1.

§ 855.24 Foreign military sales (FMS) cargo.

(a) *FMS charges.* So that the U.S. Air Force may properly apply charges for loading and other services performed in support of foreign government aircraft transporting FMS cargo, the following information is required on each request:

(1) Description of cargo (nomenclature) to include requisition numbers, if available, applicable FMS case(s) number(s), and delivery term codes.

(2) U.S. Air Force agency with which prior arrangements have been made for provision of military terminal loading and or other services.

(3) U.S. government FMS case management agency to which costs for services rendered are chargeable.

(4) Name, address, and telephone number of freight forwarder.

(5) Name, address, and telephone number of shipper.

(b) *Explosives and other hazardous material.* Aircraft transporting hazardous material must specify in paragraph 5 of the ALAN request the U.S. Department of Transportation proper shipping name and hazard class with respective number of pieces, weight, and cube. Additionally, in the case of explosives, provide net explosive weight of each explosive class and identify the U.S. facility where the hazardous material is to be loaded or unloaded.

(c) *Loading services.* When an aircraft picks up or delivers material at a U.S. Air Force base, it must be equipped with sufficient cargo pallets and or tiedown materials to facilitate loading. Compatible 463L pallets and nets will be exchanged on a one-for-one basis for serviceable units. Nonstandard pallets and nets cannot be exchanged; however, they will be used to build-up cargo loads after arrival of the aircraft. Aircraft arriving without sufficient cargo loading and tiedown devices must be floor loaded and the aircraft crew will be responsible for purchasing necessary ropes, chains, etc.

§ 855.25 Supply and service charges.

(a) Supplies and services furnished to a foreign government aircraft which are not covered by an FMS case will be charged for as prescribed in AFM 67-1, volume I, part one, chapter 10, section N, subsection 2; AFR 177-102, paragraph 29.24; and AFR 170-3; or other applicable laws and regulations.

(b) Invoicing procedures for terminal services (aircraft loading or unloading) prescribed in AFR 177-112, paragraph 4-25, will be used except when loading or unloading services are chargeable to an FMS case; that is, material assigned delivery term code 8 in the DD Form 1513, U.S. DOD Offer and Acceptance. FMS material assigned delivery term code 8 will be billed to the FMS case as prescribed in AFR 170-3.

(c) Communications services are normally provided only for official government business. If charges accrue to the U.S. government, reimbursement must be provided.

§ 855.26 Landing, parking, and storage fees.

Fees will not be charged for foreign military or foreign government aircraft unless specified in the HQ USAF/CVAII message granting authorization for landing.

§ 855.27 Waiver authority.

HQ USAF/CVAII reserves the right to waive the above procedures for any unusual or unique use not specifically authorized by this regulation for use of U.S. Air Force facilities by foreign government aircraft.

Subpart F—Joint Use of a U.S. Air Force Installation

§ 855.28 U.S. Air Force joint-use policy.

Joint-use of a U.S. Air Force installation will be considered only if there will be no compromise of military response, security, readiness, or safety and when requested by authorized local government representatives eligible to sponsor a public airport. Such requests are considered and evaluated on an individual basis by all reviewing levels. Generally, an airfield will be considered for joint-use if it does not have a nuclear alert force, pilot training, nuclear storage, or a major classified mission. Civil operations must begin within 5 years of formalizing an agreement.

§ 855.29 Procedures for sponsor.

To initiate consideration for joint-use of a U.S. Air Force installation, a formal proposal must be submitted by a local government agency eligible to sponsor a public airport to the installation commander, and include the following:

(a) Type of operation.

(b) Type and number of aircraft to be located on or operating at the installation.

(c) An estimate of the number of annual operations for the first 5 years.

§ 855.30 Procedures for U.S. Air Forces.

(a) The installation commander, on receipt of the request, without precommitment or comment, will send the documents to the Air Force representative at the FAA regional office within the geographical area where the installation is located, with an information copy to HQ USAF/PRPJ.

(b) The U.S. Air Force representative at the FAA regional office will provide comments on the request regarding airspace, air traffic control, and other related areas, return the request with appropriate comments to the installation commander, and advise local FAA personnel of the proposal for joint-use. Operational considerations will be based on the premise that military aircraft will receive priority handling (except in emergencies), if traffic must be adjusted or resequenced. Manpower increases in air traffic control or related support activities required solely for the civil operation, normally will not be considered but if accommodated, must be fully reimbursed by the joint-use sponsor. Additional equipment or relocation of equipment must be funded by the civil sponsor.

(c) The installation commander will comment on the request and send the comments and all related documents through channels to HQ USAF/PRPJ.

(d) The U.S. Air Force will act as lead agency for the preparation of the environmental analysis (Part 989 of this chapter). The community government representatives, working in coordination with local U.S. Air Force personnel and other concerned local or federal officials, must identify the proposal, develop conceptual alternatives, and provide planning, socioeconomic, and environmental information as specified by HQ USAF/LEEV. The information must be complete and accurate in order to serve as a basis for the preparation of U.S. Air Force environmental documents. The sponsor will normally fund the environmental studies required for the environmental impact analysis process. Environmental analysis requirements can be obtained from HQ USAF/LEEV, Washington, DC 20332-5000.

(e) In addition to the environmental analysis, HQ USAF/PRPJ will consider all of the following factors when evaluating a joint-use proposal:

(1) The current and programmed military activities at the installation.

(2) Runway and taxiway facilities. Joint-use will normally not be considered at locations with single runway capacity.

(3) Security. Joint-use increases the possibility for sabotage, terrorism, and vandalism. Joint-use will not be considered:

(i) If military and civil aircraft would be collocated.

(ii) When other than normal airfield facilities would be shared.

(iii) If access to the civil facilities would require routine transit through the base.

(4) Availability of supplies and maintenance services.

(5) Volume and type of military traffic.

(i) Compatibility of proposed civil operations with present and planned military operations.

(ii) Normally, aircraft must be certified for operation under instrument flight rules (IFR), equipped with a two-way radio, and operated by an IFR qualified crew.

(6) Fire, crash, and rescue services.

(7) The extent to which the proposed use might detract from the installation capability to meet national defense needs.

(8) Availability of public airports to accommodate the current and future civil aviation requirements of the community and the practicality of constructing or expanding a public airport.

(9) Availability of sufficient land for civil facilities. The majority of land for the civil facilities must be located on the perimeter of the U.S. Air Force installation or be segregatable in a manner which does not detract from security. Federal legislative jurisdiction should be retroceded to the State after joint-use is implemented. If the community does not already own the needed land, it must be acquired at no expense to the U.S. government. If land presently owned by the government is desired, the community must contact the General Services Administration regarding availability of excess U.S. government property and submit an application through FAA (50 U.S.C. 1622). Application for lease of U.S. Air Force property must be processed through channels to HQ USAF/LEER as prescribed in AFR 87-3. All real property outleased will be processed through the Corps of Engineers at fair market value.

(10) Whether the community would acquire, construct, and maintain all necessary facilities for civil aviation operations; for example, a terminal building, parking ramp, taxiways, and, if appropriate, a civil runway. The U.S. Air Force will not provide manpower to install, operate, maintain, alter, or relocate navigation equipment or aircraft arresting systems for the sole use of civil aviation. U.S. Air Force approval would be required on siting, design, and construction of the civil facilities.

(11) Terms for reimbursement. The civil sponsor must reimburse the U.S. Air Force a proportionate share for maintenance and operation of the government runway and other facilities used.

(f) The proposed joint-use agreement will be negotiated by HQ USAF/PRPJ and concluded on behalf of the Air Force by SAF/MI. The joint-use agreement will state the extent to which the provisions of this regulation will apply to all civil aviation use authorized.

(g) When processing major amendments to existing joint-use agreements, (a) through (f) of this section are applicable.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 86-25423 Filed 11-12-86; 8:45 am]

BILLING CODE 3910-01-M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 11

Natural Resource Damage Assessments

AGENCY: Office of the Secretary, Interior.

ACTION: Extension of comment period.

SUMMARY: On August 1, 1986, the Department of the Interior (Department) published a final rule (51 FR 27674) establishing procedures for assessing damages to natural resources for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Clean Water Act. In the **Federal Register** publication, the Department requested additional public comment on the concept of a "special resource" exception to the damage measurement rule contained in the final type B regulation (51 FR 27724). The Department is extending the period for public comment on the special resource concept from September 29, 1986, to November 28, 1986.

DATE: Comments on the concept of "special resources" should be submitted by November 28, 1986.

ADDRESS: Comment should be sent to: Keith Eastin, Deputy Under Secretary, CERCLA 301 Project Director, Room 4354, Department of the Interior, 1801 "C" Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Keith Eastin, (202) 343-5183; David Rosenberger, (202) 343-1301; Alison Ling, (415) 556-8807; or Willie Taylor, (202) 343-7531.

SUPPLEMENTARY INFORMATION: In the December 20, 1985, Notice of Proposed Rulemaking (50 FR 52126), the Department of the Interior proposed an exception to the general common law rule that natural resource damages are the lesser of restoration or replacement costs, or the diminution of use values. This exception, which covered a narrow class of resources called "special resource," was set forth in § 11.35(d) of the proposed rule. The intent of this concept was to create a very narrow exception to the general common law rule that would have allowed damages to be based on restoration or replacement costs for such "special resources."

After careful evaluation of the public comments on the proposed notice the Department deleted the special resource exception from the final type B rule, but indicated that it would further consider the need for, and the extent of, any exception. The Department requested, in 51 FR 27724, additional public comment on the issue. The Department indicated that it would implement any changes as a result of the review and consideration of public comment received by amending the final type B rule. Upon request, the Department has granted a 60-day extension of time to comment. The extension is retroactive to September 29, 1986.

The Department appreciates the interest in the special resource issue. The Department intends to respond to the comment submitted and will, if necessary, propose amendments to the final type B rule relating to the special resource concept on or about March 15, 1987.

Dated: November 7, 1986.

Keith E. Eastin,

Deputy Under Secretary.

[FR Doc. 86-25552 Filed 11-12-86; 8:45 am]

BILLING CODE 4310-10-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 205

Disaster Assistance; Withdrawal of Proposed Revisions

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Withdrawal of Proposed Regulations.

SUMMARY: The Federal Emergency Management Agency (FEMA) gives notice that proposed rules revising disaster assistance regulations (51 FR 13332, April 18, 1986) have been withdrawn.

FOR FURTHER INFORMATION CONTACT: John Lundberg, Office of Disaster Assistance Programs, FEMA, Room 714, 500 C Street SW., Washington DC 20472 (202) 646-3688.

SUPPLEMENTARY INFORMATION: On April 18, 1986, FEMA published in the **Federal Register** (51 FR 13332-13373) proposed rules which would have revised Federal disaster assistance regulations, 44 CFR Part 205, Subpart C, The Declaration Process and State Commitment; Subpart D, Temporary Housing Assistance; Subpart E, Public Assistance Eligibility Criteria; Subpart H, Project Administration; and Subpart M, Hazard Mitigation. FEMA has determined that these proposed regulations should be withdrawn.

Therefore, the proposed revisions to disaster assistance regulations are withdrawn and Chapter I, Title 44 of Code of Federal Regulations is not amended by revising Part 205.

Dated: November 6, 1986.

Dave McLoughlin,

Deputy Associate Director, State and Local Programs and Support.

[FR Doc. 86-25553 Filed 11-12-86; 8:45 am]

BILLING CODE 6718-02-M

FEDERAL MARITIME COMMISSION

46 CFR Part 580

[Docket No. 86-29]

Maritime Carriers and Related Activities in Foreign Commerce; Filing of Service Contracts and Availability of Essential Terms

AGENCY: Federal Maritime Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission proposes to amend its rules governing service contract recordkeeping because of excessive delays the Commission has experienced in promptly obtaining adequate service contract records. The Proposed Rule would require ocean common carriers and conferences to maintain service contract records in the United States in an organized, readily accessible manner; to identify the location of records and recordkeeper(s); and to produce service contract records within 15 days from the date of a Commission request.

DATE: Comments due on or before January 12, 1987.

ADDRESS: Comments (original and 20 copies) to: Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573, (202) 523-5725.

FOR FURTHER INFORMATION CONTACT:

Robert D. Bourgoin, General Counsel, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573 (202) 523-5740.

Robert G. Drew, Director, Bureau of Tariffs, 1100 L Street, NW., Washington, DC 20573, (202) 523-5796.

SUPPLEMENTARY INFORMATION: Section 8(c) of the Shipping Act of 1984 (1984 Act or Act), 46 U.S.C. app. 1707(c), authorizes ocean common carriers or conferences to enter into service contracts with shippers or shippers' associations, subject to the requirements of the Act and the Commission's regulations. The Commission's rules governing the use of service contracts require, among other things, that ocean common carriers and conferences maintain service contract shipment records for a period of five years from the termination of each contract, 46 CFR 580.7(j). In addition, service contracts are required to state the ". . . shipment records which will be maintained to support the contract," 46 CFR 580.7(b)(3)(vi).

The Commission's Interim Rules implementing the 1984 Act, 49 FR 18852, May 3, 1984, required service contract shipment records to be maintained by a resident representative *in the United States* for a period of five years from the completion of the contract. However, when the Commission adopted final service contract rules, it decided against requiring records to be kept in the United States, because there appeared to be no compelling necessity to do so at the time. The Commission made it clear, however, that if any difficulties were encountered in obtaining service contract information in the future, it would consider reimposing a United States recordkeeping requirement. Docket No. 84-21, *Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States—Service Contracts and Time/Volume Contracts* 49 FR 45370, November 15, 1984.

The Commission has now experienced considerable difficulties in obtaining service contract records. Approximately twenty-five percent of the service contract audits scheduled by the Commission's Bureau of Investigations have been delayed for varying periods of time. In some cases, the Commission has had to wait over eight months to receive the requested information from carriers or conferences. Moreover, the fact that some service contract records are located overseas has resulted in additional delays caused by foreign government involvement in the process of producing requested records. In addition, the kinds of records maintained by carriers have not always proven to be sufficient to enable the Commission to verify compliance with a contract. Accordingly, the Commission is not proposing a rule to effectively deal with the problem of timely production of service contract records, including a requirement that such records be maintained in the United States.

The Proposed Rule defines "service contract records," and requires each service contract to identify the specific location of the records within the United States, and the name, title, address, and telephone number of the individual who will make records available to the Commission. The Proposed Rule would also require that every ocean common carrier or conference tender services contract records within 15 days from the date of a written request by designed officials of the Commission. The Proposed Rule also retains the present requirement to maintain records for five years and adds a requirements that the records be maintained in an organized, readily accessible manner.

The auditing of service contracts is vital to the Commission's responsibility to ensure that ocean common carriers and conferences are abiding by the terms of service contracts and to ensure that acts prohibited by the 1984 Act are treated appropriately. Essential to the auditing process is timely production of records which are capable of verifying compliance with service contract terms. Maintaining the records in the United States and providing the Commission with the location of records and name of the ocean common carrier or conference representatives which maintain such records will expedite production of the records. The production of records or documents within 15 days from the date of the written request appears reasonable, particularly in light of the proposed requirement that ocean common carriers and conferences

maintain such records in the United States. This Proposed Rule should permit prompt and adequate Commission access to service contract records.

The Federal Maritime Commission has determined that the Proposed Rule, if adopted, is not a "major rule" as defined in Executive Order 12291, 46 FR 12193, February 27, 1981, because it will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) a significant adverse effect on competition, employment, investment productively, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission certifies that the Proposed Rule will not, if adopted, have a significant economical impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980, 44 U.S.C. 3504(h). A copy of the request for OMB review and supporting documentation may be obtained from the Commission's Secretary. Comments on the information collection aspects of this rule should be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for the Federal Maritime Commission.

List of Subjects in 46 CFR Part 580

Administrative practice and procedure, Antitrust, Automatic data processing, Cargo vessels, Confidential business information, Contracts, Exports, Freight, Imports, Maritime carriers, Penalties, Rates and fares, Reporting and recordkeeping requirements.

Therefore, Part 580 of Title 46, Code of Federal Regulations, is proposed to be amended as follows:

1. The authority citation to Part 580 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702–1705, 1707, 1709, 1712, 1714–1716 and 1718.

2. Section 580.7 is amended by redesignating paragraphs (a)(5) and (a)(6) as paragraphs (a)(6) and (a)(7), respectively, by adding a new paragraph (a)(5), by revising paragraph (b)(3)(vi), by adding paragraph (b)(3)(vii), and by revising paragraph (j) to read as follows:

§ 580.7 Filing of service contracts and availability of essential terms.

(a) * * *

(5) *Service contract records* means such information as will enable the Commission to verify compliance with the terms of a service contract and shall include freighted ocean bills of lading, or equivalent shipping documents, with riders, attachments, invoices, and corrections, and any other documents, which establish that the terms of the contract are being or have been met.

* * * * *

(b) * * *

(3) Service contracts shall clearly state:

* * * * *

(vi) The types of service contract records which will be maintained.

(vii) The specific location in the United States of service contract records; and the name, title, address and telephone number of the individual who will make records available to the Commission pursuant to § 580.7(j).

* * * * *

(j) *Recordkeeping and production of records.* (1) Every ocean common carrier or conference shall maintain in the United States service contract records in an onganized, readily accessible manner for a period of five years from the termination of each contract.

(2) Every ocean common carrier or conference shall, upon written request of the Director, Bureau of Investigations or the Director of any District Office, submit requested service contract records within 15 days from the date of the request.

* * * * *

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 86–25612 Filed 11–12–86; 8:45 am]

BILLING CODE 6730-01-M

Notices

Federal Register
Vol. 51, No. 219
Thursday, November 13, 1986

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

DEPARTMENT OF AGRICULTURE

Forms Under Review by Office of Management and Budget

November 7, 1986.

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

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

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

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

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

Extension

• Food and Nutrition Service.
Claim for Reimbursement Summer Food Service Program
Recordkeeping; June, July and August
Non-profit institutions; 2,250 responses; 1,688 hours; not applicable under 3504(h)
Joseph Surdick (703) 756–3870

• Rural Electrification Administration.
Schedule of Advances on FFB Notes Guaranteed
REA–152
Annually
Small Businesses or organizations; 100 responses; 25 hours; not applicable under 3504(h)
Milton E. Wright (202) 382–1933

New

• Agricultural Stabilization and Conservation Service
7 CFR Part 702 Colorado River Basin Salinity Control Program Regulations
CRSC–1, –2, –3
On occasion
Farms; 644 responses; 194 hours; not applicable under 3504(h)
Cecil Lower (202) 475–5924

• Farmers Home Administration.
FmHA Offset of Income Tax Refunds and Reporting Delinquent Accounts to Credit Bureaus
On occasion
Individuals or households; Farms; 420 responses; 105 hours; not applicable under 3504(h)
Jack Holston (202) 382–9736

Revision

• Food and Nutrition Service.
Coupon Account and Destruction Report
FNS–471
Recordkeeping; Monthly
State or local governments; 78,888 responses; 22,971 hours; not applicable under 3504(h)
Paul Jones (703) 756–3385

Reinstatement

• Food and Nutrition Service.
Food Stamp Program Regulations, Part 275—Quality Control (Reporting and Recordkeeping)
Recordkeeping; On occasion
State or local governments; 53 responses; 266 hours; not applicable under 3504(h)
Joseph H. Pinto (703) 756–3471

• Food and Nutrition Service.
Negative Sample and Periodic Reports for Quality Control—Food Stamp Program
FNS–245, –247, –248
Recordkeeping; On occasion; Monthly; Annually
Individuals or households; State or local governments; 31,774 responses; 94,376 hours; not applicable under 3504(h)
Nancy Theodore (703) 756–3469

Revision

• Extension Service.
Application for Authorization to Use the 4–H Club Name or Emblem
On occasion
Individuals or households; Businesses or other for-profit; Non-profit institutions; Small businesses or organizations; 30 responses; 15 hours; not applicable under 3504(h)
V. Milton Boyce (202) 447–6527

Donald E. Hulcher,
Departmental Clearance Officer.

[FR Doc. 86–25632 Filed 11–12–86; 8:45 am]
BILLING CODE 3410–01–M

Soil Conservation Service

Lumpkin County Road Backslopes Critical Area Treatment Measure, Georgia

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of a Finding of No Significant Impacts.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969; the Council of Environmental Quality Guidelines (40 CFR Part 1500); and the Soil Conservation Service Guidelines (7 CFR Part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for Lumpkin County Road Backslopes Critical Area Treatment Measure, Lumpkin County, Georgia.

FOR FURTHER INFORMATION CONTACT: B.C. Graham, State Conservationist, Soil Conservation Service, Federal Building, Box 13, 355 East Hancock Avenue, Athens, Georgia 30601; Telephone: 404–546–2273.

SUPPLEMENTARY INFORMATION: The environmental assessment of this federally assisted action indicates that the project will not cause significant

local, regional, or national impacts on the environment. As a result of these findings, B.C. Graham, State Conservationist, has determined that the preparation and review of an environmental impact statement is not needed for this project.

The measure concerns a plan for the treatment of critically eroding roadbank areas. The planned works as described in the Finding of No Significant Impact consists of the establishment of erosion control vegetation on 21.3 acres.

The Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency, Federal, State, and local agencies, and interested parties. Basic data developed during the environmental assessment are on file and may be reviewed by contacting Mr. B.C. Graham. A limited number of copies of the FONSI are available to fill single copy requests at the above address.

No administrative action on implementation of the proposal will be taken under 30 days after the date of this publication in the **Federal Register.**

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.901—Resource Conservation and Development—and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials)

Dated: November 3, 1986.

B.C. Graham,

State Conservationist.

[FR Doc. 86-25569 Filed 11-12-86; 8:45 am]

BILLING CODE 3410-16-M

ARCTIC RESEARCH COMMISSION

Notice is hereby given that the Arctic Research Commission will meet in Anchorage, Alaska on 18 November 1986 starting at 3:00 p.m. On 18 November, the Commission plans to conduct a workshop on Arctic research logistics at the Sheraton Anchorage Hotel, Anchorage, Alaska. This workshop will be held in conjunction with the Consultative Workship on the Draft Five-Year Federal Arctic Research Plan. Agenda items include: (1) Overview of workshops purpose and methods to be used in acquiring and using information (2) availability of research vessels and current and anticipated requirements (3) the role and needs for satellite systems in Arctic research (4) buoy programs and expected future requirements (5) logistical support needed for terrestrial research (6) the elements of coordination and the systems required to manage logistics for national Arctic research effort (7) other logistical options and their specific roles in Arctic research.

Following the speakers and also at the end of the session, there will be opportunities for comments and short statements.

Contact Person for More Information: W. Timothy Hushen, Executive Director, Arctic Research Commission (213) 743-0970.

W. Timothy Hushen,

Executive Director, Arctic Research Commission.

[FR Doc. 25652 Filed 11-12-86; 8:45 am]

BILLING CODE 7555-01-M

DEPARTMENT OF COMMERCE

Agency Forms Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposals for collection of information under the provisions of the Paperwork reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration
Title: Delivery Verification Certificate
Form Number: Agency -ITA-647P; OMB-0625-0063
Type of Request: Extension of the expiration date of a currently approved collection
Burden: 500 respondents; 133 reporting hours
Needs and Uses: On occasion foreign governments request U.S. importers of strategic commodities to supply them with proof that the commodities shipped to the U.S. were not diverted from their intended destination and were in fact actually imported into the U.S. As a part of its responsibilities in the foreign trade field, Export Administration has agreed to receive these representations from persons in the U.S. regarding their intended disposition of commodities. Export Administration acts as the certifying agent by issuing certificates which are provided to the requesting government.
Affected Public: Businesses or other for-profit institutions; small businesses or organizations
Frequency: On occasion
Respondent's Obligation: Required to obtain or retain a benefit
OMB Desk Officer: Sheri Fox 395-3785

Agency: International Trade Administration
Title: Shipments of Primary Nickel
Form Number: Agency-ITA-920; OMB-0625-0012
Type of Request: Extension of the expiration date of a currently approved collection
Burden: 21 respondents; 14 reporting hours
Needs and Uses: The information is required in support of the President's industrial mobilization responsibilities under the Defense Production Act of 1950, as amended. The survey provides data on shipments of primary nickel and is used to determine stockpile goals and establish acquisition and disposal programs.
Affected Public: Businesses or other for-profit institutions
Frequency: Quarterly
Respondent's Obligation: Mandatory
OMB Desk Officer: Sheri Fox 395-3785.

Agency: International Trade Administration
Title: Copper Controlled Materials
Form Number: Agency-ITA-9008; OMB-0625-0011
Type of Request: Extension of the expiration date of a currently approved collection
Burden: 100 respondents; 200 reporting hours
Needs and Uses: The informaton is required in support of the President's priorities and allocations authority under the Defense Production Act of 1950. The information requested provides data on defense rated shipments of copper and copper base alloy products. The data are used by the International Trade Administration to establish and monitor the obligation ("set-asides") of producers of copper and copper base alloy products to accept defense rated orders.
Affected Public: Businesses or other for-profit institutions; small businesses or organizations
Frequency: Quarterly
Respondent's Obligation: Mandatory
OMB Desk Officer: Sheri Fox 395-3785

Agency: International Trade Administration
Title: Overseas Business Interest Questionnaire
Form Number: Agency-ITA-471P; OMB-0625-0039
Type of Request: Extension of the expiration date of a currently approved collection
Burden: 1,000 respondents; 500 reporting hours
Needs and Uses: Firms participating in overseas trade events are asked to provide information on the audience they wish to target. The information is used by overseas posts of the United States and Foreign Commercial

Services to arrange appointments for mission/show particpants during scheduled trade promotion events.
Affected Public: Businesses or other for-profit institutions; small businesses or organizations
Frequency: On occasion
Respondent's Obligation: Voluntary
OMB Desk Officer: Sheri Fox 395-3785

Agency: International Trade Administration
Title: Titanium Metal
Form Number: Agency—ITA-991; OMB-0628-0019
Type of Request: Extension of the expiration date of a currently approved collection
Burden: 35 respondents; 140 reporting hours
Needs and Uses: This information is required in support of the President's industrial mobilization responsibilities under the Defense Production Act of 1950. Titanium is a strategic and critical material essential to defense production. The information collected provides data on the supply, production and shipments of titanium sponge, ingot, and mill shapes, the consumption of scrap, and the imports of titanium sponge. The data are used by several Federal agencies in support of their programs.
Affected Public: Businesses or other for-profit institutions; small businesses or organizations
Frequency: Quarterly.
Respondent's Obligation: Mandatory.
OMB Desk Officer: Sheri Fox, 395-3785.

Agency: International Trade Administration
Title: Steel Controlled Materials Report
Form Number: Agency—ITA-943; OMB-0628-0017
Type of Request: Extension of the expiration date of a currently approved collection
Burden: 100 respondents; 133 reporting hours
Needs and Uses: This information is required in support of the President's priorities and allocations authority under the Defense Production Act of 1950, as amended, as implemented by the Defense Priorities and Allocations System Regulation. The information provides data on defense rated shipments of iron and steel. The data are used to establish and monitor the obligation ("set-asides") of producers of iron and steel to accept defense rated orders.
Affected Public: Businesses or other for-profit institutions
Frequency: Quarterly.
Respondent's Obligation: Mandatory.
OMB Desk Officer: Sheri Fox, 395-3785.

Agency: International Trade Administration
Title: Shipment of Nickel Alloy Products
Form Number: Agency—ITA-942; OMB-0625-0021
Type of Request: Extension of the expiration date of a currently approved collection
Burden: 21 respondents; 14 reporting hours
Needs and Uses: The information collected from nickel alloy products producers is required for the enforcement and administration of the delegated authority of the Defense Production Act of 1950, as amended, to manage the consumption and use of controlled materials. The survey provides data on defense rated shipments of nickel alloy products. The information is used to monitor the "set-asides" of producers of nickel alloys to accept defense rated orders.
Affected Public: Businesses or other for-profit institutions; small businesses or organizations
Frequency: Quarterly.
Respondent's Obligation: Mandatory.
OMB Desk Officer: Sheri Fox, 395-3785.

Copies of the above information collection proposals can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-4217, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collections should be sent to Sheri Fox, OMB Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

Dated: November 6, 1986.

Edward Michals,

Departmental Clearance Officer, Information Management Division, Office of Information Resources Management.

[FR Doc. 86-25599 Filed 11-2-86; 8:45 am]

BILLING CODE 3510-CW-M

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of the Census
Title: Questionnaire Design for Decennial Census Forms
Form Number: Agency-DC-2-U(F); OMB-0607-0532
Type of Request: Extension of a currently approved collection
Burden: 600 respondents; 900 reporting hours
Needs and Uses: This program of questionnaire design research for the 1990 Decennial Census will be used to refine the question wording, layout, and instructions for the census questionnaire which will be administered to the entire population.
Affected Public: Individuals or households
Frequency: One time
Respondent's Obligation: Voluntary
OMB Desk Officer: Timothy Sprehe, 395-4814

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-4217, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Tomothy Sprehe, OMB Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

Dated: November 6, 1986.

Ed Michals,

Departmental Clearance Officer, Information Management Division, Office of Information Resources Management.

[FR Doc. 86-25600 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-CW-M

Agency Forms Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposals for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Economic Analysis
Title: Transactions of U.S. Affiliate, Except an Unincorporated Bank, with Foreign Parent
Form Number: Agency—BE-605; OMB—0608-0009
Type of Request: Revision of a currency approved collection
Burden: 3,100 respondents; 12,400 reporting hours
Needs and Uses: Data are needed on current and capital account transactions between foreign owners (other than banking branches and agencies) hodling a 10 percent or more ownership interest in U.S. business enteprises and their U.S. business enterprises. These data are used to prepare the balance of payments accounts of the United States.
Affected Public: Business or other for-profit institutions
Frequency: Quarterly
Respondent's Obligation: Mandatory.

OMB Desk Officer: Timothy Sprehe 395-4814
Agency: Bureau of Economic Analysis
Title: Transactions of U.S. Banking Branch or Agency with Foreign Parent
Form Number: Agency—BE-606B; OMB—0608-0023
Type of Request: Revision of a currently approved collection
Burden: 325 respondents; 1,300 reporting hours
Needs and Uses: These data are needed on current and capital account transactions between foreign owners holding a 10 percent or more ownership interest in unincorporated U.S. banks and the U.S. banking branches or agencies that they hold. The data are used to prepare the balance of payments accounts of the United States.
Affected Public: Businesses or other for-profit institutions
Frequency: Quarterly
Respondent's Obligation: Mandatory.
OMB Desk Officer: Timothy Sprehe 395-4814

Copies of the above information collection proposals can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-4217, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collections should be sent to Timothy Sprehe, OMB Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

Dated: November 6, 1986.

Edward Michals,

Departmental Clearance Officer, Information Management Division Management.

[FR Doc. 86-25601 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-07-M

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has sumitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Economic Development Administration
Title: The Determinants of Plant Location
Form Number: Agency—NA; OMB—NA
Type of Request: New collection
Burden: 500 respondents; 250 reporting hours
Needs and Uses: EDA will conduct this survey to detemine why plants locate where they do. EDA will use the collected information in its effort to attract manufacturing to distressed areas.
Affected Public: Businesses or other for-profit institutions, small businesses or organizations
Frequency: One time
Respondent's Obligation: Voluntary
OMB Desk Officer: Timothy Sprehe 395-4818

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-4217, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Timothy Sprehe, OMB Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

Dated: November 6, 1986.

Ed Michals,

Departmental Clearance Officer, Information Management Division, Office of Information Resources, Management.

[FR Doc. 86-25599 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-W-M

Bureau of the Census

Annual Surveys In Manufacturing Area; Determination

In conformity with Title 13,United States Code (Section 131, 182, 224, and 225), I have determined that annual data to be derived from the surveys listed below are needed to aid the efficient performance of essential governmental functions and have significant application to the needs of the public and industry. The data derived from these surveys, most of which have been conducted for many years, are not publicly available from nongovernmental of other governmental sources.

Most of the following commodity or product surveys provide data on shipments or productions; some provide data on stocks, unfilled orders, orders booked, consumption, and so forth. Reports will be required of all or a sample of establishments engaged in the production of the items covered by the following list of surveys. These surveys are listed under major group headings based on the *Standard Industrial Classification Manual* (1972 edition) promulgated by the Office of Management and Budget for use of Federal Government statistical agencies.

Annual Current Industrial Reports

Major Group 20—Food and Kindred Products

Confectionery

Major Group 22—Textile Mill Products

Broadwoven fabrics finished
Narrow fabrics
Yarn production
Knit fabric production
Carpets and rugs

Major Group 23—Apparel and Other Finished Products Made From Fabrics and Similar Materials

Mens's and boys' apparel
Women's apparel
Underwear and nightwear
Children's apparel
Gloves and mittens

Major Group 24—Lumber and Wood Products, Except Furniture

Hardwood plywood
Softwood plywood
Lumber production and mill stocks

Major Group 26—Paper and Allied Products

Pulp, paper, and board

Major Group 28-Chemicals and Allied Products

Industrial gases
Inorganic chemicals
Pharmaceutical preparations, except biologicals
Sulfuric acid
Paints, varnish, and lacquer

Major Group 30—Rubber and Miscellaneous Plastics Products

Rubber
Plastics bottles

Major Group 31—Leather and Leather Products

Footwear

Major Group 32—Stone, Clay, and Glass

Consumer, scientific, technical, and industrial glassware Fibrous glass
Major Group 33—Primary Metal Industries
Steel mill products
Insulated wire and cable
Nonferrous castings
Ferrours castings

Major Group 34—Fabricated Metal Products, Except Machinery and Transportation Equipment

Selected heating equipment

Major Group 35—Machinery, Except Electrical

Internal combustion engines

Farm machinery and lawn and garden equipment
Mining machinery and mineral processing equipment
Air-conditioning and refrigeration equipment
Computers and office and accounting machines
Pumps and compressors
Selected industrial air pollution control equipment
Construction machinery
Anti-friction bearings
Fluid power products
Robots

Major Group 36—Electrical Machinery, Equipment, and Supplies

Radios, televisions, and phonographs
Motors and generators
Wiring devices and supplies
Switchgear, switchboard apparatus, relays, and industrial controls
Communications equipment
Semiconductors and printed circuit boards
Elecctromedical equipment
Electric housewares and fans
Electric lighting fixtures
Major household appliances
Transformers

Major Group 37—Transportation Equipment

Aerospace orders

Major Group 38—Professional, Scientific, and Controlling Instruments; Photographic and Optical Goods; Watches and Clocks

Selected instruments and related products

The following survey represents an annual supplement of a monthly survey and will cover the same establishments canvassed monthly. There will be no duplication of reporting, however, since the type of data collected on the annual supplement will be different from that collected monthly.

Major Groups 32—Stone, Clay, and Glass

Glass containers

The following list of surveys represents annual counterparts of monthly and quarterly surveys and will cover only those establishments that are not canvassed or do not report in the more frequent surveys. Accordingly, there will be no duplication in reporting. The content of these annual reports will be identical with that of the monthly and quarterly reports.

Major Group 20—Food and Kindred Products

Flour milling products

Major Group 22—Textile Mill Products

Broadwoven fabric (gray)
Consumption on the woolen system and worsted combing

Major Group 23—Apparel and Other Finished Products Made From Fabrics and Similar Materials

Sheets, pillowcases, and towels

Major Group 32—Stone, Clay, and Glass

Glass containers
Refractories
Clay construction products
Flat Glass

Major Group 33—Primary Metal Industries

Inventories of steel mill shapes

Major Group 34—Fabricated Metal Products, Except Machinery and Transportation Equipment

Plumbing fixtures
Steel shipping drums and pails
Closures for containers

Major Group 35—Machinery, Except Electrical

Construction machinery

Major Group 36—Electrical Machinery, Equipment, and Supplies

Fluorescent lamp ballasts
Electric lamps

Major Group 37—Transportation Equipment

New complete aircraft and aircraft engines, except military
Truck trailers

Annual Survey of Manufactures

The annual survey of manufactures collects industry statistics such as total value of shipments, employment, payroll, work hours, capital expenditures, cost of materials consumed, supplemental labor costs, and so forth. This survey, while conducted on a sample basis, covers all manufacturing industries, including data on plants under construction but not yet in operation.

Annual Survey of Research and Development

A survey of research and development (R&D) activities is conducted. The major data obtained in this survey include total R&D expenditures by source of funds, the number of scientists and engineers employed, the amounts spent for pollution abatement and energy R&D and, for comparative purposes, the total net sales and receipts and the total employment of the company.

Annual Survey of Shipments to Federal Government Agencies

A survey of shipments to the Federal Government is conducted to provide information on the effect of Federal procurement on selected industries by Federal Government agencies.

Annual Survey of Pollution Abatement Costs and Expenditures

The annual survey of pollution abatement costs and expenditures is designed to collect from manufacturers the total expenditures by industry and geographic area to abate pollutant emissions. The survey covers current operating costs and capital expenditures to abate air and water pollution and solid waste. This survey also will obtain the costs recovered from abatement activities and assets in place for the abatement of pollutants.

Annual Survey of Plant Capacity

The annual survey of plant capacity obtains information such as the amount of time a plant is in operation; operating rates as related to preferred levels and practical capacity; the value of production and other statistics for actual, preferred, and practical capacity operating levels; and the reasons for operating at less than capacity.

The report forms will be furnished to firms included in these surveys. Copies of survey forms are available on request to the Director, Bureau of the Census, Washington, DC 20233.

I have, therefore, directed that these annual surveys be conducted for the purpose of collecting the data as described.

Dated: November 6, 1986.

John G. Keane,

Director, Bureau of the Census.

[FR Doc. 86-25589 Filed 11-12-86; 8:45 am]
BILLING CODE 3510-07-M

International Trade Administration

Brookhaven National Laboratory; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 86-240. Applicant: Brookhaven National Laboratory, Upton, NY 11973. Instrument:

Superconducting Magnet System. Manufacturer: Cryogenic Consultants Limited, United Kingdom. Intended Use: See notice at 51 FR 25924.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. Reasons: The foreign instrument provides a guaranteed magnetic field of 9.0 tesla, field homogeneity of 1.0% over 10.0 millimeters, and vacuum in the bore. The National Institutes of Health advises in its memorandum dated September 29, 1986 that (1) this capability is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 86-25640 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-N

University of Pennsylvania; Decision on Application For Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 86-226. Applicant: University of Pennsylvania, Philadelphia, PA 19104. Instrument: Preparative Quencher/Stopped-flow System, PQ/SF-53CD with UV-Visible Spectrophotometer Unit (SU-40A). Manufacturer: Hi-Tech Scientific Ltd., United Kingdom. Intended Use: See notice at 51 FR 22844.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. Reasons: The foreign instrument provides time resolution less than 1.0 millisecond, aging times between <1.0 millisecond and 10 seconds, and stopped-flow capability. The National Institutes of Health advises in its memorandum dated September 29, 1986 that (1) these capabilities are pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 86-25641 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

Cornell University; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC.

Docket No. 86-306. Applicant: Cornell University, Ithaca, NY 14853. Instrument: FTIR Spectrophotometer, Model DA3.3. Manufacturer: Bomem Incorporated, Canada. Intended use: See notice at 51 FR 33282.

Comments: None received. Decision: Approved No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. Reasons: The foreign article provides an unapodized resolution of 0.0026 cm^{-1} and a range from 5 cm^{-1} in the far infrared to 45 000 cm^{-1} in the ultra violet. These capabilities are pertinent to the applicant's intended purpose. We know of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 25643 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-05-M

Good Samaritan Hospital and Medical Center; Decision on Application For Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 86-225. Applicant: Good Samaritan Hospital and Medical Center, Portland, OR 97210. Instrument: Electronically Controlled Digital Camera System for Detecting and Analyzing Motion. Manufacturer: Northern Digital, Canada. Intended Use: See notice at 51 FR 22844.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. Reasons: The foreign instrument provides 3-dimensional digital recordings for motion analysis with angular displacement sensitivity less than 4.0 degrees. The National Institutes of Health advises in its memorandum dated September 29, 1986 that (1) this capability is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign intrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 86-25642 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

Iowa State University of Science and Technology; Decision on Application For Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 am and 5:00 pm in Room 1423, U.S. Department of Commerce, 14th and Consitituion Avenue, NW., Washington, DC.

Docket Number: 86-301. Applicant: Iowa State University of Science and Technology, Ames, IA 50011. Instrument: Interfermeter Spectrophotometer, Model DA3.16. Manufacturer: Bomen Inc., Canada. Intended Use: See notice at 51 FR 33283.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being

manufactured in the United States. Reasons: The foreign article provides an unapodized resolution of 0.26 cm^{-1} and a vacuum of 0.1 Torr. These capabilities are pertinent to the applicant's intended purpose. We know of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 86-25646 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

Roswell Park Memorial Institute; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 86-245. Applicant: Roswell Park Memorial Institute, Buffalo, NY 14263. Instrument: Rotating Anode X-Ray Generator, Model RU-200H with Accessories. Manufacturer: Rigaku Corporation, Japan. Intended Use: See notice at FR 51 25924.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. Reasons: The foreign instrument provides high power density (12.0 kilowatts per square millimeter) and a small focal spot size (0.1 x 1.0 millimeter). The National Institutes of Health advises in its memorandum dated September 29, 1986 that (1) this capaiblity is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Imports Programs Staff.

[FR Doc. 86-25644 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

Regents of the University of California; Decision on Application For Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 86-305. Applicant: Regents of the University of California, Riverside, CA 92521. Instrument: Electromagnetic Ground Conductivity Meter. Manufacturer: Geonics Limited, Canada. Intended Use: See notice at 51 FR 33282.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. Reasons: The foreign article permits uninterrupted investigation of solute phenomenon without affecting soil and chemical parameters using non-destructive sampling procedures. A range of five conductivity measurements allows *in situ* determinations of both dilute and concentrated chemical movement in soil. This capability is pertinent to the applicant's intended purpose. We know of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 86-25645 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

University of Washington; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 86-244. Applicant: University of Washington, Seattle, WA 98195. Instrument: Mass Spectrometer, Model VG 70SEQ. Manufacturer, VG Analytical Ltd., United Kingdom. Intended Use: See notice at 51 FR 25924.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. Reasons: The foreign instrument provides resolution to 50,000, extended mass range to 15,000, MS/MS and FAB capability. The National Institutes of Health advises in its memorandum dated September 29, 1986 that (1) these capabilities are pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 86-25648 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

University of Wisconsin-Madison; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 86-259. Applicant: University of Wisconson-Madison, Madison, WI 53706. Instrument: Scanning Electron Microscope, Model S-900. Manufacturer: Hitachi Ltd., Japan. Intended Use: See notice at 51 FR 26732.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. Reasons: The foreign instrument provides high resolution (1.0 nanometers at 20,000 volts) and operation with a 6.0 nanometer beam at 1000 votes. The National Institutes of Health advises in its memorandum dated September 29, 1986 that (1) this capability is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value

to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 86-25647 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

[A-570-007]

Barium Chloride From the Peoples Republic of China; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to a request by the petitioner, the Department of Commerce has conducted an administrative review of the antidumping duty order on barium chloride from the People's Republic of China. The review covers one exporter of this merchandise to the United States and the period October 1, 1984 through September 30, 1985. The review indicates the existence of dumping margins during the period.

As a result of the review, the Department has preliminarily determined to assess antidumping duties equal to the calculated differences between United States price and foreign market value.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: November 13, 1986..

FOR FURTHER INFORMATION CONTACT: Michael Rill or Maureen Flannery, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 377-5255/3601.

SUPPLEMENTARY INFORMATION: .

Background

On October 17, 1984, the Department of Commerce ("the Department") published in the **Federal Register** (49 FR 40635) an antidumping duty order on barium chloride from the People's Republic of China ("PRC"). The petitioner, Chemical Products Corporation, requested in accordance with § 353.53a(a) of the Commerce Regulations that we conduct an administrative review. We published a notice of initiation of the antidumping duty administrative review on November 12, 1985 (50 FR 46689).

Scope of the Review

Imports covered by the review are shipments of barium chloride, a chemical compound having the formula BaC12 of BaC12-2H20. Barium chloride is currently classifiable under item 417.7000 of the Tariff Schedules of the United States Annotated.

The review covers one exporter of Chinese barium chloride to the United States, China National Chemicals Import and Export Corporation ("SINOCHEM"), and the period October 1, 1984 through September 30, 1985.

For certain sales to the United States, we were preliminarily unable to determine that the U.S. purchaser was not related to the exporter. For those sales we used the best information available for assessment purposes. The best information available was the weighted-average margin on sales to unrelated purchasers.

United States Price

In calculating United States price the Department used purchase price, as defined in section 772 of the Tariff Act. Purchase price was based on the c.i.f. packed price to an unrelated purchaser in the United States. We made deductions for discounts, marine insurance, and ocean freight. No other adjustments were claimed or allowed.

Foreign Market Value

In accordance with section 773(c) of the Tariff Act, we used the weighted-average price of barium chloride imported into the United States from a basket of countries as the basis for foreign market value.

We have concluded that the economy of the PRC is state-controlled for purposes of this administrative review. As a result, section 773(c) of the Tariff Act requires us to use either the prices or the constructed value of such or similar merchandise sold by a country or countries whose economy is not state-controlled. Section 353.8 of our regulations establishes a preference for foreign market value based upon sales prices in a non-state-controlled-economy country at a stage of economic development comparable to that of the state-controlled-economy country.

After an analysis of countries which produce barium chloride, we determined that India and Peru were the countries most comparable to the PRC in their stages of economic development. However, the Indian Embassy declined to permit us to contact Indian firms, and the firm contacted in Peru did not respond.

Lacking information on sales of barium chloride from a country at a stage of economic development comparable to that of the PRC, and lacking information needed to calculate foreign market value based on valuation of the Chinese factors of production in a non-state-controlled-economy country at a stage of economic development comparable to that of the PRC, we have based foreign market value on the prices of imports of such merchandise into the United States during the period of review. We excluded imports from countries with known export subsidies and based foreign market value on imports from the remaining exporting countries: France, Italy, the Netherlands, and the United Kingdom.

We calculated foreign market value as the weighted-average f.a.s. value of these imports based on U.S. Census Bureau import statistics. Lacking further information, we made no adjustments to this average price.

Preliminary Results of the Review

As a result of our review, we preliminary determine that a dumping margin of 48.08 percent exists for the period October 1, 1984 through September 30, 1985.

Interested parties may submit written comments on these preliminary results on or before November 24, 1986 and may request disclosure and/or a hearing within 10 days of the date of publication. Any hearing, if requested, will be held on November 24, 1986. Any request for an administrative protective order must be made no later than 5 days after the date of publication. The Department will publish the final results of the administrative review, including the results of its analysis of issues raised in any such comments or hearing.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentage stated above. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided for by § 353.48(b) of the Commerce Regulations, a cash deposit of estimated antidumping duties based on the above margin shall be required for SINOCHEM. For any future entries of this merchandise from a new exporter, not covered in this review, whose first shipments occurred after September 30, 1985 and who is unrelated to the reviewed firm, a cash deposit of 48.08 percent shall be required. These deposit requirements are effective for all shipments of Chinese barium chloride entered, or withdrawn from warehouse, for consumption on or after the date of

publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Dated: November 7, 1986.

Gilbert B. Kaplan,

Deputy Assistant Secretary, Import Administration.

[FR Doc. 86-25746 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

[A-559-502]

Antidumping Duty Order; Light-Walled Rectangular Pipes and Tubes From Singapore

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: In an investigation concerning light-walled rectangular pipes and tubes (LWR pipes and tubes) from Singapore, the United States Department of Commerce (the Department) and the United States International Trade Commission (the ITC) have determined that LWR pipes and tubes from Singapore are being sold at less than fair value and that imports of LWR pipes and tubes from Singapore threaten material injury to a United States industry. Therefore, based on these findings, in accordance with the "Special Rule" provision of section 736(b)(2) of the Tariff Act of 1930, as amended (the Act), 19 U.S.C. 1673e(b)(2), all unliquidated entries, or warehouse withdrawals, for consumption of LWR pipes and tubes from Singapore made on or after the date of publication of the ITC's affirmative determination of threat of material injury in the **Federal Register** will be liable for the possible assessment of antidumping duties. Further, a cash deposit of estimated antidumping duties must be made on all such entries, and withdrawals from warehouse, for consumption made on or after the date of publication of this antidumping duty order in the **Federal Register.**

EFFECTIVE DATE: November 13, 1986.

FOR FURTHER INFORMATION CONTACT: Frank R. Crowe or Mary S. Clapp, Office of Investigations, International Trade Administration, United States Department of Commerce, 14th Street and Constitution Ave. NW., Washington, D.C. 20230; telephone: (202) 377-4087 or 377-1769, respectively.

SUPPLEMENTARY INFORMATION: The products covered by this investigation are welded carbon steel pipes and tubes of rectangular (including square) cross section having a wall thickness of less than 0.156 inch as currently provided for in item 610.4928 of the *Tariff Schedules of the United States Annotated.* These products are commonly referred to in the industry as mechanical pipes and tubes.

In accordance with section 733 of the Tariff Act of 1930, as amended (the act) (19 U.S.C. 1673b), on April 22, 1986, the Department preliminarily determined that there was reason to believe or suspect that LWR pipes and tubes from Singapore were being sold at less than fair value (51 FR 15941, April 29, 1986). On September 11, 1986, the Department made its final determination that these imports were being sold at less than fair value (51 FR 33101, September 18, 1986).

On November 3, 1986, in accordance with section 735(d) of the Act (19 U.S.C. 1673d(d)), the ITC notified the Department that such importations threaten material injury to a United States industry.

Therefore, in accordance with sections 736 and 751 of the Act (19 U.S.C. 1673e and 1675), the Department directs United States Customs officers to assess, upon further advice by the administering authority pursuant to section 736(a)(1) of the Act (19 U.S.C 1673e(a)(1)), antidumping duties equal to the amount by which the foreign market value of the merchandise subject to the order exceeds the United States price for all entries of such merchandise from Singapore. These antidumping duties will be assessed on all unliquidated entries of such merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's affirmative determination of threat of material injury in the **Federal Register** in accordance with the "Special Rule" provision of section 736(b)(2) of the Act (19 U.S.C. 1673e(b)(2).

Because the ITC determined that imports of LWR pipes and tubes from Singapore only threaten material injury to, rather than materially injure, a U.S. industry, Customs field offices are being directed to terminate the suspension of liquidation, release any bond or other security and refund any cash deposit made to secure the payment of antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption, before the ITC final determination publication date in the **Federal Register.**

On and after the date of publication of this notice, United States Customs officers must require at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margin as noted below:

Manufacturers/producers/exporters	Weighted average (percent)
Steel Tubes of Singapore (PTE), Ltd.	12.03
All others	12.03

The margin is a change from the original September 11, 1986, final determination figure of 12.6. This change was made to correct clerical errors discovered in the calculation of the margin for the final determination.

This determination constitutes an antidumping duty order with respect to LWR pipes and tubes from Singapore, pursuant to section 736 of the Act (19 U.S.C. 1673e) and § 353.48 of the Commerce Regulations (19 CFR 353.48). We have deleted from the Commerce Regulations Annex I of 19 CFR Part 353, which listed antidumping findings and orders currently in effect. Instead, interested parties may contact the Office of Information Services, Import Administration, for copies of the updated list of orders currently in effect.

This notice is published in accordance with section 736 of the Act (19 U.S.C. 1673e) and § 353.48 of the Commerce Regulations (19 CFR 353.48).

Joseph A. Spetrini,

Acting Deputy Assistant Secretary for Import Administration.

November 10, 1986.

[FR Doc. 86-25750 Filed 11-12-86; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Carribean Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Caribbean Fishery Management Council's Administrative Subcommittee will convene a public meeting, November 20, 1986, from 9:30 a.m. to approximately 4 p.m., at the Carribbean Council's office (address below), to address issues related to the Administrative Subcommittee's regular administrative operations; to examine the proposed concepts of utilizing the approach of permit sanctions together with monetary penalties in the enforcement of fishery management plans' regulations, and a draft revised penalty schedule for violations to those regulations incurred in the Carribbean.

For further information contact the Carribbean Fishery Management Council, Banco de Ponce Building, Suite 1108, Hato Rey, Puerto Rico 00918; telephone: (809) 753–4926.

Dated: November 7, 1986.

Richard B. Roe,

Director, Office of Fisheries Management, National Marine Fisheries Service.

[FR Doc. 86–25630 Filed 11–12–86; 8:45 am]

BILLING CODE 3510–22–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjusting Import Limits for Certain Cotton, Wool and Man-Made Fiber Apparel Products Produced or Manufactured in the Philippines

November 7, 1986.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on November 7, 1986. For further information contact Eve Anderson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212.

Background

A CITA directive dated December 20, 1985 (50 FR 52830), as amended, established limits for certain specified categories of cotton, wool and man-made fiber textile products, including Categories 338/339, 342–NT, 347, 443, 633, 634, 636–NT, 638/639, 641–T, 641–NT, 643, 646–T, 647, 648–T, 648–NT and 650, produced or manufactured in the Philippines and exported during the agreement year which began on January 1, 1986 and extends through December 31, 1986. At the request of the Government of the Republic of the Philippines, pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of November 24, 1982, as amended, between the Governments of the United States and the Republic of the Philippines, the 1986 limits for the foregoing categories are being adjusted by the application of carryover.

In the letter published below, the Chairman of the Committee for the Implementation of Textile Agreements directs the Commissioner of Customs to adjust the restraint limits previously established for the categories, as indicated.

A description of the cotton, wool and man-Made fiber textile categories in terms of T.S.U.S.A. numbers was published in the **Federal Register** on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983, (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), November 9, 1984 (49 FR 44 782), and in Statistical Headnote 5, Schedule 3 of the Tariff Schedules of the United States Annotated (1986).

William H. Houston III,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 7, 1986.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229

Dear Mr. Commissioner: This directive further amends, but does not cancel, the directive issued to you on December 20, 1985 by the Chairman, Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton, wool, and man-made fiber textile products, produced or manufactured in the Philippines and exported during the twelve-month period which began on January 1, 1986 and extends through December 31, 1986.

Effective on November 7, 1986, the directive of December 20, 1985 is hereby further amended to include the following adjusted restraint limits: [1]

Category	Adjusted 12-month limit [2]
338/339	1,007,443 dozen.
342–NT	75,070 dozen.
347	349,846 dozen.
443	2,651 dozen.
633	22,209 dozen.
634	242,193 dozen.
636–NT	55,426 dozen.
638/639	1,091,889 dozen.
641–T	100,117 dozen.
641–NT	231,415 dozen.
643	54,336 dozen.
646–T	321,970 dozen.
647	104,930 dozen.
648–T	244,107 dozen.
648–NT	70,864 dozen.
650	19,041 dozen.

[2] The limits have not been adjusted to account for any imports exported after December 31, 1985.

The Committee for the Implementation of Textile Agreements had determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553 (a)(1).

[1] The agreement provides, in part, that: (1) Specific limits may be exceeded during the agreement year by designated percentages; (2) specific limits may be adjusted for swing, carryover and carryforward; and (3) administrative arrangements or adjustments may be made to resolve minor problems arising in the implementation of the agreement.

Sincerely,

William H. Houston III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 86–25639 Filed 11–12–86; 8:45 am]

BILLING CODE 3510–DR–M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB).

Dates of Meeting: 2–3 December 1986.

Times of Meeting: 0830–1700 hours.

Place: 5001 Eisenhower Avenue, Alexandria, VA.

Agenda: The Army Science Board Effectiveness Review of the U.S. Army Research Institute for the Behavioral and Social Sciences will hold its kickoff meeting. The meeting will consist of the following briefings: Institute Overview, Commander ARI; Laboratory Overviews on Manpower and Personnel, Systems Research, Trained Research, and Basic Research. The panel will address the following questions: What is the quality of staff, facility and technical program?; How productive is the lab in accomplishing its mission?; How relevant is the lab's work to import Army problems?; How can we improve the assessment methodology and procedures?; What are the lessons learned from conducting the review? This meeting will be closed to the public in accordance with section 552b(c) of Title 5, U.S.C., specifically subparagraph (1) thereof, and Title 5, U.S.C., Appendix 1, subsection 10(d). This classified and nonclassified matters to be discussed are so inextricably intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695–3039 or 695–7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 86–25571 Filed 11–12–86; 8:45 am]

BILLING CODE 3710–08–M

Board of Visitors, U.S. Military Academy; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following meeting:

Name of Committee: Board of Visitors, United States, Military Academy.

Date of Meeting: 3–5 December 1986.

Place of Meeting: West Point, New York (Building 600).

Time of Meeting: 9:00 a.m.

Proposed Agenda: Discussion of the following items; Cadet Pay, Judge Advocate Activities, Superintendent's Honor Review Committee Report, Long Range Planning, and Conclusions and Recommendations for inclusion in the Annual Board of Vistors Report.

All proceedings are open. For further information contact Colonel D.P. Tillar, Jr., United States Military Academy, West Point, New York 10996-5000.

For the Board of Visitors.

D.P. Tillar, Jr.,

COL, FA Executive Secretary, USMA Board of Visitors.

[FR Doc. 86-25515 Filed 11-12-86; 8:45 am]

BILLING CODE 3710-92-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER87-44-000 et al.]

Electric Rate and Corporate Regulation Filings; Wisconsin Public Service Corp. et al.

Take notice that the following filings have been made with the Commission:

1. Wisconsin Public Service Corp.

[Docket No. ER87-44-000]

November 5, 1985.

The filing company submits the following:

Take notice that on October 23, 1986, Wisconsin Public Service Corporation (WPSC) of Green Bay, Wisconsin, submitted for filing revised rates which reduce the company's charges for full requirements and partial requirements wholesale for resale customers by 3%. The customers affected by the filing and their rate schedule designations are:

Customer and Rate Schedule or Tariff Designation

Alger Delta Electric Assoc.; Rate Schedule No. 36
Washington Island Electric; Rate Schedule No. 40
Village of Daggett; Tariff, Orig. Vol 2, Service Agreement No. 3
City of Stephenson; Tariff, Orig. Vol 2, Service Agreement No. 4
Village of Stratford; Tariff, Orig. Vol 2, Service Agreement No. 6
Wisconsin Public Power, Inc. System; Tariff, Orig. Vol 2, Service Agreement No. 1
City of Wisconsin Rapids; Tariff, Orig. Vol 2, Service Agreement No. 5
Consolidated Water Power Co.; Tariff, Orig. Vol 1, Service Agreement No. 1
City of Manitowoc; Tariff, 1st Rev. Vol 1, Service Agreement No. 2
City of Marshfield; Tariff, 1st Rev. Vol 1, Service Agreement No. 3

The Alger Delta Electric Association, the Village of Daggett and the City of Stephenson are located in Michigan. The other customers are located in Wisconsin.

The company asks that the proposed rates be made effective on January 1, 1987. Copies of the filing have been served on the affected customers, the Wisconsin Public Service Commission and the Michigan Public Service Commission.

Comment date: November 18, 1986, in accordance with Standard Paragraph E at the end of this notice.

2. Southwestern Electric Power Co.

[Docket No. ER878-40-000]

November 5, 1986.

Take notice that on October 22, 1986, Southwestern Electric Power Company ("SWEPCO") tendered for filing a Letter Agreement providing for the sale of replacement energy from SWEPCO to the Oklahoma Municipal Power Authority ("OMPA") and a Rate Schedule for Third-Party Purchase and Resale Transactions (Pursuant to FERC Order No. 84). The Commission accepted the rate for third-party purchase and resale transactions reflected in the Rate Schedule for filing in 1983 for use in three SWEPCO interconnection agreements which provided for such transactions. The Rate Schedule tendered for filing incorporates the established Order No. 84 rate in a traffic format intended for general applicability where SWEPCO purchases and resells energy from another utility. SWEPCO requests an effective date of August 4, 1986 for the Letter Agreement and accordingly seeks waiver of the notice requirements of the Federal Power Act. SWEPCO requests an effective date of September 2, 1980 for the Rate Schedule to coincide with the earlier established effective date for SWEPCO's Order 84 rate.

Copies of the filing have been sent to OMPA, the Oklahoma Corporation Commisson and the Louisiana Public Service Commission.

Comment date: November 18, 1986, in accordance with the Standard Paragraph E at the end of this notice.

3. Ohio Power Co.

[Docket No. ER87-42-000]

November 5, 1986.

Take notice that American Electric Power Service Corporation (AEP) on October 23, 1986, tendered for filing on behalf of its affiliate Ohio Power Company (OPCO), which is an AEP affiliated operation subsidiary, Modification No. 13 dated April 1, 1986 to the facilities and Operating Agreement dated May 1, 1967 between OPCO and the Dayton Power and Light Company (Dayton). The Commission has previously designated the 1967 Agreement as OPCO's Rate Schedule FERC No. 36 and Dayton Company's Rate Schedule FERC No. 31.

Modification No. 12 revises the Parties' Short Term Power Service Schedule by adding provisions for a rate of "up to" the Parties' respective demand and energy rates. Such reductions are, however, limited to 110% of the out-of-pocket cost associated with each specific reservation for Short Term Power and Energy. All of the rates proposed here, pertaining to OPCO, have previously been accepted for filing by the Federal Energy Regulatory Commission in various other OPCO filings.

AEP has requested that the Commission permit this Modification to become effective in two parts, allowing Dayton's Short Term Power "up to" provisions to become effective as of September 25, 1986 and the remainder of this Modification to become effective immediately. This request has been made so that Dayton could participate in Short Term Power opportunity sales that would not have otherwise been made.

Copies of this filing were served upon Dayton and the Public Utilities Commission of Ohio.

Comment date: November 18, 1986, in accordance with Standard Paragraph E at the end of this notice.

4. Arkansas Power & Light Co.

[Docket No. ER81-577-013]

November 5, 1986.

Take notice that on October 14, 1986, Arkansas Power & Light Company (AP&L) tendered for filing a compliance report reflecting the application on final rates referred to in the above referenced docket.

Comment date: November 18, 1986, in accordance with Standard Paragraph E at the end of this notice.

5. Kentucky Utilities Co.

[Docket No. ER78-417-008]

November 6, 1986.

Take notice that on October 27, 1986, Kentucky Utilities Company tendered for filing in this docket a document which it terms its "Compliance Filing," to which are attached a form Contract for Electric Service, Electric Rate Schedule WPS-83SR (M), and Rules, Regulations, Terms, and Conditions. Kentucky Utilities proposes to make the changes in service and/or rate, charge, classification, rule, regulation, practice or contract effective as soon as the Commission takes the required and

appropriate steps and permits such effectiveness.

Comment date: November 19, 1986, in accordance with Standard Paragraph E at the end of this notice.

6. Niagara Mohawk, Power Corp.

[Docket No. ER87-75-000]

November 6, 1986.

Take notice that on November 3, 1986, Niagara Mohawk Power Corporation (NMPC) tendered for filing a proposed change to rate schedules to increase charges for transmission and delivery of power and energy to industrial customers receiving Replacement and/or Expansion Power, such power and energy being purchased by NMPC from the Power Authority of the State of New York (PASNY).

The proposed change would increase the charge provided under Rate Schedule FERC No. 19 for the transmission and delivery of power and energy and affect those industrial customers receiving Replacement and/or Expansion Power. An effective date of January 2, 1987 is requested. In addition, the same rate change would apply to transmission and delivery of power and energy by NMPC to certain industrial customers from PASNY's Fitzpatrick Nuclear Plant under NMPC's Rate Schedule FERC No. 95, and the Niagara Frontier Transportation Authority under Rate Schedule FERC No. 136, which incorporate by reference the charges provided under Rate Schedule FERC No. 19.

Comment date: November 19, 1986, in accordance with Standard Paragraph E at the end of this notice.

7. Orange and Rockland Utilities, Inc.

[Docket No. ER87-72-000]

November 6, 1986.

Take notice that on October 31, 1986, Orange and Rockland Utilities, Inc. tendered for filing proposed changes in its Power Supply Agreement with Pike County Light and Power Company, Rate Schedule FERC No. 44. The proposed changes would: (1) Decrease the return on equity from 15.5 percent to 14 percent; (2) eliminate the 43 percent cap on the equity ratio (currently, equity in excess of the 43 percent cap is assigned the embedded cost of debt); and, (3) eliminate the 6-month averaging provision that provides for a limited filing to reevaluate the return on equity when specified interest rates persist above or below 9.5 percent. The return on equity is one component of the return on investment applied to utility plant serving a joint use function as between the two companies.

Copies of the filing were served upon the New York State Public Service Commission, the Pennsylvania Public Utility Commission, and the Office of the Consumer Advocate in Pennsylvania.

Comment date: November 19, 1986, in accordance with Standard Paragraph E at the end of this notice.

8. Tucson Electric Power Co.

[Docket No. ER86-676-000]

November 6, 1986.

Take notice that on October 14, 1986, Tucson Electric Power Company (Tucson) tendered for filing a supplement of explanation to the Interconnection Agreement between Tucson and Rocky Mountain Generation Cooperative, Inc. (Rocky Mountain) originally tendered for filing on August 19, 1986 in this docket. Tucson files this supplement to clarify the applicability of paragraph A.5.2 of Service Schedule A to the Agreement, entitled Economy Energy Interchange. It is not presently contemplated that services will be provided under that Paragraph. Should the Parties in the future agree to provide services under that Paragraph the Parties will file at that time a rate schedule for services under that Paragraph, with, if necessary, any applicable cost support data.

Tucson states that it has served a copy of the filing upon Rocky Mountain.

Comment date: November 20, 1986, in accordance with Standard Paragraph E at the end of this notice.

9. Orange and Rockland Utilities, Inc.

[Docket No. ER87-73-000]

November 6, 1986.

Take notice that on October 31, 1986, Orange and Rockland Utilities, Inc. tendered for filing proposed changes in its Power Supply Agreement with Rockland Electric Company, Rate Schedule FERC No. 43. The proposed changes would: (1) Decrease the return on equity from 15.5 percent to 14 percent; (2) elimninate the 43 percent cap on the equity ratio (currently, equity in excess of the 43 percent cap is assigned the embedded cost of debt); and, (3) eliminate the 6-month averaging provision that provides for a limited filing to reevaluate the return on equity when specified interest rates persist above or below 9.5 percent. The return on equity is one component of the return on investment applied to utility plant serving a joint use function as between the two companies.

Copies of the filing were served upon the New York State Public Service Commission, the New Jersey Board of Public Utilities, and the Office of the Public Advocate (Division of Rate Counsel) in New Jersey.

Comment date: November 19, 1986, in accordance with Standard Paragraph E at the end of this notice

10. Wisconsin Electric Power Co.

[Docket No. ER87-67-000]

November 6, 1986.

Take notice that on October 31, 1986, Wisconsin Electric Power Company (WEPCO) tendered for filing proposed changes in its wholesale tariff for service to its wholesale customers. The effect of these changes would be to decrease estimated charges to WEPCO's wholesale customers by approximately $910,000 on a forecast 1987 basis. The proposed rates included lower energy charges and higher demand charges, but all customers would pay less under the proposed rates than under the present rates. The voltage differential for service is being revised to flat percentages applied to the energy and demand charges. A provision to recover take-or-pay charges from a coal supplier is being re-filed in order to continue its effectiveness beyond December 31, 1986.

WEPCO has also submitted an executed Exhibit C to its service agreement with Alger Delta Electric Cooperative, reflecting a change in voltage level at one delivery point.

WEPCO requests an effective date of December 30, 1986, sixty days after filing, and suspension for two days, until January 1, 1987.

Copies of the filing have been served upon WEPCO's jurisdictional customers. Copies have also been mailed to the Michigan Public Service Commission and the Public Service Commission of Wisconsin.

Comment date: November 19, 1986, in accordance with Standard Paragraph E at the end of this document.

Standard Paragraphs

E. Any person desiring to the 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,

Acting Secretary.

[FR Doc. 86-25529 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RM85-1-000 (Parts A-D) et al.]

Columbia Gas Transmission Corp. et al.; Order Dismissing Petitions for Clarification and Motion to Require Filing

(Issued: November 5, 1986)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

In the matter of: Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol (Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company), (Texas Independent Producers and Royalty Owners Association), (Northwest Central Pipeline Corporation), (Yankee International Company), (Capital Energy Corporation), (Iowa Electric Light and Power Company), (ONG Western, Inc.), (Cascade Natural Gas Corporation), (Felmont Oil Corporation and Essex Offshore, Inc.), (Nycotex Gas Transport), (Illinois Commerce Commission); Docket No. RM85-1-000 (Parts A-D)

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol (National Fuel Gas Distribution Corporation); Docket No. RM-85-1-174

National Fuel Gas Distribution Corporation; Docket No. CP81-319-001

This order dismisses eleven petitions for clarification of Order No. 436[1] and one motion to require an interstate pipeline company to file tariff provisions providing for open access transportation in accordance with that order and the Regulations promulgated thereunder. The petitions are dismissed summarily, without adjudication on the merits and without prejudice to their being filed in other form if the movants so decide.

The various petitions, and the relief requested, are as follows:

1. Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company (collectively Columbia) seek clarification that, having elected to become open access transporters under Order No. 436, they thereby are excused from certain filing requirements under Part 154 of the Regulations. In the alternative, Columbia requests waiver of the filing requirements.

2. The Texas Independent Producers and Royalty Owners Association (TIPRO) asks that we issue a policy statement providing for the rejection of any applications for "open carrier" status pursuant to Order No. 436 which are made conditional on terms which differ from the express requirements of that order.

3. Northwest Central Pipeline Company (Northwest Central) seeks a ruling that an oral notice which it gave to Arkla Energy Resources, one of its suppliers, stating that it desired a reduction in its firm sales entitlement was sufficient to satisfy the requirements of the Regulations. Alternatively, Northwest Central requests waiver of the Regulations to the extent necessary to effect such entitlement reduction.

4. Yankee International Company requests clarification concerning whether a transportation service previously provided it in 1986 by Panhandle Eastern Pipe Line Company (Panhandle) under a Natural Gas Act (NGA) section 7(c) certificate, but which has since been discontinued, can be reinstituted at different receipt points now that Panhandle has become an open access transporter.

5. Capital Energy Corporation requests clarification that there is no prohibition on the establishment of a class of Order No. 436 subcarriers who would aggregate the transportation services of several pipelines for the purposes of marketing the resulting agglomeration as a means of gas transportation, or otherwise acquire the rights to utilize certain pipeline capacity for the purpose of marketing gas.

6. Iowa Electric Light and Power Company (Iowa Electric) purchases gas from Natural Gas Pipeline Company of America (Natural), which is an open access transporter. Iowa Electric has elected to reduce its contract demand obligation with Natural. It requests clarification concerning whether Natural will still be required to make the election effective, after the requisite waiting period, even if Natural in the interim ceases to be an open access transporter.

7. ONG Western, Inc. transports gas pursuant to NGPA section 311 under agreements entered into both before and after October 9, 1985, the issuance date of Order No. 436. It notes that in several orders, we have held that changes made after October 9, 1985, in supply points provided in pre-October 9, 1985 transportation agreements will be treated as a new service, necessitating a new application. ONG Western requests clarification concerning whether this same ruling is applicable to it in light of its status as an open access transporter.

8. Cascade Natural Gas Corporation seeks clarification whether its transportation agreement with Northwest Pipeline Corporation would continue to qualify for transition treatment under section 284.105 of the Regulations if it disregards a clause in that agreement.

9. Felmont Oil Corporation and Essex Offshore, Inc. request clarification or waiver regarding the authority of Transcontinental Gas Pipe Line Corporation to transport natural gas on behalf of Brooklyn Union Gas Company, pursuant to section 311 of the NGPA.

10. Nycotex Gas Transport (Nycotex) entered into an agreement with Tennessee Gas Pipeline Company (Tennessee) in June 1985, whereby Tennessee agreed to transport Nycotex's gas under NGPA section 311. Nycotex incurred expenditures under the agreemenmt in August, September, and October 1985. Transportation had not commenced prior to the issuance of Order No. 436. Nycotex has requested a waiver or clarification of the transitional provisions of section 284.105 of the Regulations to allow the transaction to be completed.

11. The Illinois Commerce Commission (ICC) filed a motion on September 22, 1986, in which it seeks an order requiring Midwestern Gas Transmission Company (Midwestern) to file tariff amendments to provide for open access transportation on its southern system under Order No. 436. The motion is predicated on Midwestern's affiliation with Tennessee Gas Pipeline Company (Tennessee) as co-subsidiaries of Tenneco, Inc.; the fact that Tennessee filed tariff changes on June 3, 1986, to provide open access transportation; and that Midwestern's southern system is physically connected to and primarily supplied by Tennessee. The ICC contends that "by voluntarily acting to open Tennessee under Order 436, that this same decision, of necessity, must be applied to Midwestern." On October 7, 1986, Midwestern filed an answer in opposition to the ICC's motion.

12. Finally, National Fuel Gas Distribution Corporation, which except for one subsystem is exempt from the requirements of the Natural Gas Act under section 1(c) and has been issued a blanket certificate under § 284.224 of the Regulations, seeks clarification on a series of eleven questions relative to the transportation under its blanket certificate of locally produced gas to interstate pipelines.

Discussion

Order No. 436 was issued on October 9, 1985, more than one year ago. That order established the framework for a new, simplified, voluntary

[1] FERC Statutes and Regulations, Regulations Preambles 1982-1985, ¶ 30,665; 50 FR 42408 (October 18, 1985).

transportation program under section 7 of the NGA and section 311 of the Natural Gas Policy Act (NGPA), under which any pipeline electing to participate would be required to provide non-discriminatory access to its facilities for the transportation of gas by shippers, local distribution companies and end-users. Order No. 436 was followed and refined by Order No. 436-A,[2] Order No. 436-B,[3] Order No. 436-C,[4] Order No. 436-D [5] and Order No. 436-E.[6] Each of these orders either granted in part applications for rehearing of the underlying order, and thus amended Order No. 436, or denied petitions for rehearing and reconsideration. At the same time, the Commission responded to numerous petitions for clarification of the order, some of which were predicated on particular factual situations and others of which generally interpreted the Order's requirements. Eventually, the Commission intercepted issued in excess of 130 orders, responding to approximately 200 requests for clarification or waiver, involving many aspects of Order No. 436.

Even when they were based on individual facts, the orders granting or denying petitions for clarification were not case specific, nor did they affect only the particular applicant or transaction posed in the petition. Rather, they served to make clear the overall substance of the Rulemaking and its requirements and, as such, the decisions rendered therein are generally applicable as part and parcel of the basic Rule. For this reason the orders on petitions for clarification were published in the **Federal Register**. They may be relied upon by anyone, to the same extent as the underlying Order, in fixing the duties and responsibilities attendant upon a decision whether or not to proceed under the terms and conditions laid out in Order No. 436. In this respect, they are unlike, for example, private revenue rulings issued by the Internal Revenue Service, which are binding only on the individuals or businesses immediately involved and relate only to the precise transaction under consideration.

Order No. 436 and the Regulations promulgated therein have now been in effect for an extended period. A large number of transportation transactions have been entered into in reliance thereon. The order has been clarified extensively by the numerous orders mentioned above. Many of the newly filed requests either tend to seek clarification in the nature of changing the Rule or waiving its requirements, or involved a highly fact-specific situation of the type best handled in a declaratory order.

A full year has elapsed since the issuance of Order No. 436. There is no longer a need to issue emergency clarifications of a newly adopted rule. At this juncture, the wiser course is to consider such pleadings pursuant to the Commission's established processes, and to refrain from issuing further orders on petitions for clarification or waiver, or for major modifications as requested by TIPRO and the ICC, unless a strong showing is made in the application that a major element of the Rule has been completely over looked (which we consider unlikely in light of the large number of refinements and explanations that already have been issued) or that an immediate resolution of the problem posed is essential to the effective administration or operation of the open access transportation program.

On due consideration of the petitions under consideration, we find that none are of such a nature under the standard herein enunciated as to require their resolution by clarification. The petitions for clarification and requests for waiver, as well as the other motions addressed herein, will be dismissed without prejudice. The parties may file a request under § 385.207(a) of the Regulations for a declaratory order by the Commission, or a complaint pursuant to § 385.206, or request for an interpretation by the General Counsel under § 385.1901, accompanied by the filing fee required by the Regulations for such applications. Notice of complaints and petitions for declaratory orders will be published in the **Federal Register** in accordance with Commission policy, to afford an opportunity for public comment.

The Commission orders:

The petitions for clarification or waiver of Order No. 436, and the motion filed by the Illinois Commerce Commission, considered herein are dismissed without prejudice.

By the Commission.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25525 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[2] *Id.*, ¶ 30,675, 50 F.R. 52217 (December 23, 1985).

[3] FERC Statutes and Regulations III, ¶ 30,688; 51 Fed. Reg. 6398 (February 24, 1986).

[4] 34 FERC ¶ 61,404 (March 28, 1986); 51 F.R. 11566 (April 4, 1986).

[5] 34 FERC ¶ 61,405 (March 28, 1986); 51 F.R. 11566 (April 4, 1986).

[6] 34 FERC ¶ 61,403 (March 28, 1986); 51 F.R. 11566 (April 4, 1986).

[Docket No. RM85-1-000]

Order Granting Request for Waiver From Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol for Panda Resources, Inc.

Issued: November 5, 1986.

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeva.

On December 27, 1985, Panda Resources, Inc. filed a request for waiver of the transitional provisions of Order No. 436 [1] as they apply to a transportation transaction performed under section 311 of the Natural Gas Policy Act of 1978. We will grant Panda's request.

The Comanche Gathering System Joint Venture, which is composed of serveral companies including Panda, entered into agreements from late 1984 through early 1985 to purchase gas from producers in Comanche County, Kansas. A gathering system was constructed at a cost of $415,000. On October 4, 1985, Comanche entered into a written agreement to sell the gas to Northern Gas Marketing, Inc. who, in turn, agreed to sell the gas at the wellhead to Peoples Natural Gas Company, a Division of Utilicorp United Inc. On October 7, ANR Pipeline Company entered into a written agreement to transport the gas on behalf of Peoples from Comanche to Northern Natural Gas Company, Division of Enron, Corporation's (Northern Natural) system in Kiowa County, Kansas, under section 311 of the NGPA and Subpart B of section 284 of the Commission's Regulations. Northern Natural would transport the gas to Peoples for its system supply pursuant to section 311 of the NGPA and Subpart B of section 284 of the Commission's Regulations under a transportation contract executed on October 17, 1983. On May 16, 1985, in Docket No. ST84-104-000, Northern extended its transportation service until October 16, 1987. ANR's and Northern Natural's transportation under section 284 is pursuant to the provisions of that section as it was effective prior to November 1, 1985.

In *CLARCO Gas Company, Inc.*, 35 FERC ¶ 61,339 (1986), we held that waiver of the transitional provisions of Order No. 436 will be granted where evidence exists to show (1) an agreement prior to October 9, 1985, between two or more parties that commits the parties to an element of the transaction, (2) the construction of significant facilities or the expenditure

[1] 33 FERC ¶ 61,007 (1985); FERC Statutes and Regulations ¶ 30,665 (1985).

of substantial funds prior to October 9, 1985 in reliance on that agreement, and (3), if the agreement relied upon was oral, execution of the agreement in written prior to October 9, 1985. In addition, we stated that we will require a showing that the transaction for which waiver is sought is of a type that qualifies for transitional treatment.

We conclude that Panda meets the test established in *CLARCO*. A written contract to sell the gas existed prior to October 9, 1985, as did a written contract to transport the gas. In additon, the gas will be transported for the system supply of a local distribution company. Accordingly, Panda's request is granted.

By the Commission.

Lois D. Cashell,

Acting Secretary.

[FR. Doc. 86-25526 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RM85-1-000]

Orders Denying Request for Waiver From Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol for Tennessee Gas Pipeline Co.

Issued November 5, 1986.

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Tranbandt and C. M. Naeve.

On July 30, 1986, Tennesee Gas Pipeline Company (Tennessee) filed a request for waiver of § 284.105(a) of the Commission's Regulations.[1] Tennessee requests authorization to continue or recommence transportation service for 83 local distribution companies, interstate pipelines and intrastate pipelines that were originally authorized under subparts B and G of part 284 of the regulations. Tennessee seeks a waiver to extend service until the earlier of June 30, 1987, or 30 days after the Commission issues an order on the merits of the take-or-pay funding issue in Docket No. RM86-119-000.

Tennessee is currently transporting natural gas pursuant to § 284.105 of the Commission's Regulations. On June 3, 1986, in Docket No. CP86-534-000, Tennessee filed an application to obtain an Order No. 436 blanket certificate. Tennessee also filed in Docket No. RP86-119-000, tariff sheets addressing Tennessee's take-or-pay problems.

By an order issued on July 2, 1986,[2] the Commission rejected Tennessee's tariff sheets, finding that the take-or-pay proposals constituted an unlawful tracking proposal. The Commission set the matter for hearing. In response, on July 15, 1986, Tennessee withdrew its Order No. 436 blanket certificate application.

Tennessee, in its petition, cited to *Texas Eastern Transmission Corporation*,[3] wherein the Commission granted a waiver to allow Texas Eastern to continue section 311 transportation without becoming subject to the provisions of § 284.10 of the Regulations. Texas Eastern was granted a waiver of section 284.10 to avoid a break in service while the conditions under which Texas Eastern would implement Order No. 436 transportation were established. Tennessee claims it has shown similar good cause. We do not agree.

In *Texas Eastern*, the Commission granted a temporary waiver of the Regulations to a pipeline that had an Order No. 436 settlement on file and was providing section 311 transportation. The waiver allowed Texas Eastern to continue new NGPA section 311 arrangements after June 30, 1986 without invoking the rights of its firm sales customers to reduce their firms sales entitlements or convert those entitlements to firm transportation. Although Tennessee argues that granting its requested waiver would be similar to the action taken in *Texas Eastern*, the two cases have virtually nothing in common. In the instant docket, Tennessee does not have an Order No. 436 settlement on file and is not providing section 311 transportation. Furthermore, Tennessee is not requesting a waiver of the contract conversion reduction provisions, which would otherwise be triggered automatically by providing new transportation under NGPA section 311. Rather, Tennessee seeks to waive the grandfather provision of § 284.105 until Tennessee's take-or-pay funding issues are worked out. There is no similarity whatsoever between this case and *Texas Eastern*.

Section 284.105(a) was designed to prevent undue hardship by allowing transactions that were ongoing when the rule was issued to run their course. To allow the extension of 83 transactions pending resolution of take-or-pay issues would be grossly unfair to parties who might desire transportation but who had no previous transactions to "entend." It would also be tantamount to suspending the application of Order No. 436 in large measure. This we will not do.

We find that Tennessee has not established good cause for waiver. Tennesee's request is hereby denied.

By the Commission.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25527 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. QF87-20-000]

Small Power Production and Cogeneration Facilities; Qualifying Status; Eli Lilly Industries, Inc.

November 6, 1986.

On October 17, 1986, Eli Lilly Industries, Inc. (Applicant), of Call Box 1198, Pueblo Station, Carolina, Puerto Rico 00628-1198 submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a completed filing.

The topping-cycle cogeneration facility will be located in Carolina, Puerto Rico and will consist of two diesel engine generators, two waste heat recovery steam generators, two jacket water heat recovery plates, and two frame heat exchangers. The net electric power production capacity of the facility will be 4919 kW. The primary source of energy will be fuel oil. Construction of the facility will begin in February 1987.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition 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. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25608 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

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[1] 18 CFR 284.105(a) provides that any transportation service that was commenced on or before October 9, 1985, under the terms that applied prior to November 11, 1985, may be continued until the earlier of October 9, 1987, or the expiration of the original extended term.

[2] Docket No. CP86-534-000, 36 FERC ¶ 61,032.

[3] Order issued June 27, 1986, Docket No. RP86-110-001, 35 FERC ¶ 61,405.

[Docket No. QF87-21-000]

Small Power Production and Cogeneration Facilities; Qualifying Status; Willis and Paul Group

November 6, 1986.

On October 17, 1986, the Willis and Paul Group (Applicant), of 66 Ford Road, Denville, New Jersey 07834, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located adjacent to the BP Performance Polymers, Inc. plant on Thomas Road in Mansfield Township, New Jersey. The facility will consist of a water-wall circulation fluid bed combustion boiler and a steam turbine generator. Steam produced in the boiler will be sold to BP Performance Polymers, Inc. for process use and will also be used in a sludge drying process to be located adjacent to the project. The primary energy source will be coal in the form of anthracite silt. The maximum electric power production capacity of the facility will be 30 MW. Construction of the facility is expected to begin late in 1987.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition 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. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25609 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA87-1-32-003]

Colorado Interstate Gas Co.; Proposed Change in FERC Gas Tariff

November 6, 1986

Take notice that on October 30, 1986, pursuant to Ordering Paragraph (A)(1) of the Commission's Order issued September 30, 1986, in Docket No. TA87-1-32, as modified by an Order issued October 14, 1986. Colorado Interstate Gas Company (CIG) filed revised rates reflecting the elimination of $35 million in projected costs attributable to Order No. 451.

On October 30, 1986, CIG submitted for filing as part of its FERC Gas Tariff six copies each of Substitute Twenty-Sixth Revised Sheet No. 7 and First Substitute Twenty-Seventh Revised Sheet No. 8, reflecting the elimination of the $35 million in projected Order No. 451 costs.

At the same time, CIG resubmitted for filing Alternate Twenty-Sixth Revised Sheet No. 7 and Alternate First Substitute Twenty-Seventh Revised Sheet No. 8, which sheets were previously filed on August 15, 1986, and reflect CIG's estimate of the impact of Order No. 451 on its gas costs.

CIG stated that it strongly believed that the alternate tariff sheets more accurately reflect the cost of gas that it will actually incur because of the good faith negotiation rule of Order No. 451, and therefore urged that the alternate tariff sheets be accepted for filing and be made effective on October 1, 1986. CIG noted that it was providing to the Commission and all parties the details underlying and supporting its estimate of the Order No. 451 impact, and accordingly, submitted that it was entirely appropriate for the Commission to accept the tendered alternate tariff sheets for filing to be effective on October 1, 1986. However, should the Commission not agree, CIG requested that the revised sheets eliminating the Order No. 451 costs be accepted for filing to be effective on October 1, 1986.

Because of the shortness of time between the filing date and the date that October billings must be mailed out, CIG also advised the Commission that it intends to bill its customers on the basis of the alternate tariff sheets that include the $35 million Order No. 451 costs. Should the Commission ultimately determine that this was inappropriate, CIG agreed to refund any revenue overrecovery resulting from use of the alternate tariff sheets.

CIG noted that it had complied with the balance of the Commission's September 30, 1986, Order on October 15, 1986.

CIG respectfully requested the Commission to grant any waivers of the Commission's Regulations as it may deem necessary to accept this filing.

Copies of the filing have been served upon CIG's jurisdictional customers, other interested public bodies, and parties of record in this proceeding.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure.

All such petitions or protests should be filed on or before Nov. 13, 1986. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25610 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP85-57-014]

Natural Gas Pipeline Company of America; Proposed Changes to FERC Gas Tariff

November 6, 1986.

Take notice that on October 27, 1986, Natural Gas Pipeline Company of America (Natural) tendered for filing tenth Revised Sheet No. 5E to be a part of its FERC Gas Tariff, Third Revised Volume No. 1.

Natural states that the purpose of this sheet is to set out the threshold percentages and discount rates applicable to Rate Schedule IOS for the month of November 1986. The filing is being made in accordance with the provisions of Rate Schedule IOS which was authorized by FERC order issued March 13, 1986 at Docket No. CP85-57-003.

Natural requests waiver of the Commission's regulations to the extent necessary to permit tenth Revised Sheet No. 5E to become effective November 1, 1986. Copies of this filing were mailed to Natural's jurisdicitonal customers and to interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211). All such motions or protests should be filed on or before November 13, 1986. 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,

Acting Secretary.

[FR Doc. 86-25611 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER86-719-000]

Pacific Gas and Electric Co.; Filing

November 5, 1986.

Take notice that on October 27, 1986, Pacific Gas and Electric Company (PGandE) tendered for filing an amended tariff sheet which was previously designated as Supplement No. 1 to Original Tariff Sheet No. 173 PGandE's letter dated September 26 and the accompanying filing (filed September 29) to the Commission. PGandE requests that revised Supplement No. 1 Tariff Sheet be substituted for the Supplement No. 1 Tariff Sheet previously provided in PGandE's September 29 filing which has been designated as Docket No. ER86-719-000.

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, 385.214). All such motions or protests should be filed on or before November 18, 1986. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this application are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25604 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER86-204-005]

Pennsylvania Electric Co.; Filing

November 7, 1986.

Take notice that on October 14, 1986, Pennsylvania Electric Company tendered for filing a compliance report whereby refunds of all revenue amounts collected in excess of the settlement rate levels, together with interest computed in accordance with 35.19(a) of the Commission's Regulations, were made on September 30, 1986.

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, 385.214). All such motions or protests should be filed on or before November 20, 1986. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this application are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25605 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER86-361-002]

Upper Peninsula Power Co.; Filing

November 7, 1986.

Take notice that on October 10, 1986, Upper Peninsula Power Company (UPPCO) tendered for filing a compliance report whereby UPPCO states that because increased rates were suspended until October 17, 1986, no refunds had to be made. Rates found to be higher than settlement rates were not collected.

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, 385.214). All such motions or protests should be filed on or before November 20, 1986. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this application are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

FR Doc. 86-25606 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER87-65-000]

West Texas Utilities Co.; Filing

November 6, 1986.

Take notice that on October 31, 1986, West Texas Utilities Company (WTU) tendered for filing proposed changes in its FERC Electric Service Tariff, Original Volume No. 1, unexecuted letter amendments to its electric service agreement with Texas-New Mexico Power Company (formerly Community Public Service Company) and unexecuted letter amendments to contracts for electric service with the Cities of Brady and Coleman, Texas. WTU has proposed a phased rate increase and certain other rate schedule changes applicable to the affected customers. Level B Rates, proposed to be effective on January 1, 1987, would increase revenues from jurisdictional sales by $5,079,360 based on calendar year 1987. Level A Rates, proposed to be effective on December 31, 1986, would increase revenues from jurisdictional sales by $4,054,501, based on calendar year 1987. The principal difference between the two sets of rates is the return on common equity which the rates are designed to produce. WTU requests that the Level A Rates be suspended until January 1, 1987, in accordance with the terms of settlement in WTU's last rate case.

Copies of the filing have been served on the customers of WTU affected by the filing and upon the Public Utilities Commission of Texas.

Any person desiring to be heard or to protest this 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, 385.214). All such motions or protests should be filed on or before November 19, 1986. Protests will be considered by the Commission in determining the apropriate 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 application are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 86-25607 Filed 11-12-86; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[A-9-FRL-3109-3] [EPA Project Number SJ 85-06]

Approval of Prevention of Significant Air Quality Deterioration (PSD) Permit to Rio Bravo Refining Company

AGENCY: Environmental Protection Agency (EPA), Region 9.

ACTION: Notice.

SUMMARY: Notice is hereby given that on October 22, 1986 the Environmental Protection Agency issued a PSD permit under EPA's federal regulations 40 CFR 52.21 to the applicant named above. The PSD permit grants approval to construct a 36 MW (gross) coal-fired cogeneration facility to be located in the Poso Creek Oil Field, Kern County, California. The permit is subject to certain conditions, including an allowable emission rate (2-hour average) as follows: SO_2—14.0 lbs/hr or 20 ppm at 3% O_2, for NO_x—the more stringent of 38.9 lbs/hr or 78 ppm at 3% O_2, and for CO—105.1 lbs/hr.

FOR FURTHER INFORMATION CONTACT: Anita Tenley at (415) 974-8240

ADDRESS: Copies of the permit are available for public inspection upon request; address request to: Anita Tenley (A-3-1), U.S. Environmental Protection Agency, Region 9, 215 Fremont Street, San Francisco, CA 94105, (415) 974-8240, FTS 454-8240.

SUPPLEMENTARY INFORMATION: Best Available Control Technology (BACT) requirements inlcude the use of limestone injection to control SO_2 emissions, with limestone at a minimum Ca/S molar ratio of 1.6:1 being injected directly into the combustion chambers. To control NO_x emissions, the use of selective non-catalytic reduction is required as BACT, utilizing ammonia injection within the boiler at a point where a temperature range of 1500-1700 °F is achieved during normal operations. Ammonia shall be injected at a minumum NH_3/NO_x ratio of 6.1:1 on a weight basis.

DATE: The PSD permit is reviewable under section 307(b)(1) of the Clean Air Act only in the Ninth Circuit Court of Appeals. A petition for review must be filed by January 12, 1987.

Dated: October 31, 1986.

David P. Howekamp,

Director, Air Management Division, Region 9.

[FR Doc. 86-25583 Filed 11-12-86; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-59231B; FRL-3109-5]

Approval of Test Marketing Exemptions for a Certain Chemical

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of an application for test marketing exemption (TME) under section 5(h)(6) of the Toxic Substances Control Act (TSCA), TME-86-61. The test marketing conditions are described below.

EFFECTIVE DATE: November 3, 1986.

FOR FURTHER INFORMATION CONTACT: Michelle Roddy, Premanufacture Notice Management Branch, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Rm. E-611B, 401 M St. SW., Washington, DC 20460, (202-475-8993).

SUPPLEMENTARY INFORMATION: Section 5(h)(1) of TSCA authorizes EPA to exempt persons from premanufacture notification (PMN) requirements and permit them to manufacture or import new chemical substances for test marketing purposes if the Agency finds that the manufacture, processing, distribution in commerce, use and disposal of the substances for test marketing purposes will not present any unreasonable risk of injury to health or the environment. EPA may impose restrictions on test marketing activities and may modify or revoke a test marketing exemption upon receipt of new information which casts significant doubt on its finding that the test marketing activity will not present any unreasonable risk of injury.

EPA hereby approves TME-86-61. EPA has determined that test marketing of the new chemical substance described below, under the conditions set out in the TME application, and for the time period and restrictions (if any) specified below, will not present any unreasonable risk of injury to health or the environment. The production volume must not exceed that specified in the application. All other conditions and restrictions described in the application and in this notice must be met.

The following additional restrictions apply to TME-86-61. A bill of lading accompanying each shipment must state that the use of the substance is restricted to that approved in the TME. In addition, the Company shall maintain the following records until five years after the date they are created, and shall make them available for inspection or copying in accordance with section 11 of TSCA:

1. The applicant must maintain records of the quantity of the TME substance produced.
2. The applicant must maintain records of the dates of shipment to each customer and the quantities supplied in each shipment.
3. The applicant must maintain copies of the bill of lading that accompanies each shipment of the TME substance.

T 86-61

Date of Receipt: September 23, 1986.

Notice of Receipt: October 3, 1986 (51 FR 35425).

Applicant: Confidential.

Chemical: (S) Amine bis (hydrogenated tallow alkyl) methyl, citrates.

Use: (S) Formulated laundry wash cycle product.

Production Volume: Confidential.

Number of Customers: Confidential.

Worker Exposure: Manufacturing: Minimal dermal and respiratory exposure to a total of 4 persons for one 8 hour period.

Test Marketing Period: One year.

Commercing on: November 3, 1986.

Risk Assessment: EPA identified no significant human health concerns. Therefore, the test market substance will not present any unreasonable risk of injury to health. EPA has identified potential environmental concerns. However, EPA has determined that the estimated releases of the test market substance will not present any unreasonable risk of injury to the environment.

Public Comments: None.

The Agency reserves the right to rescind approval or modify the conditions and restrictions of an exemption should any new information come to its attention which casts significant doubt on its finding that the test marketing activities will not present any unreasonable risk of injury to health or the environment.

Dated: November 3, 1986.

Charles L. Elkins,

Director, Office of Toxic Substances.

[FR Doc. 86-25582 Filed 11-12-86; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-59231A; FRL 3109-4]

Approval of Test Marketing Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of an application for test

marketing exemption (TME) under section 5(h)(6) of the Toxic Substances Control Act (TSCA), TME-86-60. The test marketing conditions are described below.

EFFECTIVE DATE: November 3, 1986.

FOR FURTHER INFORMATION CONTACT: Robert Wright, Premanufacture Notice Management Branch, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Rm. E-611, 401 M St. SW., Washington, DC 20460, (202-382-7800).

SUPPLEMENTARY INFORMATION: Section 5(h)(1) of TSCA authorizes EPA to exempt persons from premanufacture notification (PMN) requirements and permit them to manufacture or import new chemical substances for test marketing purposes if the Agency finds that the manufacture, processing, distribution in commerce, use and disposal of the substances for test marketing purposes will not present any unreasonable risk of injury to health or the environment. EPA may impose restrictions on test marketing activities and may modify or revoke a test marketing exemption upon receipt of new information which casts significant doubt on its finding that the test marketing activity will not present any unreasonable risk of injury.

EPA hereby approves TME-86-60. EPA has determined that test marketing of the new chemical substance described below, under the conditions set out in the TME application, and for the time period and restrictions (if any) specified below, will not present any unreasonable risk of injury to health or the environment. The production volume must not exceed that specified in the application. All other conditions and restrictions described in the application and in this notice must be met.

The following additional restrictions apply to TME-86-60. A bill of lading accompanying each shipment must state that the use of the substance is restricted to that approved in the TME. In addition, the Company shall maintain the following records until five years after the date they are created, and shall make them available for inspection or copying in accordance with section 11 of TSCA:

1. The applicant must maintain records of the quantity of the TME substance produced.

2. The applicant must maintain records of the dates of shipment to each customer and quantities supplied in each shipment.

3. The applicant must maintain copies of the bill of lading that accompanies each shipment of the TME substance.

T 86-60

Date of Receipt: September 23, 1986.

Notice of Receipt: October 3, 1986 (51 FR 35425).

Applicant: Uniroyal Incorporated.

Chemical: (G) An isocyanate terminated polyurethane prepolymer.

Use: (G) Chemical intermediate for industrial applications.

Production Volume: 45,000 kg.

Number of Customers: Confidential.

Worker Exposure: Manufacturing: Minimal inhalation exposure to a total of 3 persons for one 4 hour period, up to 20 days.

Test Marketing Period: Six months.

Commencing on: (*November 3, 1986*).

Risk Assessment: EPA identified no significant human health concerns. Therefore, the test market substance will not present any unreasonable risk of injury to health. EPA has identified potential environmental concerns. However, EPA has determined that the estimated releases of the test market substance will not present any unreasonable risk of injury to the environment.

Public Comments: None.

The Agency reserves the right to rescind approval or modify the conditions and restrictions of an exemption should any new information come to its attention which casts significant doubt on its finding that the test marketing activities will not present any unreasonable risk of injury to health or the environment.

Dated: Noveber 3, 1986.

Charles L. Elkins,
Director, Office of Toxic Substances.

[FR Doc. 86-25580 Filed 11-12-86; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL MARITIME COMMISSION

Notice of Agreements(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.: 224-004177-003.

Title: Seattle Terminal Agreement.

Parties:

Port of Seattle (Port)
Stevedoring Services of America (SSA)

Synopsis: The proposed amendment would permit the Port to lease an additional 8.5 acres to SSA. The parties have requested a shortened review period.

Agreement No.: 202-010676-020.

Title: Mediterranean/U.S.A. Freight Conference.

Parties:

Achille Lauro
C.I.A. Venezolana de Navegacion
Compania Trasatlantica Espanola, S.A.
Costa Line
Farrell Lines, Inc.
"Italia" de Navigazione, S.p.A.
Jugolinija
Jugooceanija
Lykes Lines
Nedlloyd Lines
Sea-Land Service, Inc.
Zim Israel Navigation Company, Ltd.

Synopsis: The proposed amendment would clarify certain applications of independent action, it would prohibit proxies at owner's meetings and permit self-policing as an alternative to employing an independent neutral body. It would also require each party to appoint a senior executive, and up to two alternates, to give notice of independent action and would change the vote required to permit alternate port service by land.

Agreement No.: 202-01848-002.

Title: North Europe-Virgin Islands Rate Agreement.

Parties:

Trans Freight Lines
Tropical Shipping and Construction Co., Ltd.

Synopsis: The proposed amendment would delete the parties' authority to agree upon the level of compensation paid to ocean freight forwarders under the agreement. The parties have requested a shortened review period.

Agreement No.: 224-011025.

Title: Seattle Terminal Agreement.

Parties:

Port of Seattle (Port)
Hanjin Container Lines, Ltd. (Hanjin)

Synopsis: The proposed agreement would permit the Port to lease approximately 13 acres of improved, paved land together with office space to Hanjin for use in its terminal operations at Terminal 46 in the Port of Seattle.

Additionally, the agreement provides for the preferential use by Hanjin of one ship's berth and container handling equipment. The parties have requested a shortened review period.

Agreement No.: 224-011026.

Title: Seattle Terminal Agreement.

Parties:

Port of Seattle (Port)

Stevedoring Services of America (SSA)

Synopsis: The proposed amendment would permit the Port to lease to SSA space in Transit Shed 2 and an adjacent chassis and auto parking area at Terminal 37 in the Port of Seattle for use in its terminal operations. The parties have requested a shortened review period.

Dated: November 7, 1986.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 86-25613 Filed 11-12-86; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Banc One Corp. et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than November 28, 1986.

A. **Federal Reserve Bank of Cleveland** (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. *Banc One Corporation,* Columbus, Ohio; to acquire 100 percent of the voting shares of Northwest National Bank, Rensselaer, Indiana.

2. *Park National Corporation,* Newark, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of The Park National Bank, Neward, Ohio, and thereby indirectly acquire The Richland Trust Company, Mansfield, Ohio.

B. **Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *Community Bancshares, Inc.,* Blountsville, Alabama; to acquire 100 percent of the voting shares of Madison County Bank, New Hope, Alabama, a *de novo* bank.

2. *Community Bancshares, Inc.,* Blountsville, Alabama; to acquire 100 percent of the voting shares of Morgan County Bank, Falkville, Alabama, a *de novo* bank.

Board of Governors of the Federal Reserve System, November 6, 1986.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 25574 Filed 11-12-86; 8:45 am]

BILLING CODE 6210-01-M

Change in Bank Control Notice; Acquisition of Banks or Bank Holding Companies

The notificants listed in this notice have applied for the Board's approval under the Change in Bank Control Act (12 U.S.C. 1817(j) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in the paragraph 7 of the Act (12 U.S.C. 1817(j)(7).

The applications are available for immediate inspection at the Federal Reserve Bank indicated. Once the applications have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that application or to the offices of the Board of Governors.

Comments regarding these applications must be received not later than November 28, 1986.

A. **Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *Frank Pupello,* Tampa, Florida; to acquire 12.4 percent of the voting shares of Key Bankshares, Inc., Tampa, Florida, and thereby indirectly acquire Key Bank of Florida, Tampa, Florida.

2. *Jorge Gadala Samour,* Miami, Florida, to acquire 37.18 percent of Executive Banking Corporation, Miami, Florida.

Board of Governors of the Federal Reserve System, November 6, 1986.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 86-25575 Filed 11-12-86; 8:45 am]

BILLING CODE 6210-01-M

NewCentury Bank Corp; Application To Engage de Novo in Permissible Nonbanking Activities

The company listed in this notice has filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo,* either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the application must be received at the Reserve Bank indicated

or the office of the Board of Governors not later than December 1, 1986.

A. Federal Reserve Bank of Chicago (Franklin D. Dreyer, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *NewCentury Bank Corporation*, Bay City, Michigan; to engage *de novo* in providing data processing services to First of America Bank-Mid Michigan, Gladwin, Michigan, pursuant to § 225.25(b)(7) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 6, 1986.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 86-25576 Filed 11-12-86; 8:45 am]

BILLING CODE 6210-01-M

Sovran Financial Corp., et al. Applications To Engage de Novo in Nonbanking Activities

The companies listed in this notice have filed applications under § 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity. Unless otherwise noted, such activities will be conducted throughout the United States.

The applications are available for immediate inspection at the Federal Reserve Bank indicated. Once the applications have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposals can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 2, 1986.

A. Federal Reserve Bank of Richmond (Lloyd W. Bostian, Jr., Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *Sovran Financial Corporation*, Norfolk, Virginia; to engage *de novo* through its subsidiary, Sovran Investment Corporation, Richmond, Virginia, in offering cash management services, including customer account-related functions, for customers of Sovran Investment Corporation and its affiliate banks.

B. Federal Reserve Bank of Atlanta (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *Barnett Banks of Florida, Inc.*, Jacksonville, Florida; to engage *de novo* through its subsidiary, Barnett Banks Insurance Inc., Jacksonville, Florida, in acting as a reinsurer of home mortgage redemption insurance that is directly related to an extension of credit by Barnett or any of its subsidiaries.

Board of Governors of the Federal Reserve System, November 6, 1986.

James McAfee.

Associate Secretary of the Board.

[FR Doc. 86-25577 Filed 11-12-86; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office for Civil Rights; Statement of Organization Functions and Delegations of Authority

Part A, Chapter AT (Office for Civil Rights) of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services as last amended at 47 FR 20033 (April 10, 1982) is amended. The changes made to the Office for Civil Rights include: The realignment of the subordinate organizations of the Office of Management and Policy and changing the title of the Office of Management, Planning and Evaluation; the realignment of the subordinate organizations of the Office of Program Operations; the change in reporting relationship of the Regional Offices to report to the Director of the Office for Civil Rights; the transfer of the Policy and Special Projects organization to the Office of the Director and the realignment of the regional offices. The changes are as follows:

1. Amend Part A, Chapter AT Sections AT.00, AT.10, and subsections A, B, and C of Section AT.20 as revised to read as follows: Chapter AT, Office for Civil Rights.

Section AT.00 Mission

The primary mission of the Office for Civil Rights is to eliminate unlawful discrimination and to insure equal opportunities for the beneficiaries of Federal financial assistance provided by the Department of Health and Human Services. This shall be accomplished as quickly and effectively as possible, but with meaningful efforts at voluntary compliance.

Section AT.10 Organization

The Office for Civil Rights is under the supervision of the Director who reports to the Secretary. The Director also serves as the Secretary's Special Assistant for Civil Rights, responsible for overall coordination of the Department's civil rights activities. The Office is comprised of the following headquarters components.

Office of the Director, Policy and Special Projects Staff, Executive Secretariat, EEO/Affirmative Action Coordinator

Office of the Associate Deputy Director for Management Planning and Evaluation

Office of Management Planning and Evaluation, Quality Assurance and Evaluation Division, Budget and Administrative Services Division, Management Analysis and Information Division

Office of the Associate Deputy Director for Program Operations, Voluntary Compliance and Outreach Division, Investigations Division, Program Development and Training Division

Regional Office for Civil Rights, Investigations Division (Branch in small offices), Voluntary Compliance and Outreach Division, (Branch in small offices)

Section AT.20 Functions

A. *Office of the Director:* As the Department's chief officer for the enforcement of the nondiscrimination provisions of law and as adviser to the Secretary on civil rights, the Director is responsible for the overall operations of the Office for Civil Rights; establishes policy and serves as adviser to the Secretary on civil rights matters, including intradepartmental activities aimed at incorporating civil rights compliance into programs the Department administers; sets overall direction and priorities of the Office through budget requests and long-range operating plans; determines policies and standards for the civil rights investigative and voluntary compliance programs in coordination with the

Secretary and other Federal agencies; supervises OCR field components; determines cases for enforcement action. In consultation with the Office of the General Counsel (OGC), identifies cases for referral to the Department of Justice for legal action and cases for the institution of administrative enforcement proceedings; consults with the Associate General Counsel, Civil Rights Division; represents the Secretary before Congress and the Executive Office of the President on matters relating to civil rights; and solicits the participation of beneficiaries and recipients in the conduct of the Department's civil rights enforcement and voluntary compliance programs.

The Director of the office is served by a Deputy who acts as his/her alter ego. In addition, this office has primary responsibility for oversight of budget formulation and execution and personnel activities.

1. Policy and Special Projects Staff: Develops and disseminates civil rights policy. Undertakes special projects in program areas to provide guidance in implementation strategies for new or revised programs. Develops policy statements, speeches and other materials for the Director. Serves as the focal point of external communication including liaison with the Assistant Secretary for Public Affairs where necessary.

Conducts a research program to develop and maintain a body of information on civil rights issues in health and human services in cooperation with the Office of Program Operations; collects and maintains information on recurrent and special policy issues and needs; develops civil rights policy, regulations and guidelines; provides policy interpretations and policy research information to other OCR components; reviews Departmental regulations for civil rights adequacy; reviews policy implications of legislative proposals and budget documents submitted to the Director for approval; and maintains and disseminates a policy digest.

Maintains liaison with Congress and other Federal departments and agencies charged with civil rights enforcement responsibilities; prepares the Inter-Agency Report on Age Discrimination for which OCR plays a lead role; conducts activities in coordination and consultation with the Assistant Secretary for Legislation; reviews pending legislation for civil rights implications; notifies appropriate Congressional committees of significant civil rights developments and informs members of compliance developments affecting recipients of Federal funds in their Congressional districts. Administers the Freedom of Information and Privacy Act.

Recommends, analyzes and evaluates pilot or model compliance reviews to test new program approaches or to validate standards and procedures; translates pilot or model review findings into recommendations of specific program activities needed to support similar reviews; when appropriate provides these recommendations to the Voluntary Compliance and Outreach Division for implementation; conducts special studies involving new or revised programs and makes recommendations for implementation.

Prepares publications and coordinates as necessary with the Assistant Secretary for Public Affairs through the Policy and Special Projects staff. Prepares news releases, articles and other informational material.

2. Executive Secretariat: Reviews all documents forwarded to the Director for approval; establishes and monitors procedures for timely responses to the Secretary, Department components, Congress, government agencies, and the public; assigns responsibility for preparation of documents and clearance dates; determines internal clearance procedures; arranges for necessary coordination with other Department components; follows up on work assignments made by the Director; disseminates Director's decisions in headquarters; serves as liaison with Secretary's executive secretariat; and maintains Director's official files.

3. EEO/Affirmative Action Coordinator: Serves as principal adviser to the Director regarding EEO/affirmative action planning, implementation, and direction. Is responsible for assisting OCR Senior Staff and Regional Civil Rights Directors to identify and achieve affirmative action goals. Works with Department-level EEO/Affirmative Action Staff to insure that OCR's plans and procedures adhere to Departmental and Equal Employment Opportunity Commission (EEOC) guidelines. Serves as primary liaison to OS Personnel for the implementation of OCR's Federal Equal Opportunity Recruitment Program (FEORP) in headquarters, and advises Regional Civil Rights Directors on FEORP liaisons with Regional Personnel Offices. Serves as primary contact with all standing OCR affirmative action committees. Facilitates settlement of EEO complaints made against OCR and assists in implementing EEO settlements.

B. *Office of Management Planning and Evaluation.* Serves as the Director's principal adviser in management policy, budget formulation and execution, and automated data processing systems for the office. In addition, provides administrative, logistical, planning, evaluative, analytical and management information support services.

1. Management Information and Analysis Division

Collects, maintains and disseminates automated management information; coordinates information requests for all OCR components; provide ADP support services to all OCR components, including studies to determine areas where needs could be met by the use of data processing technology; functions as liaison with the Department management information offices; conducts studies to determine methods of reducing costs and improving quality and effectiveness of data collection and referral; acquires equipment, supplies and products necessary to support the ADP system; insures adherence to Department and Federal ADP standards; establishes controls, to assure the security of the ADP equipment and the data within the information systems; as directed, develops programs to be incorporated in the system.

Develops, tracks, analyzes and reports on Secretary and Director level management initiatives, timeframes and internal objectives for case processing. Develops and disseminates administrative policy and guidance (e.g., procurement, etc.); advises OCR components on effect of changes in Departmental administrative policy; provides management analysis services.

Provides operational analysis services including analyzing field workloads through the Case Management Information System and recommending adjustments in case processing goals; develops, implements and monitors field management systems, including a comprehensive work measurement system; serves as liaison with the Office of Program Operations in the development of performance standards in the field; provides guidance to insure uniform implementation of administrative and management policy in the field; conducts management studies and reviews of field offices to identify problems and needs; recommends operational resources adjustments. Conducts management studies to assess effectiveness and efficiency of OCR component operations and develops recommendations for improvement.

Conducts surveys (e.g., Hill-Burton Survey) and other studies as appropriate and evaluates survey data.

2. Budget and Administrative Services Division

Formulates and executes OCR Budget; serves as liaison with departmental financial management units; reports to the Associate Deputy Director on fiscal matters; translates office wide goals into budgets with supporting documentation for legislative recommendations; and develops resource and operations planning and budget development guidelines within OMB's framework; prepares testimony for use by the Director before appropriation committees of Congress.

Functions as liaison with the Department personnel and logistical support offices; provides full range of property management services, including space, equipment and supplies management, insures adherence to Federal and Departmental policies and standards regarding security of records, files and equipment; manages files and records maintenance systems; develops and directs counseling and training activities concerning employees' career development opportunities and other programs for personnel development.

3. Quality Assurance and Internal Control Division

Develops and conducts ongoing quality assurance program for field and headquarters components, performs review and analysis of selected completed cases to assess consistency in the application of procedures; analyzes case processing and support systems to assess efficiency and effectiveness; prepares reports and recommendations for improving program activity; identifies areas in which new or modified compliance policies are necessary and makes recommendations; through quality assurance program identifies programmatic training needs in headquarters and the field and makes appropriate recommendations. Develops and implements office internal control system. Conducts audits to assess effectiveness and efficiency of internal control areas, develops recommendations for improvement in internal control areas and performs follow-up audits where indicated. Serves as liaison with Department internal control staff. Assists in the development of performance standards for headquarters; administers employee performance management, merit pay and SES systems for headquarters and field.

Establishes planning systems, and studies data. Directs research on recipient and beneficiary populations and analyzes the resulting data; provides statistical analysis and research support for the recipient and beneficiary information needs throughout the office. Participates in long-range and budget planning.

C. *Office of Program Operations.* Manages a national program of civil rights complaints investigations and voluntary compliance and outreach activities. Serves as principal adviser to the Director in enforcement and Voluntary compliance activities. Carries out the responsibility for the uniform and timely implementation of program policies in operating components.

Reviews cases recommended for enforcement and makes enforcement recommendations to the Director and the Office of General Counsel.

1. Voluntary Compliance and Outreach Division

Oversees a compliance review program for recipients; provides assistance to field offices for uniform implementation of voluntary compliance policies; provides field offices with necessary headquarters assistance concerning program matters in compliance reviews; develops and manages the provision of intradepartmental technical assistance and outreach programs aimed at civil rights policy implementation; develops and manages the provision of comprehensive outreach programs to constituent groups; develops and disseminates specialized materials for recipients and beneficiaries; provides leadership and guidance in implementing civil rights compliance activities in the operating divisions (OPDIVs) of the Department; plans and conducts a continuing program of evaluating civil rights compliance activities in the OPDIVs; conducts a program of training for OPDIV staff to carry out their civil rights responsibilities; facilitates communication of matters related to civil rights with other Departmental offices, Federal departments non-HHS agencies, and State and local governments, including organizations representing such units of government; advises recipients on requirements for filing of civil rights compliance assurance forms and maintains a file of completed forms.

2. Investigations Division

Oversees conduct of investigations that result form constituent complaints or other information requiring formal investigation; provides assistance to field offices for uniform and timely implementation of regulations and policies in investigations; monitors investigation activities to determine program problems; assesses investigative plans and letters of findings to insure proper case development and supportable findings; provides field offices with necessary headquarters assistance concerning technical program matters in investigations; provides liaisons between headquarters and field offices to facilitate resolution of issues and policy questions; serves as intake unit and determines jurisdiction in age discrimination complaints and forwards them to the Federal Mediation and Conciliation Service; reviews cases recommended for enforcement and makes final enforcement recommendations to the Associate Deputy Director; conduct negotiations in conjunction with field offices to secure compliance in cases recommended for enforcement; secures resource person for preparation of testimony in enforcement cases; provides supplemental staff and technical support in precedent setting or extensive investigations; maintains a library of letters of findings and operates an office system to warn the Director, and Secretary of imminent case decisions and their potential effects.

3. Program Development and Training Division

Serves as the Associate Deputy Director's principal adviser on program planning and staff program training. Develops and directs all OCR program training for headquarters and field office personnel. Provides leadership, guidance and direction in the develolpment and coordination of plans which identify civil rights objectives and establish priorities for attaining these goals. Develops an annual operating plan for the office. Provides input into long range planning process.

Develops and directs civil rights training programs for headquarters and field offices; assists Office components identifying training needs; locates appropriate sources to meet those needs, including outside training courses, consultant instruction, and development of internal programs; identifies needs for procedures/manual and develops and disseminates those manuals for the conduct of investigations and compliance activities.

2. Amend Chapter AT Subsection D of Section AT.20 by eliminating the entire subsection and substituting the following:

I. Office of the Regional Manager

Within goals set by the Director develops and delivers a comprehensive regional enforcement and voluntary

compliance program to carry out the office mission; manages staff and other resources allocated to the region; directs a program to meet OCR objectives in such areas as quantity, quality and timeliness of work products in investigations and voluntary compliance activities; serves as a resource to the HHS Regional Directors on civil rights matters; disseminates and implements OCR policies and procedures; establishes priorities for work assigned to the civil rights attorney in the regional attorney's office; determines compliance of recipients of Federal financial assistance; negotiates voluntary compliance; approves, disapproves, and monitors implementation of voluntary compliance and corrective plans; approves, disapproves, and monitors State agency Methods of Administration; determines the most effective enforcement method, including conciliation of differences between complainants and recipients; recommends to the Director administrative and/or judicial enforcement actions when voluntary compliance cannot be obtained; participates in headquarters policy and program development; prepares regional budget proposal and supporting resource and work measurement justification; implements final budget allotment for region; implements the part of the Annual Operating Plan (AOP) pertaining to the conduct of complaint investigations, compliance reviews, voluntary compliance activities, staff training and other regional office activities; coordinates with the Freedom of Information Officer and OCR headquarters on information requests and news media inquiries. Establishes and maintains effective relations with offices of Governors, mayors, county officials, and other key State and local officials; furnishes advice and assistance to them in civil rights matters, and strives to develop mutually beneficial Federal-State-local partnerships; responds to Congressional inquiries; implements court decisions as they pertain to the program; provides input into and implements OCR's affirmative action plan.

Administrative Unit: Provides the Regional Program Manager with evaluative reports and advice concerning the Office's achievement of its overall goals and objectives, specifically with regard to: the quantity of compliance activities completed; the completion of compliance actions within established time frames; the achievement of change for beneficiaries. Monitors region AOP; oversees regional resource planning; conducts regional data collections, support services, computer input; assesses and assists in meeting regional training needs; provides administrative support services such as personnel, reproduction of materials, space and supply acquisition and utilization, maintenance, correspondence control, safety, and travel; coordinates and implements OCR's Case Information Management System; and provides internal program quality control.

1. Investigations Division (called Investigations Branch in small regions)

Under the authorities the Office enforces; serves as complaint intake unit; conducts complaint investigations of health and human services institutions to eliminate unlawful discrimination and to insure equal opportunity for the beneficiaries of Federal financial assistance provided by the Department of Health and Human Services; determines compliance of recipients; advises Regional Manager (through the Division Director in small regions) on critical enforcement action; provides assistance to recipients for corrective action; and monitors implementation of corrective plans; coordinates enforcement activities with regional civil rights attorney, OPDIV regional officials, State, and other Federal agencies, and, as appropriate, headquarters offices and divisions; solicits regional/area civil rights attorney's legal opinion on investigations, as the Regional Manager deems appropriate; and processes all complaints received, including determination of jurisdiction and completeness.

2. Voluntary Compliance and Outreach Division (called Branch in small regions)

Conducts project reviews in order to assist in identifying potential compliance problems; negotiates voluntary compliance with health and human services institutions; advises the Regional Program Manager on critical compliance matters; coordinates voluntary compliance activities with OPDIV and STAFFDIVs, regional officials, State, local and other Federal agencies and, as appropriate, headquarters offices and divisions; provides assistance and outreach services to recipients, beneficiaries and organizations as requested or referred; represents the regional office to promote understanding of the Office's responsibilities and voluntary compliance programs; establishes and maintains effective relationships with offices of Governors, State and local officials in order to provide advice and assistance to them on civil rights matters; establish and maintain liaison with ROFEC to assist in providing technical assistance on architectural barrier problems; maintain close liaison with the Regional Office of Public Affairs in carrying out speaking engagements, media appearances and interviews.

Dated: November 3, 1986.

Don M. Newman,

Acting Secretary.

[FR Doc. 86-25614 Filed 11-12-86; 8:45 am]

BILLING CODE 4150-04-M

Statement of Organization Functions and Delegations of Authority; Public Affairs Office

Part A of the Statement of Organizations, Functions and Delegations of Authority for the Department of Health and Human Services is amended. Part A. Office of the Secretary, Chapter AP, Office of Public Affairs as last published at 45 FR 18488 (March 21, 1980) is being amended. This change in the Office of Public Affairs consolidates functions within the Office to improve the management of the assigned functions and improve the utilization of resources. The changes are as follows:

1. Part A, Chapter AP (Office of Public Affairs) is deleted in its entirety and replaced with the following:

AP.00 Mission
AP.10 Organization
AP.20 Functions

Section AP.00 Mission

The mission of the Office of the Assistant Secretary for Public Affairs (OASPA) is to serve as the Secretary's principal public affairs policy advisor; to provide centralized professional leadership and continuous monitoring and evaluation of Departmentwide policies, procedures and operating practices regarding public affairs activities; and to administer the Freedom of Information Act, Privacy Act and other information access statutes.

Section AP.10 Organization

The Office of the Assistant Secretary for Public Affairs, headed by the Assistant Secretary for Public Affairs, who reports to the Secretary, consists of the following organizations:

The Office of the Assistant Secretary for Public Affairs
Office of the Principal Deputy Assistant Secretary for Public Affairs
FOIA/Privacy Act Division
Speech and Editorial Division
Communications Services Division

Office of the Deputy Assistant Secretary for News
News Division

Section AP.20 Functions

A. The Office of the Assistant Secretary for Public Affairs

Provides executive leadership, policy direction, and management strategy for the Department's public affairs programs and activities. Counsels and acts for the Secretary and the Department in carrying out responsibilities under statutes, Presidential directives, and Secretarial orders for informing the general public, specialized audiences, HHS employees, and other Federal employees about the programs, policies, and services of the Department. Establishes and enforces policies and practices which produce an accurate, clear, efficient, and consistent flow of information to the general public and other audiences about departmental programs and activities.

Provides advice, counsel and information to the Secretary and other HHS policymakers to assure that public affairs impact is considered in the establishment of departmental policies or the conduct of its activities.

Serves as the principal point of contact with senior White House officials regarding communications and press issues.

Exercises professional leadership and provides functional management of public affairs activities throughout the Department to assure that Secretarial priorities are followed, high quality standards are met, and cost-effective, non-duplicative communications products are developed which accurately and effectively inform its audiences.

Serves as Secretarial surrogate throughout the public and private sector to both represent the views of the Administration and the Secretary, and to inform and educate various audiences.

Insures coordination among public affairs components. Manages public affairs issues and special activities that cut across Operating Division lines.

B. Office of the Principal Deputy Assistant Secretary for Public Affairs

Directs all public affairs activities in the absence of the Assistant Secretary.

Is responsible for policies and activities related to the Department's speech and editorial services, communications services, public affairs policy analysis, and oversight of Freedom of Information and Privacy Act Division.

Provides advice and assistance on all public affairs matters, in consultation with the Assistant Secretary for Public Affairs. Provides management or coordination to high priority media campaigns and information programs in the Department.

Acts as liaison to private sector organizations, to the Operating and Staff Divisions, to the public affairs units in the HHS Operating Divisions and Regions, and to other Federal agencies, including OMB and the Office of Public Liaison at the White House.

Provides management and oversight of regional public affairs activities.

Initiates, designs and effects outreach programs for all organizations, associations and individuals concerned with the broad range of policies, programs, and issues of the Department.

B.1. FOIA/Privacy Act Division

Administers Information access and privacy protection laws and HHS regulations implementing these laws to insure Department-wide consistency in information disclosure/confidentiality policies, practices and procedures. Such laws include the Freedom of Information Act and the Privacy Act, as well as the open meetings provisions of the Federal Advisory Committee Act, the Government in the Sunshine Act and the disclosure provisions of the Ethics in Government Act.

In concert with Office of General Counsel staff, assists in development of regulations implementing these statutes and develops policy interpretations and guidelines as well as procedural materials and training programs for all Department components.

Develops policy guidelines and training programs for all HHS components regarding the FOIA and related legislation, i.e., the Privacy Act, Federal Advisory Committee Act, and the Government in the Sunshine Act.

Provides responses to requests made under the Freedom of Information Act and determines the availability of records and information under the law and HHS Regulations.

Resolves questions which overlap the FOIA and the privacy Act regarding release of records.

Provides policy guidance on and maintains the index of materials required by FOIA.

B.2. Speech and Editorial Division

Serves as the principal resource within the Department for reviewing and editing written materials reflecting the views of the Secretary, Under Secretary and Chief of Staff.

Prepares speeches, statements, articles, and related material for the Secretary, Under Secretary, Chief of Staff and other top Department officials.

Researches and prepares Op Ed pieces, features, articles, and stories for the media.

Reviews all regulations and other policy memoranda, and advises the Deputy Assistant Secretary for Public Affairs of appropriate response.

B.3. Communications Services Division

Provides direction to all audiovisual activities in and for the Department.

Responsible for all aspects of print and audiovisual production and programming in support of the Secretary, the ASPA and senior HHS management. Operates the HHS studio and coordinates activities of other HHS studios as required. Under the direction of the ASPA, develops and implements media campaigns and special projects. Acts as liaison to broadcast organizations.

Establishes departmental policy and procedures for the procurement, design, production, distribution and quality control of media campaigns, audiovisual products exhibits and publications.

Reviews and clears all media campaigns, audiovisual products and exhibits produced with Departmental funds. Reviews audiovisual aspects of HHS public affairs' components plans to insure they are supportive of HHS policy.

Reviews and clears all periodicals and publications materials produced with departmental funds. Provides liaison with OMB on matters pertaining to publications and periodicals.

Reviews and approves contracts for public affairs services. Collects and analyzes information on projected departmental public affairs offices' budgets, staffing and communication initiatives.

Monitors clearinghouse and information center activities. Reviews and approves departmental information center requests for contracts, including both research contracts and information center operating contracts. Collects operating data from departmental information centers and reports on accomplishments in information dissemination and effectiveness of personnel use and government expenditures.

Responds to inquires from Congress and other arms of the government that involve the collection of data about HHS public affairs activities.

Responds to requests for speakers and coordinates the scheduling of speaking engagements of various policy-level officials of the Department.

Manages the Hispanic Communications function which provides Spanish language news services and Hispanic media liaison, Spanish language print and audiovisual clearances, advises HHS components on Hispanic communications strategies and serves as a contact for public liaison with Hispanic groups and individuals.

Coordinates all activities of private sector initiatives of the White House.

C. Office of the Deputy Assistant Secretary for News

Responsible for policies and activities related to providing the public with information about the Department's policies and programs through the news media.

Provides advice and assistance on all public affairs matters, in consultation with the Assistant Secretary for Public Affairs. Provides management or coordination to high priority media campaigns and information programs in the Department.

Is responsible for management oversight of the Press Office and related activities.

Conducts an active communications program with the public on behalf of the Department through the media and other avenues of communication, in order to further public understanding of its policies, programs and issues.

Coordinates press activities with the White House Press Office and other government departmental press operations.

Oversees the departmental message center, preparing Presidential and Secretarial messages for deserving individuals and organizations.

Serves as a writing resource for the Secretary, a source of news clippings from major newspapers, a filing source for Secretarial materials, and a resource for public affairs preparation and planning.

C.1. News Division

Plans, directs and coordinates the issuance of public information from HHS to the press and broadcast media.

Prepares news releases and other news material for the Secretary and other top Department officials. Reviews and clears all news releases and other news materials prepared by HHS components.

Identifies news opportunities for the Secretary.

Makes recommendations concerning press releases on upcoming publication of regulations or other actions.

Identifies likely media questions for news conferences and interviews, assists in preparing background briefings for encounters with the press.

Briefs the Secretary, Under Secretary, and Chief of Staff, in conjunction with other departmental experts, for all media events.

Responds to press queries, either directly or by steering reporters to appropriate public affairs personnel in Operating Division press offices.

Coordinates press conferences for the Secretary. Acts as a liaison for reporters requesting interviews and for newspaper editorial boards wishing to meet with the Secretary.

Directs the preparation of the Green Sheet, a daily compilation of news concerning HHS programs and activities.

Monitors AP and UPI wires and distributes articles of interest throughout the day to key staff.

Dated: November 6, 1986.

Otis R. Bowen,

Secretary.

[FR Doc. 86-25615 Filed 11-12-86; 8:45 am]

BILLING CODE 4150-04-M

Health Care Financing Administration

[BERC-362-PN]

Medicare Program; Criteria for Medicare Coverage of Heart Transplants

Correction

In FR Doc. 86-23666 beginning on page 37164 in the issue of Friday, October 17, 1986, make the following correction:

On page 37164, first column, in the "**ADDRESS**" Caption, sixth line, "21270" should read "21207".

BILLING CODE 1505-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Cow Creek Band of Umpqua Tribe Reservation, OR

Cow Creek Band of Umpqua Tribe of Indians Establishment of Reservation. This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.1. Notice is hereby given that, under the authority of section 7 of the Act of June 18, 1934 (48 Stat. 986; 25 U.S.C. 467), the hereinafter-described parcels of land, located in Douglas County, Oregon, were proclaimed to be an Indian reservation, effective October 24, 1986 for exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservation.

Willamette Meridian, Douglas County, Oregon

Parcel 1

Beginning at the corner of Secs. 21, 22, 27 and 28, T. 30 S., R. 5 W.; thence South 21.93 chains to a rock corner, thence East 23.38 chains to a point in the County Road leading to Canyonville; thence North 11½° West 5.23 chains; thence North 29° West 9.39 chains; thence North 45° West 11.15 chains; thence North 83½° West 6.06 chains; thence North 87° West 3.60 chains to the point of beginning, save and except that portion of the above-described land used as a part of the Pacific Highway and the county roads.

Excepting that portion deeded to Daniel R. Baird and his wife by deed recorded September 16, 1948, File No. 82440, described as: Beginning at an iron pipe on the Easterly right-of-way line of the Pacific Highway at a point which is North 30°33′ West 280.1 feet from the Northwest corner of the Canyonville, Oregon, Masonic Cemetery, said beginning point being 1414.2 feet North and 450.0 feet East of the quarter section corner between Secs. 27 and 28, T. 30 S., R. 5 W.; thence running North 30°33′ West 198.2 feet along said highway line to an iron pipe; thence East 236.4 feet to an iron pipe; thence South 39°35′ East 216 feet to an iron pipe; thence South 89°09′ West 276.0 feet to the place of beginning.

Also excepting that portion deeded to Albert Guest and Ella May Guest, husband and wife, recorded September 16, 1948, File No. 82438, described as: Beginning at a point on the North line of the Canyonville Masonic Cemetery, said beginning point being 1175.8 feet North and 908.3 feet East of the quarter section corner between Secs. 27 and 28, T. 30 S., R. 5 W., thence running from said beginning point North 0°31′ West 248 feet, thence North 89°09′ East 200.0 feet; thence South 0°31′ East 247.0 feet to the North line of said cemetery property, thence South 89°29′ West 200.0 feet to the place of beginning.

Also excepting that portion deeded to Albert Guest and Ella May Guest, husband and wife, recorded September 16, 1948, File No. 82436, described as: Beginning at the Northwest corner of said cemetery to a point which is on the East right-of-way line of the Pacific Highway and 1173.0 feet North and 592.3 feet East of the quarter section corner between Secs. 27 and 28, T. 30 S., R 5 W.; thence running North 30°33′ West 280.1 feet along the Easterly right-of-way line of the Pacific Highway to a point; thence North 89°09′ East 451.2 feet; thence South 0°31′ East 247.0 feet to a

point on the North line of said cemetery; thence South 89°29′ West 316.0 feet along the North line of said cemetery to the point of beginning.

Also excepting that portion deeded to Sidney Ward and Florence L. Ward, husband and wife, recorded December 19, 1947, in Volume 149, Page 588, Deed Records of Douglas County described as: Beginning at an iron pipe on the West line of the James Clark Donation Land Claim No. 51, in T. 30 S., R. 5 W.; said beginning point being 1275.0 feet South of an iron bar set at the Northwest corner of Section 27 said township and range; thence running South 88°56′ East 391.0 feet to an iron pipe at the Westerly line of the Pacific Highway; thence South 28°51′ East 231.0 feet along the said highway line to an iron pipe on the North line of the Russell property, thence North 88°56′ West 517 feet along a fence line to an iron pipe at the Southwest corner of the Swanson property, thence Northerly along a fence line 200 feet to the place of beginning, and situated in Sec. 27, T. 30 S., R. 5 W.

Also excepting that portion conveyed to the State or Oregon, by and through its State Highway Commission, as recorded in Volume 188, Page 254, Deed Records of Douglas County, Oregon, described as a parcel of land lying in the NW¼NW¼ of Sec. 27, T. 30 S., R. 5 W., and being a portion of the following described property; that tract of land which was conveyed by that certain deed to Nick J. Meyer, et al., recorded in Book 160, Page 496 of Deed Records of Douglas County. The said parcel being described as follows:

A triangular piece of ground being all that part of the above-described property lying West of the Easterly right-of-way line of the present Pacific Highway.

Also excepting that portion sold to O.D. and Anna Havely, as recorded in Volume 192, Page 340, Deed Records of Douglas County, Oregon, described as follows: Beginning at a point on the North line of the Canyonville Masonic Cemetery, said beginning point being 1175.8 feet North and 1108.3 feet East of the quarter section corner between Secs. 27 and 28, T. 30 S., R. 5 W., said point being the Southeast corner of the lands sold to Albert Guest and Ella May Guest, husband and wife, as recorded September 16, 1948, Recorder's No. 82438 of the Deed Records of Douglas County; thence North 0°31′ West 112 feet; thence North 89°09′ East 380 feet; thence South 11°30′ East 112 feet to a point on the North line of said cemetery property; thence South 89°29′ West along said Masonic Cemetery line 400 feet to the point of beginning, in Sec. 27, T. 30 S., R. 5 W.

Also Excepting that portion sold to Robert H. Young and wife, as recorded in Volume 258, Recorder's No. 222404, Deed Records of Douglas County, Oregon, described as follows: Beginning at a ¾″ pipe at the Northeast corner of property described in deed to Robert H. Young and Alice Joanne Young, husband and wife, as recorded the 10th day of November 1951, in Volume 200 at page 442, Recorder's No. 131152 of the Deed Records of Douglas County; thence South 89°09′ West along the North line of said Young property 110 feet to a point marked by a ¾″ pipe; thence North 0°31′ West 50 feet to a point marked by a ¾″ pipe; thence North 89°09′ East 101 feet to a point marked by a ¾″ pipe; thence South 11°25′ East to the place of beginning, the Northeast corner of property described in deed to the said Youngs wherein O.D. Havely and Anna Havely were the grantors all in Sec. 27, T. 30 S., R. 5 W.

The above-property being situated in Sec. 27, T. 30 S., R. 5 W.

Parcel 2

Beginning on the North line of Canyonville Masonic Cemetery, said beginning point being 1175.8 feet North 1108.3 feet East of the quarter section corner between Secs. 27 and 28, T. 30 S., R. 5 W., said point being the Southeast corner of the Guest property as recorded September 16, 1948, Recorder's No. 82438, of Deed Records of Douglas County, Oregon; thence North 0°31′ West 112 feet; thence North 89°09′ East 270 feet to a point marked by a ¾″ pipe; South 11°30′ East 112 feet to a point marked by a ¾″ pipe on the North line of said cemetery property South 89°29′ feet along said Masonic Cemetery North line 270 feet to the point of beginning, all in Sec. 27, T. 30 S, R. 5 W.

Parcel 3

Beginning at an iron pipe on the Easterly right-of-way line of the Pacific Highway at a point which is North 30°33′ feet from the Northwest corner of the Canyonville, Oregon Masonic Cemetery, said beginning point being 1414.2 feet North and 450.0 feet East of the quarter section corner between Secs. 27 and 28, T. 30 S., R. 5 W.; thence running North 30°33′ West 198.2 feet along said highway line to an iron pipe; thence East 236.8 feet to an iron pipe; thence South 89°09′ West 276.0 feet to the place of beginning, and situated in Sec. 27, T. 30 S., R. 5 W.

The above-described parcels contain a total of 28.71 acres, more or less, which are subject to all valid rights, reservations, rights-of-way, and easements of record.

Ross O. Swimmer,

Assistant Secretary—Indian Affairs.

[FR Doc. 86-25517 Filed 11-12-86; 8:45 am]

BILLING CODE 4310-02-M

Bureau of Land Management

Eugene District Advisory Council; Meeting

Notice is hereby given in accordance with section 309 of the Federal Land Policy and Management Act of 1976 that a meeting of the Eugene District Advisory Council will be held on December 9, 1986, at 9:30 a.m. Pacific Standard Time, in Room 221 of the Federal Building, 211 E. 7th, Eugene, Oregon.

The agenda for the meeting will include: (1) An update on potential timber defaults; (2) a review of issues proposed for BLM's western Oregon planning cycle; and (3) other miscellaneous business.

The meeting is open to the public. Interested persons may make oral statements to the Council at the end of the meeting or file written statements for the Council's consideration. Anyone desiring to make an oral statement must notify the District Manager, Bureau of Land Management, 1255 Pearl St., Eugene, Oregon, 97401 by December 5. A per-person time limit may be established by the District Manager, depending on the number of persons wanting to address the Council.

Summary minutes of the Council meeting will be maintained in the District Office and will be available for public inspection and reproduction during regular business hours within 30 days following the meeting.

Dated: November 4, 1986.

Melvin D. Clausen,

District Manager.

[FR Doc. 86-25518 Filed 11-12-86; 8:45 am]

BILLING CODE 4310-33-M

[AZ-040-07-4212-12; A 22435, A 22436]

Realty Action; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Designation of public lands for transfer out of Federal ownership in exchange for lands owned by the State of Arizona, Notice of Termination of segregative effect for public lands and opening of public land to entry for disposal by state exchange.

SUMMARY: BLM proposes to exchange public land with the State of Arizona in order to achieve more efficient management of the public land through consolidation of ownership.

All of the public land in the following described sections and subdivisions is being considered for disposal by exchange pursuant to section 206 of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1716).

Gila and Salt River Meridian, Arizona

T. 8 S., R. 16 E.,
Sec. 23.
T. 15 S., R. 19 E.,
Sec. 14.
T. 6 S., R. 22 E.,
Sec. 26, public land south of Reservation Bdy.
T. 15 S., R. 22 E.,
Sec. 22, NW¼.
T. 21 S., R. 22 E.,
Sec. 34.
T. 22 S., R. 22 E.,
Secs. 14 and 15;
Sec. 24, E½, NE¼SW¼, S½SW¼'
Secs. 25, 26 and 27.
T. 22 S., R. 23 E.,
Sec. 17;
Sec. 18, lot 4;
Sec. 19, N½SE¼SE¼SW¼, S½S½SE¼SW¼, NE¼SW¼SE¼, S½NW¼SW¼SE¼, S½SW¼SE¼, SE¼SE¼;
Secs. 20, 21, 28 and 30.
T. 6 S., R. 24 E.,
Sec. 25, SW¼SW¼.
T. 13 S., R. 25 E.,
Secs. 13 and 24.
T. 14 S., R. 25 E.,
Sec. 4.
T. 13 S., R. 26 E.,
Secs. 11, 14 and 15.
T. 14 S., R. 26 E.,
Secs. 23, 25 and 26.
T. 12 S., R. 27 E.,
Secs. 12, 13 and 22;
Sec. 23, N½NW¼, SW¼NW¼, SE¼SW¼;
Secs. 24, 26 and 27.
T. 13 S., R. 27 E.,
Secs. 1, 3, 10–13, 19, 24 and 27.
T. 12 S., R. 28 E.,
Secs. 4–7, 16, 19, 20, 29, 30 and 31.
T. 13 S., R. 28 E.,
Sec. 6, lots 3 and 4 (South of railroad R/W), lot 5 and SE¼NW excepting Highway R/W, lots 6 and 7, E½SW¼;
Sec. 8, S½SW¼;
Sec. 11;
Sec. 12, S½SW¼;
Secs. 17–21, 25, 27 and 28;
Sec. 27, NE¼, E½NW¼, NW¼NW¼;
Secs. 34 and 35.
T. 13 S., R. 29 E.,
Secs. 17, 18, 19, 25–28, 30, 31, 33, 34 and 35.
T. 4 S., R. 30 E.,
Sec. 25.
T. 8 S., R. 30 E.,
Sec. 19, lots 3 and 4, SE¼SW¼, S½SE¼;
Sec. 30, NE¼.
T. 13 S., R. 30 E.,
Sec. 30.
T. 14 S., R. 30 E.,
Sec. 13.
T. 4 S., R. 31 E.,
Sec. 30.
T. 8 S., R. 31 E.,
Sec. 22, N½NE¼, NE¼NW¼, SE¼SW¼, S½SE¼.
T. 8 S., R. 32 E.,
Sec. 3;
Sec. 9, NW¼SE¼;
Sec. 10, lots 1–4 incl., W½E½, NW¼, E½SW¼;
Sec. 15.

The lands described above comprise 22,504.04 acres, more or less in Cochise County; 2,593.43 acres, more or less, in Greenless County; 614.02 acres, more or less, in Graham County; and 320 acres, more or less, in Pinal County.

The above described lands will be segregated from entry under the mining laws, except the mineral leasing laws, effective upon publication of this notice in the **Federal Register.** The segregative effect will terminate upon issuance of patent to the State of Arizona or upon expiration of two years from the effective date, or by publication of a Notice of Termination by the Authorized Officer, whichever comes first.

Final determination of disposal will await completion of environmental analyses.

Publication of this notice shall also terminate the segregative effect previously placed on the following described public lands:

Gila and Salt River Meridian, Arizona

T. 18 S., R. 21 E.,
Sec. 32, lots 5 and 6.
T. 6 S., R. 24 E.,
Sec. 25, NW¼NW¼.

The lands described above comprise 66.00 acres, more or less.

On the date of publication of this notice, the following described public land shall be open to entry for the purpose of exchange with the State of Arizona:

Gila and Salt River Meridian, Arizona

T. 12 S., R. 27 E.,
Sec. 24, E½.

DATE: For a period of 45 days from date of publication in the **Federal Register,** interested parties may submit comments to the Safford District Manager, 425 E. 4th Street, Safford, Arizona 85546.

SUPPLEMENTARY INFORMATION: Detailed informaiton concerning the exchange is available at the Safford District Office.

Dated: November 4, 1986.

Vernon L. Saline,

Acting District Manager.

[FR Doc. 86–25519 Filed 11–12–86; 8:45 am]

BILLING CODE 4310-32-M

Minerals Management Service

Development Operations Coordination Document; Exxon Co., U.S.A.

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the Receipt of a Proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that Exxon Company, U.S.A. has submitted a DOCD describing the activities it proposes to conduct on Leases OCS–G 016 and 0367, Blocks 31 and 32 respectively, West Delta 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 onshore base located at Grand Isle, Louisiana.

DATE: The subject DOCD was deemed submitted on November 4, 1986.

ADDRESSES: A copy of the subject DOCD is available for public review at the office of the Regional Director, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Wholesalers Pkwy., Room 114, New Orleans, Louisiana (Office Hours: 9 a.m. to 3:30 p.m., Monday through Friday).

FOR FURTHER INFORMATION CONTACT: Mr. Michael J. Tolbert; Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section, Exploration/Development Plans Unit; Phone (504) 736–2867.

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.

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 December 13, 1979, (44 FR 53685). Those practices and procedures are set out in revised section 250.34 of Title 30 of the CFR.

Dated: November 5, 1986.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 86–25520 Filed 11–12–86; 8:45 am]

BILLING CODE 4310-MR-M

Development Operations Coordination Document; Hall-Houston Oil 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 Hall-Houston Oil Company has submitted a DOCD describing the activities it proposes to conduct on Lease OCS–G 7834, Block 30, Chandeleur Area, offshore Louisiana and Mississippi. Proposed plans for the above area provide for the development and produciton of hydrocarbons with support activities to be conducted from an onshore base located at Venice, Louisiana.

DATE: The subject DOCD was deemed submitted on October 31, 1986. Comments must be received within 15 days of the 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 Office of the Regional Director, Gulf of Mexico Region, Minerals Management Service, 1201 Wholesalers Pkwy., Room 114, New Orleans, Lousiana (Office Hours: 9 a.m. to 3:30 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: Ms. Angie D. Gobert; Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section; Exploration/Development Plans Unit, Phone (504) 736–2876.

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 December 13, 1979, (44 FR 53685). Those practices and procedures are set out in revised Section 250.34 of Title 30 of the CFR.

Dated: November 4, 1986.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 86–25521 Filed 11–12–86; 8:45 am]

BILLING CODE 4310–MR–M

Development Operations Coordination Document; Petroleum Corp.

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the Receipt of a Proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that Huffco Petroleum Corporation has submitted a DOCD describing the activities it proposes to conduct on Lease OCS-G 0988, Block 275, Eugene Island 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 onshore base located at Freshwater City, Louisiana.

DATE: The subject DOCD was deemed submitted on November 3, 1986.

ADDRESS: A copy of the subject DOCD is available for public review at the Office of the Regional Director, Gulf of Mexico OCS Region, Minerals Management Service, 1420 South Clearview Pkwy., Room 114, New Orleans, Louisiana (Office Hours: 9 a.m. to 3:30 p.m., Monday through Friday).

FOR FURTHER INFORMATION CONTACT: Michael J. Tolbert; Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans Platform and Pipeline Section, Exploration/Development Plans Unit; Phone (504) 736–2867.

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 Minerals Managment Service is considering approval of the DOCD and that it is available for public review.

Revised rules governing practices and procedures under which the Minerals Managment Service makes information contained in DOCDs available to affected States, executives of affected local governments, and other interested parties became effective December 13, 1979, (44 FR 53685). Those practices and procedures are set out in revised 250.34 of Title 30 of the CFR.

Dated: November 4, 1986.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico, OCS Region.

[FR Doc. 86–25522 Filed 11–12–86; 8:45 am]

BILLING CODE 4310–MR–M

Development Operations Coordination Document; Walter Oil & Gas Corp.

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the Receipt of a Proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that Walter Oil & Gas Corporation has submitted a DOCD describing the activities it proposes to conduct on lease OCS-G 4719, Block 321, Galveston Area, offshore Texas. Proposed plans for the above area provide for the development and production of hydrocarbons with support activities to be conducted from an onshore base located at Freeport, Texas .

DATE: The subject DOCD was deemed submitted on November 3, 1986.

ADDRESSES: A copy of the subject DOCD is available for public review at the Office of the Regional Director, Gulf of Mexico OCS Region, Minerals Management Service, 1420 South Clearview Pkwy., Room 114, New Orleans, Louisiana (Office Hours: 9 a.m. to 3:30 p.m., Monday through Friday).

FOR FURTHER INFORMATION CONTACT: Ms. Angie D. Gobert; Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section, Exploration/Development Plans Unit; Phone (504) 736–2876.

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.

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 December 13, 1979, (44 FR 53685). Those practices and procedures are set out in revised § 250.34 of Title 30 of the CFR.

Dated: November 4, 1986.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico, OCS Region.

[FR Doc. 86-25523 Filed 11-12-86; 8:45 am]

BILLING CODE 4310-MR-M

National Park Service

Martin Luther King, Jr., National Historic Site and Preservation District Advisory Commission; Meeting

Notice is hereby given in accordance with the Federal Advisory Commission Act that a meeting of the Martin Luther King, Jr., National Historic Site Advisory Commission will be held at 10:30 a.m. on Wednesday, December 3, 1986, at The Martin Luter King, Jr., Center for Non-Violent Social Change, Inc., Freedom Hall, Room 261, 449 Auburn Avenue, NE., Atlanta, Georgia 30312.

The purpose of the Martin Luther King, Jr., National Historic Site Advisory Commission is to consult with the Secretary of the Interior on matters of planning, development and administration of the Martin Luther King, Jr., National Historic Site. The purpose of this meeting will be to update the Commission on park activities and operations.

The members of the Advisory Commission are as follows:

Mr. William Allison, Chairman
Mr. John H. Calhoun, Jr.
Dr. Elizabeth A. Lyon
Mr. C. Randy Humphrey
Mrs. Christine King Farris
Mr. Handy Johnson, Jr.
Mr. James Patterson
Mrs. Valena Henderson
Mrs. Millicent Dobbs Jordan
Mr. John W. Cox
Reverend Joseph L. Roberts, Jr.
Mrs. Coretta Scott King, Ex-Officio Member, Director, National Park Service, Ex-Officio Member

The meeting will be open to the public; however, facilities and space for accommodating members of the public are limited. Any member of the public may file with the Commission a written statement concerning the matters to be discussed.

Persons wishing further information concerning the meeting or who wish to submit written statements may contact Randolph Scott, Superintendent, Martin Luther King, Jr., National Historic Site. 522 Auburn Avenue, N.E., Atlanta, Georgia 30312; Telephone 404/331-5190. Minutes of the meeting will be available approximately 4 weeks after the meeting.

Dated: October 30, 1986.

Robert M. Baker,

Regional Director, Southeast Region.

[FR Doc. 86-25662 Filed 11-12-86; 8:45 am]

BILLING CODE 4310-70-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-350 (Preliminary)]

Certain Forged Steel Crankshafts From Brazil; Petition and Termination of Investigation

AGENCY: International Trade Commission.

ACTION: Notice of withdrawal of petition and termination of investigation.

SUMMARY: On October 30, 1986, the Commission received a letter from petitioner in the subject investigation (Wyman-Gordon Company) withdrawning its petition. The Commission has been advised that the petition filed with the Department of Commerce was simultaneously withdrawn, and the administering authority will not initiate a formal antidumping investigation in accordance with 19 U.S.C. 1673a(a). Consequently, there will be no imports subject to investigation by the administering authority and there will be no basis upon which the Commission will be able to render a preliminary determination. Therefore, the Commission is terminating the antidumping investigation instituted effective October 9, 1986 (51 FR 36871, Oct. 16, 1986).

EFFECTIVE DATE: October 30, 1986.

FOR FURTHER INFORMATION CONTACT: Diane Mazur (202-523-7914), Office of Investigations, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

Authority: This investigation is being terminated under authority of the Tariff Act of 1930, title VII.

Issued: November 5, 1986.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 86-25595 Filed 11-12-86; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-255]

Certain Garment Hangers; Commission Decision Not To Review an Initial Determination Amending Complaint and Notice of Investigation To Add One Respondent

AGENCY: International Trade Commission.

ACTION: Amendment of complaint and notice of investigation to add one respondent.

SUMMARY: Notice is hereby given that the Commission has determined not to review the presiding administrative law judge's (ALJ) initial determination (ID) (Order No. 5) amending the complaint and notice of investigation to add Hangers Unlimited, Inc. of Englewood, New Jersey as a respondent in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Charles H. Nalls, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 523-1626.

SUPPLEMENTARY INFORMATION: On September 23, 1986, complainant Batts, Inc., filed a motion (Motion No. 255-1) to amend the complaint and notice of investigation to add Hangers Unlimited, Inc. of Englewood, New Jersey as a respondent. The presiding ALJ issued an ID granting the motion on October 1, 1986. No petitions for review of the ID were received nor were any comments received from Government agencies.

Copies of the ID and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436, telephone 202-523-1626. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

Issued: November 5, 1986.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 86-25596 Filed 11-12-86; 8:45 am]

BILLING CODE 7020-02-M

[Investigations Nos. 731-TA-293, 294, and 296 (Final)]

Certain Welded Carbon Steel Pipes and Tubes From the Philippines and Singapore

Determinations

On the basis of the record[1] developed in investigations Nos. 731-TA-293 and 294 (Final), the Commission unanimously determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673(b)), that an industry in the United States is not materially injured or threatened with material injury, and that the establishment of an industry in the United States is not materially retarded, by reason of imports of standard pipes and tubes[2] from the Philippines and Singapore which have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

The Commission further determines,[3] on the basis of the record developed in investigation No. 731-TA-296 (Final), pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)), that an industry in the United States is threatened with material injury by reason of imports of light-walled rectangular pipes and tubes[4] from Singapore which have been found by the Department of Commerce to be sold in the United States at LTFV. The Commission also determines, pursuant to section 735(b)(4)(B) of the Tariff Act of 1930 (19 U.S.C. 1673d(b) (4)(B)), that no material injury would have been found but for any suspension of liquidation of entries of the Merchandise.[5]

[1] The record is defined in § 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(i)).

[2] For purposes of these investigations, the term "standard pipes and tubes" covers welded carbon steel pipes and tubes of circular cross section, 0.375 inch or more but not over 16 inches in outside diameter, provided for in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925 of the *Tariff Schedules of the United States (Annotated)* (TSUSA).

[3] Chairman Liebeler, Vice Chairman Brunsdale, and Commissioner Lodwick make negative determinations.

[4] For purposes of this investigation, the term "light-walled rectangular pipes and tubes" covers welded carbon steel pipes and tubes of rectangular (including square) cross section, having a wall thickness less than 0.156 inch, provided for in item 610.4928 of the TSUSA.

[5] Chairman Liebeler, Vice Chairman Brunsdale, and Commissioner Lodwick, having made negative determinations, do not address the question of whether material injury would have been found but for any suspension of liquidation of entries.

Background

The Commission instituted these investigations effective April 28, 1986, following preliminary determinations by the Department of Commerce that imports of certain welded carbon steel pipes and tubes from the Philippines and Singapore were being sold at LTFV within the meaning of section 731 of the Act (19 U.S.C. 1673). Notice of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of May 14, 1986 (51 FR 17682). The hearing was held in Washington, DC, on September 17, 1986, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 3, 1986. The views of the Commission are contained in USITC Publication 1907 (November 1986), entitled "Certain Welded Carbon Steel Pipes and Tubes from the Philippines and Singapore: Determinations of the Commission in Investigations Nos. 731-TA-293, 294, and 296 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

Issued: November 4, 1986.

By order of the Commission:

Kenneth R. Mason,

Secretary.

[FR Doc. 86-25598 Filed 11-12-86; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-259]

Certain Battery-Powered Smoke Detectors; Investigation

AGENCY: International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 9, 1986, pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), on behalf of BRK/Colorado, Inc., 140 South Union, Lakewood, Colorado 80228, and Pittway Corporation, 333 Skokie Boulevard, Northbrook, Illinois 60065-3012. An amendment and supplement to the complaint were filed on October 23, 1986. The complaint, as amended, alleges unfair methods of competition and unfair acts in the importation into the United States of certain battery-powered smoke detectors, and in their sale, by reason of alleged infringement of at least claims 1, 2, 7, 9-10, and 14-16 of U.S. Letters Patent Re. 29,983. The complaint further alleges that the effect or tendency of unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

The complainants request that the Commission institute an investigation and, after a full investigation, issue a permanent exclusion order and permanent cease and desist orders.

FOR FURTHER INFORMATION CONTACT: Cheri M. Taylor, Esq., or Deborah S. Strauss, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202-523-0440 and 202-523-1233, respectively.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930 and in § 210.12 of the Commission's Rules of Practice and Procedure (19 CFR 210.12).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on November 5, 1986, ordered that:

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, an investigation be instituted to determine whether there is a violation of subsection (a) of section 337 in the unlawful importation into the United States of certain battery-power smoke detectors, or in their sale, by reason of alleged infringement of claims 1, 2, 7, 9-10, and 14-16 of U.S. Letters Patent Re. 29,983, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are—

BRK/Colorado, Inc., 140 South Union, Lakewood, Colorado 80228

and

Pittway Corporation, 333 Skokie Boulevard, Northbrook, Illinois 60665-3012.

(b) The respondents are the following companies, alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Management Investment & Technology Company, Ltd., Wah Ming Building—15th Floor, 34 Wong Chuk Hang Road, Aberddeen, Hong Kong

Wing Wah Chong Investment Company, Ltd., Flat-A1 A2, 2-S Fortune Factory Bldg., 40 Lee Chung Street, Chai-Wan, Hong Kong

Dicon Systems Limited, 719 Clayson Road, Toronto, Ontario M9M 2H4, Canada

Gateway Scientific, Inc., 3020 Red Hill Avenue, Costa Mesa, California 92626

Southwest Laboratories, Inc., 3505 Cadillac Avenue—Bldg. F-1, Costa Mesa, California 92626

Emhart Corporation, 426 Colt Highway, Farmington, Connecticut 06032

Firex Corp., 2464 Wisconsin Avenue, Downers Grove, Illinois 60515

Jameson Home Products, Inc., 2464 Wisconsin Avenue, Downers Grove, Illinois 60515

Fyrnetics, Inc., 1021 Davis Road, Elgin, Illinois 60120

Ten-Tek Electronics, Inc., 631 Executive Drive, Willowbrook, Illinois 60525

Universal Security Instruments, Inc., 10324 South Dolfield Road, Owings Mills, Maryland 21117

Pyrotector, Inc., 333 Lincoln Street, Hingham, Massachusetts 02043

Notifier Company, 3700 North 56th Street, Lincoln, Nebraska 68504

North American Philips Corporation, Norelco Consumer Products Division, 100 East 42nd Street, New York, New York 10017

(c) Cheri M. Taylor, Esq., and Deborah S. Strauss, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 701 E Street NW., Room 125 and Room 126, respectively, Washington, DC 20436, shall be the Commission investigative attorneys, party to this investigation; and

(3) For the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding administrative law judge.

Response must be submitted by the named respondents in accordance with § 210.21 of the Commission's Rules of Practice and Procedure (19 CFR 210.21). Pursuant to §§ 201.16(d) and 210.21(a) of the rules (19 CFR 201.16(d) and 210.21(a)), such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings.

The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Room 156, Washington, DC 20436, telephone 202-523-0471. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

Issued: November 6, 1986.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 86-25594 Filed 11-12-86; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-245]

Certain Low-Nitrosamine Trifluralin Herbicides, Commission Decision To Review Initial Determinations, Schedule for Filing of Written Submissions

AGENCY: International Trade Commission.

ACTION: Notice is hereby given that the Commission has determined to review the administrative law judge's (ALJ's) initial determinations (ID's) terminating all respondents in the above-captioned investigation on the basis of a consent order agreement and settlement and licensing agreements.

AUTHORITY: The authority for the Commission's action herein is contained in section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and in §§ 210.53-210.56 of the Commission's Rules of Practice and Procedure (19 CFR 210.53-210.56).

FOR FURTHER INFORMATION CONTACT: Wayne W. Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0350.

SUMMARY: On October 6, 1986, the presiding ALJ (Judge Mathias) issued two IDs (Orders Nos. 25 and 26) terminating all the respondents in the above-referenced investigation on the basis of a consent order and settlement and licensing agreements. Order No. 25 terminates respondents Agan Chemical Manufacturers Ltd. and Makhteshim-Agan (America) Inc. (Agan) on the basis of a consent order. The consent order is based on a consent order agreement which is accompanied by settlement and license agreements between complainant Eli Lilly and Co. (Lilly) and Agan. Order No. 26 terminates respondents Industria Prodotti Chimici, S.p.A. (I.Pi.Ci.) and Aceto Agricultural Chemicals Corp. (Aceto) on the basis of settlement agreements between Lilly, I.Pi.Ci. and Aceto and a license agreement between Lilly and I.Pi.Ci No petitions for review or comments from Government agencies or the public have been received.

Having examined the record, the Commission has concluded that the following policy issue warrants review:

Whether the consent order which is the subject of Order No. 25 should be issued, in view of the fact that the respondents concerned therein (Agan) have concluded settlement and license agreements with complainant Lilly. The Commission is particularly interested in the justification for further expenditures of public resources which might be involved in monitoring or enforcing the consent order. The Commission notes that Order No. 26 terminates the respondents concerned therein (I.Pi.Ci. and Aceto) on the basis of settlement and license agreements alone.

Written submissions: The parties to the investigation and interested Government agencies are encouraged to file written submissions on the issue under review.

Written submissions on the issue under review, must be filed not later than the close of business on November 20, 1986. Reply submissions on the issue under review, if any, must be filed not later than the close of business on December 3, 1986.

Commission Hearing: The Commission does not plan to hold a public hearing in connection with this review.

Additional Information: Persons submitting written submissions must file the original document and 14 true copies thereof with the Office of the Secretary on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment by the administrative law judge. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. Documents containing

confidential information approved by the Commission for confidential treatment will be treated accordingly. All nonconfidential written submissions will be available for public inspection in the Office of the Secretary.

Notice of this investigation was published in the **Federal Register** of April 9, 1986 (51 FR 12218).

Copies of the nonconfidential version of the administrative law judge's initial determinations and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436, telephone 202-523-0161. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

Issued: November 6, 1986.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 86-25593 Filed 11-12-86; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-246]

Certain Xenon Lamp Dissolver Slide Projectors and Components Thereof; Commission Decision Not To Review an Initial Determination Granting a Motion To Amend the Notice of Investigation

AGENCY: International Trade Commission.

ACTION: Nonreview of the presiding administrative law judge's initial determination granting respondents' motion to amend the notice of investigation.

SUMMARY: On September 22, 1986, respondents D.O. Industries, Inc. (D.O. Industries) and Hokushin Precision Instruments Inc. (Hokushin) filed a motion to amend the notice of investigation in the above-captioned investigation to eliminate claims of infringement of claims 2 and 9 of U.S. Letters Patent 4,158,491 (the '491 patent) from the scope of the investigation (Motion 246-7). The motion was unopposed. On October 6, 1986, the presiding administrative law judge (ALJ) issued an initial determination (ID) (Order No. 8) granting the motion. Petitions for review of the ID were due October 17, 1986; none were received. Comments from government agencies were due October 20, 1986; none were received. The Commission has determined not to review the ID.

FOR FURTHER INFORMATION CONTACT: Kristian E. Anderson, Esq., Office of the General Counsel, U.S. International Trade Commission, Washington, DC 20436, telephone 202-523-0074.

SUPPLEMENTARY INFORMATION:

Authority

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and Commission rules 210.53 and 210.55 (19 CFR 210.53, 210.55).

Background

On April 3, 1986, complainant Bergen Expo Systems, Inc (Bergen) filed a complaint with the Commission alleging that respondents D.O. Industries and Hokushin were violating section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). Specifically, complainant Bergen originally alleged that respondents are infringing claims 1, 2, 6-9, and 13 of the '491 patent. The Commission instituted the present investigation on May 7, 1986. 51 FR 16909.

Public Inspection

Copies of the ID and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Washington, DC 20436, telephone 202-523-0161. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

Issued: November 5, 1986.

By Order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 86-25597 Filed 11-12-86; 8:45 am]

BILLING CODE 7020-02-M

INTERSTATE COMMERCE COMMISSION

Agricultural Cooperative Notice to the Commission of Intent to Perform Interstate Transportation for Certain Nonmembers

Dated: November 7, 1986.

The following Notices were filed in accordance with section 10526 (a)(5) of the Interstate Commerce Act. These rules provide that agricultural cooperatives intending to perform nonmember, nonexempt, interstate transportation must file the Notice, Form BOP 102, with the Commission within 30 days of its annual meetings each year. Any subsequent change concerning officers, directors, and location of transportation records shall require the filing of a supplemental Notice within 30 days of such change.

The name and address of the agricultural cooperative (1) and (2), the location of the records (3), and the name and address of the person to whom inquiries and correspondence should be addressed (4), are published here for interested persons. Submission of information which could have bearing upon the propriety of a filing should be directed to the Commission's Office of Compliance and Consumer Assistance, Washington, DC 20423. The Notices are in a central file, and can be examined at the Office of the Secretary, Interstate Commerce Commission, Washington, DC.

(1) Agricultural Services Association, Inc.
(2) P.O. Box 360, Bells, TN 38006
(3) 118 Main Street, Bells, TN 38006
(4) Gail Chapman, P.O. Box 360, Bells, TN 38006
(1) Dawn Transport Inc.
(2) 117 W. San Ysidro Blvd. CFP No. 13, San Ysidro, CA 92073
(3) 1590 Reforma, Mexicali Baja, CA
(4) H. Jackson, 117 W. San Ysidro Blvd. CFP No. 13, San Ysidro, CA 92075
(1) Sunset Transport, Inc.
(2) C.F.P. Ste. 194, 2630 E. Beyer Blvd., San Ysidro, CA 92073
(3) Donato Guerra 900 Sur., Gulican, Sinaloa, Mexico
(4) Armondo Villalba, C.F.P. Ste. 194, 2630 E. Beyer Blvd., San Ysidro, CA 92073

Noreta R. McGee,

Secretary.

[FR Doc. 86-25557 Filed 11-12-86; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-62 (Sub-No. 2X)]

Marinette, Tomahawk and Western Railroad Co.; Exemption for Abandonment in Lincoln County, WI

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Interstate Commerce Commission exempts under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10903, et seq., the abandonment by Marinette, Tomahawk & Western Railroad Company of 1.48 miles of rail line between milepost 11.73 near Kings, and

milepost 13.21 at High School Road, Tomahawk, WI, in Lincoln County, WI, subject to standard labor protection conditions.

DATES: This exemption will be effective on December 15, 1986. Petitions to stay must be filed by November 24, 1986, and petitions for reconsideration must be filed by December 3, 1986.

ADDRESSES: Send pleadings referring to Docket No. AB-62 (Sub-No. 2X) to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423

(2) Petitioner's representatives: Francis G. McKenna, Anderson & Pendleton C.A., Suite 707, 1000 Connecticut Avenue, NW., Washington, DC 20036

Lynton W. Brooks, Servtras Management, Inc., 114 River View Boulevard, International Falls, MN 56649

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar (202) 275-7245.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to T.S. InfoSystems, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or call 289-4357 (DC Metropolitan area) or toll free (800) 424-5403.

Decided: October 31, 1986.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley.

Noreta R. McGee,

Secretary.

[FR Doc. 86-25556 Filed 11-12-86; 8:45 am]

BILLING CODE 7035-07-M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to Clean Water Act; Pima County, AZ

In accordance with Department policy, 28 CFR 50.7, Notice is hereby given that on *October 31, 1986* a proposed Consent Decree in *United States* v. *Pima County, Arizona* and *State of Arizona,* Civil Action No. 83-804-TUC, was lodged with the United States District Court for the District of Arizona. The proposed Consent Decree concerns discharges in excess of effluent limitations requirements at Pima County's Ina Road wastewater treatment plant periodically between 1978 and 1982 and occasional instances in late 1981 and early 1982 in which automatic effluent samplers at that plant were turned off by a low level employee, without the knowledge or approval of Pima County officials, in violation of sections 301 and 402 of the Clean Water Act. The proposed Consent Decree relates only to defendant Pima County and requires Pima County to pay a civil penalty of $100,000 to prepare a final Operation and Maintenance ("O&M") Manual to be submitted to EPA detailing, inter alia, operation and maintenance of plant equipment and plant-specific key operating procedures for process control of each unit, publication in certain publications of public notice condeming improper effluent sampling activities and violations of effluent limitations requirements and warning that such actions will result in legal penalties, a provision enjoining Pima County from altering any monitoring device required under the Clean Water Act of filing or maintaining an inaccurate report or record required under that Act, and subjects Pima County to certain stipulated contempt penalties for violation of the provisions of the Consent Decree.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Pima County, Arizona* and *State of Arizona,* D.J. Ref. 90-5-1-1-2050.

The proposed Consent Decree may be examined at the office of the United States Attorney, Arizona District, Tucson Office, 120 West Broadway, Suite 310, Acapulco Building, Tucson, Arizona 85701 and at the Region 9 Office of the Environmental Protection Agency, Office of General Counsel, 215 Fremont Street, San Francisco, California 94105. Copies of the Consent Decree also may be examined at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1517, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check in the amount of $1.20 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

F. Henry Habicht II,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 86-25623 Filed 11-12-86; 8:45 am]

BILLING CODE 4410-01-M

Drug Enforcement Administration

John R. Knight, M.D.; Revocation of Registration

On August 11, 1986, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued to John R. Knight, M.D. of 595 E. Broadway, South Boston, Massachusetts 02127, an Order to Show Cause proposing to revoke his DEA Certificate of Registration, AK8892766, and deny any pending applications for registration as a practitioner under 21 U.S.C. 823(f). The proposed action was predicated upon Dr. Knight's lack of authorization to handle controlled substances in the Commonwealth of Massachusetts.

The Order to Show Cause was sent to Dr. Knight by registered mail. DEA received the return receipt which indicated that the Order to Show Cause was received on August 14, 1986. More than thirty days have passed since the Order to Show Cause was served and the Drug Enforcement Administration has received no response thereto. Pursuant to 21 CFR 1301.54(a) and 1301.54(d), Dr. Knight is deemed to have waived his opportunity for a hearing. Accordingly, the Administrator now enters his final order in this matter without a hearing and based on the investigative file. 21 CFR 1301.57.

The Administrator finds that since at least 1978, Dr. Knight has been obtaining controlled substances for his own addiction through the use of fraudulent prescriptions. Dr. Knight was previously authorized by DEA to handle controlled substances at an address in New York. On or about January 12, 1981, Dr. Knight entered into a stipulation with the New York Department of Health in which Dr. Knight admitted that "between July 29, 1978 and October 31, 1978, he did, not in good faith and not in the course of his professional practice, make and utter eight false New York State prescriptions, and thereby unlawfully obtained, possessed, had under his control and self-administered Demerol." On January 14, 1981, the Department of Health for the State of New York fined Dr. Knight $3,600.00 and ordered him to surrender his controlled substance privileges.

In June 1983, investigators of the Massachusetts State Police—Diversion Investigation Unit began monitoring the controlled substance prescribing practices of Dr. Knight in Massachusetts. On June 6, 1983, Dr. Knight told a Massachusetts State Police officer that 25 of his prescriptions for Demerol were for his father's medical

condition and that 22 of his prescriptions for Demerol were for his aunt's medical condition. During a subsequent interview, Dr. Knight admitted that he actually used these prescriptions to obtain Demerol for his personal use. As a result of this information, on January 10, 1984, Dr. Knight voluntarily surrendered his Schedule II privileges with the Drug Enforcement Administration.

On April 14, 1986, the Board of Registration in Medicine for the Commonwealth of Massachusetts received information that Dr. Knight is still addicted to controlled substances and continues to attempt to obtain such substances through fraudulent prescriptions. In addition, on April 14, 1986, Dr. Knight's treating neurologist expressed the opinion that he no longer could control Dr. Knight's substance abuse problem and therefore it is not safe for Dr. Knight to continue to diagnose and treat patients.

As a result of this information, on April 16, 1986, the Board of Registration in Medicine for the Commonwealth of Massachusetts ordered the temporary suspension of Dr. Knight's license to practice medicine in the Commonwealth of Massachusetts. Dr. Knight is no longer authorized to prescribe, dispense, administer or otherwise handle controlled substances in the Commonwealth of Massachusetts. Therefore, there is a lawful basis for the revocation of Dr. Knight's DEA Certificate of Registration. 21 U.S.C. 824(a)(3). DEA has consistently held that when a registrant or applicant is without lawful authority to handle controlled substances under the laws of the state in which he practices or intends to practice, the Drug Enforcement Administration is without lawful authority to issue or maintain such registration. See, *Jerry L. Word, M.D.*, 51 FR 26613 (1986); *Meyer Liebowitz, M.D.*, 51 FR 11654 (1986); *George P. Gotsis, M.D.*, 49 FR 33750 (1984).

Since Dr. Knight cannot lawfully handle controlled substances in the State of Massachusetts, the Administrator has no choice but to revoke Dr. Knight's DEA Certificate of Registration and to deny any pending applications for registration. Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration AK8892766, previously issued to John R. Knight, M.D. be, and it hereby is revoked. The Administrator further orders that any pending applications of Dr. Knight, for registration under the Controlled Substance Act, be, and they hereby are denied. This order is effective December 15, 1986.

Dated: November 6, 1986.

John C. Lawn,

Administrator.

[FR Doc. 86-25616 Filed 11-12-86; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 86-54]

Ramon Pla, M.D.; Revocation of Registration

On June 17, 1986, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, (DEA) directed an Order to Show Cause to Ramon Pla, M.D. (Respondent) of 21100 Southgate Park Boulevard, Maple Heights, Ohio 44137. The Order to Show Cause sought to revoke his DEA Certificate of Registration AP2956641 and to deny any of his pending applications for registration as a practitioner under 21 U.S.C. 823(f). The proposed action was predicated on Respondent's lack of authorization to handle controlled substances in the State of Ohio. 21 U.S.C. 824(a)(3).

Respondent, through counsel, requested a hearing on the issues raised by the Order to Show Cause and the matter was docketed before Administrative Law Judge Francis L. Young. The Administrative Law Judge provided the Government an opportunity to file a motion for summary disposition, which the Government filed. The Administrative Law Judge then provided Respondent an opportunity to respond to the motion for summary disposition. Respondent did not file such a response. Judge Young considered the motion for summary disposition, and on September 26, 1986, issued his opinion and recommended ruling, findings of fact and conclusions of law in this matter. No hearing was held, since no factual issues were involved. Neither side filed exceptions to the recommended ruling of the Administrative Law Judge. On October 23, 1986, Judge Young transmitted the record in this matter to the Administrator. The Administrator hereby adopts the findings of fact and conclusions of law of the Administrative Law Judge and enters his final order in this matter.

The Administrative Law Judge found that on April 9, 1986, the State Medical Board of Ohio revoked Respondent's license to practice medicine and surgery in the State of Ohio, effective immediately. Therefore, Respondent is without authority to practice medicine or handle controlled substances in Ohio, the state in which he is registered. Judge Young found, as does the Administrator, that DEA does not have the statutory authority under the Controlled Substances Act to issue or maintain a registration if the applicant or registrant is without state authority to handle controlled substances. See, 21 U.S.C. 823(f). The Administrator and his predecessors have consistently so held. See, *George S. Health, M.D.*, Docket No. 86-24, 51 FR 26610 (1986); *Dale D. Shahan, D.D.S.*, Docket No. 85-57, 51 FR 23481 (1986); *Emerson Emory, M.D.* Docket No. 85-46, 51 FR 9543 (1986); *Agostino Carlucci, M.D.*, Docket No. 82-20, 49 FR 33184 (1984).

The Administrative Law Judge also found that the motion for summary disposition was properly entertained and must be granted. When no fact question is involved, or when the facts are agreed, there is no requirement that an agency convene a plenary, adversarial administrative proceeding, even though the pertinent statute prescribes a hearing. Congress does not intend administrative agencies to perform meaningless tasks. See, *United States v. Consolidated Mines and Smelting Co., Ltd.*, 445 F.2d 432, 453 (9th Cir. 1971); *NLRB v. International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO*, 549 F.2d 634 (9th Cir. 1977).

Having considered the record in this matter, the Administrator concludes that Respondent's DEA Certificate of Registration should be revoked due to his lack of authorization to handle controlled substances in the State of Ohio. Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 21 CFR 0.100(b), orders that DEA Certificate of Registration AP2956641, previously issued to Ramon Pla, M.D., is hereby revoked. In addition, the Administrator orders that any pending applications of Ramon Pla, M.D., for registration under the Controlled Substances Act, are hereby denied. This order is effective December 15, 1986.

Dated: November 6, 1986.

John C. Lawn,

Administrator.

[FR Doc. 86-25617 Filed 11-12-86; 8:45 am]

BILLING CODE 4410-09-M

John L. Vakas, M.D.; Revocation of Registration

On September 2, 1986, the Deputy Assistant Administrator, Office of

Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to John L. Vakas, M.D., 1508 W. 4th Street, Coffeyville, Kansas 67337, proposing to revoke DEA Certificate of Registration AV1287463 previously issued to him. The statutory predicate for the Order to Show Cause was an Emergency Order of Limitation issued by the Kansas State Board of Healing Arts on October 14, 1985, which prohibits Dr. Vakas administering, dispensing and/or prescribing controlled substances in the State of Kansas.

The Order to Show Cause was mailed to Dr. Vakas, registered mail, return receipt requested, and was received by the doctor at his registered address on September 8, 1986. More than thirty days have elapsed since the Order to Show Cause was received, and the Drug Enforcement Administration has received no response thereto. Pursuant to 21 CFR 1301.54(a) and (d), Dr. Vakas is deemed to have waived his opportunity for a hearing. Accordingly, the Administrator now enters his final order in this matter without a hearing and based upon the investigative file. 21 CFR 1301.57.

The Administrator finds that on October 14, 1985 the Kansas State Board of Healing Arts, after a lengthy investigation, served on Dr. Vakas an Emergency Order of Limitation of License which immediately suspended him from selling, dispensing, administering or prescribing controlled substances. On December 6, 1985, the Kansas Board issued a Petition for the Revocation, Suspension or Limitation of License in the matter of John L. Vakas, M.D. In this Petition the Board declared that the Emergency Order of Limitation of License which prohibits the administering, dispensing, and/or prescribing of controlled substances by Dr. Vakas be continued in full force until the conclusion of formal revocation proceedings. There has been no conclusion of such proceedings to date.

Among the allegations listed in the December 6, 1985 Petition of the Kansas State Board of Healing Arts were repeated instances of dispensing or distribution of controlled substances for other than legitimate medical purposes. The controlled substances involved in these dispensations included amphetamines, methylphenidate, and phenmetrazine, all Schedule II stimulant controlled substances; and various narcotic controlled substances.

The Administrator notes that Dr. Vakas was indicated by a Montgomery County, Kansas Grand Jury on March 21, 1986 of 410 counts of unlawfully prescribing controlled substances. There has been no trial or other resolution of this matter.

The Administrator has consistently held that when an individual registered with DEA is not authorized to handle controlled substances in the state in which he practices, DEA is without lawful authority to maintain his registration. See: *Avner Kauffman, M.D.*, Docket No. 85-8, 50 FR 34208 (1985); *Kenneth K. Birchard*, M.D., 48 FR 33778 (1983); and *Thomas E. Woodson, D.O.*, Docket No. 81-4, 47 FR 1353 (1982). Therefore, since Dr. Vakas is not authorized to handle controlled substances in the State of Kansas, the Administrator cannot permit him to maintain a DEA Certificate of Registration in that State.

Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824, and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration AV1287463 previously issued to John L. Vakas, M.D. is revoked effective December 15, 1986. Any outstanding applications for renewal of that registration are hereby denied.

Dated: November 6, 1986.

John C. Lawn,

Administrator.

[FR Doc. 86-25618 Filed 11-12-86; 8:45 am]

BILLING CODE 4410-09-14

Bureau of Prisons

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the Construction of a Federal Correctional Facility, In Wayne County, GA

AGENCY: Department of Justice; Federal Bureau of Prisons; Justice.

ACTION: Notice of intent to prepare a draft environmental impact statement (DEIS).

SUMMARY: 1. Proposed Action: The U.S. Department of Justice; Federal Bureau of Prisons; has determined that a new medium security Federal Correctional Institution including an adjacent minimum security facility is needed in the Southeastern United States. A site is currently being evaluated near Jesup, Georgia. The proposal calls for the initial construction of a minimum security camp housing as many as 200 inmates. The second phase of the development would consist of a 500-600 bed facility to house medium security inmates. Approximately 250 total acres would be required for read access and service/support space for the institution. In addition, exercise areas and an adequate natural buffer zone around the entire property would be included in the required acreage.

2. In the process of evaluating the specific site, the following subject will receive a detailed examination: Water and sewage, wetlands, threatened and endangered species, cultural resources, unique and prime farmlands, and varied socioeconomic issues.

3. Alternatives: In developing the DEIS, the options of no action and alternative sites for the proposed facilities will be fully and thoroughly examined.

4. Scoping Process: A number of meetings have already been held with local officials and interested citizens. Additional meetings including at least one public meeting will be held once a specific site is identified. A formal public hearing will be held after the publication of the DEIS.

5. DEIS Preparation: The DEIS should be available for public review and comment in the spring 1987.

6. Address: Question concerning the proposed action and the DEIS should be addressed to: Jim Jones, Site Acquisition Coordinator, Facilities Development and Operations, U.S. Bureau of Prisons, 320 First Street, NW., Washington, DC 20534, Telephone: (202) 272-6871.

Loy S. Hayes,

Chief, Office of Facilities Development and Operations, Federal Bureau of Prisons Department of Justice.

[FR Doc. 86-25743 Filed 11-12-86; 8:45 am]

BILLING CODE 4410-05-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (86-81)]

NASA Advisory Council, Space Systems and Technology Advisory Committee (SSTAC); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Space Systems and Technology Advisory Committee Ad Hoc Review Team on Use of Space Station as an Engineering Laboratory.

DATE AND TIME: December 4, 1986, 9 a.m. to 4 p.m.

ADDRESS: Room 625, Building FOB 10, National Aeronautics and Space Administration, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Mr. James Romero, Code RS, Office of Aeronautics and Space Technology, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-2738.

SUPPLEMENTARY INFORMATION: The NAC Space Systems and Technology Advisory Committee has established an ad hoc team to identify in-space derived experimental data that are needed by the aerospace engineering community to enhance its capability to design and operate future space systems. The team's recommendations will be factored into the selection process for in-space research and technology experiments using the space station as a laboratory facility. The meeting will be open to the public up to the seating capacity of the room (approximately 40 persons including the team members and other participants).

Type of Meeting: Open.

Agenda: December 4, 1986.

9 a.m.—Chairperson's Opening Remarks.

9:30 a.m.—Identification and Selection of Technical Areas.

11 a.m.—Assignment of Tasks.

11:30 a.m.—General Discussion of Individual Tasks.

3 p.m.—Plan Schedule of Future Meetings.

4 p.m.—Adjourn.

October 31, 1986.

Richard L. Daniels,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 86-25560 Filed 11-12-86; 8:45 am]

BILLING CODE 7510-01-M

[Notice (86-82)]

NASA Advisory Council, Aeronautics Advisory Committee (AAC); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Aeronautics Advisory Committee and the Aerospace Research and Technology Subcommittee.

DATE AND TIME: December 16, 1986, 8:30 a.m. to 4:30 p.m.; December 17, 1986, 8 a.m. to 5:30 p.m.; December 18, 1986, 8 a.m. to 12:30 p.m.

ADDRESS: Ames Research Center, Building 201, Main Auditorium, Moffett Field, CA 94035.

FOR FURTHER INFORMATION CONTACT: Ms. Joanne Teague, Office of Aeronautics and Space Technology, National Aeronatuics and Space Administration, Washington, DC 20546, 202/453-1887.

SUPPLEMENTARY INFORMATION: The NAC Aeronautics Advisory Committee was established to provide overall guidance and direction to the aeronautics research and technology activities in the Office of Aeronautics and Space Technology (OAST).

The Aerospace Research and Technology Informal Subcommittee was formed to provide technical support for the AAC and to conduct ad hoc interdisciplinary studies and assessments. The Committee, chaired by Mr. Robert B. Ormsby, is comprised of 23 members. The Subcommittee is comprised of 47 members. The meeting will be open to the public up to the seating capacity of the room (Approximately 200 persons including the Subcommittee members and other participants).

Type of Meeting: Open.

Agenda: December 16, 1986.

8:30 a.m.—Opening Remarks.

9 a.m.—Discussion of Membership Changes.

9:15 a.m.—Aeronautics Overview.

9:45 a.m.—Parallel Discipline Program Reviews on Aerodynamics, Materials & Structures, Propulsion, and Controls & Guidance/Human Factors.

1 p.m.—Facility Tour.

2 p.m.—Continuation of Discipline Program Reviews.

4:30 p.m.—Adjourn.

December 17, 1986.

8 a.m.—Continuation of Discipline Program Reviews.

1 p.m.—Facility Tour.

2 p.m.—Parallel Vehicle Program Reviews of Rotorcraft, General Aviation/Transport/Supersonic, High Performance, and Hypersonics/National Aerospace Plane.

4 p.m.—Plenary Session.

5:30 p.m.—Adjourn.

December 18, 1986.

8 a.m.—Remarks by AAC Chairperson.

8:30 a.m.—Remarks by Associate Administrator for Aeronautics and Space Technology.

9 a.m.—Progress Reports by Ad Hoc Review Team Chairpersons.

10 a.m.—Discussion of Issues and Recommendations.

11 a.m.—Summary Session.

12:30 p.m.—Adjourn.

October 31, 1986.

Richard L. Daniels,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 86-25561 Filed 11-12-86; 8:45 am]

BILLING CODE 7510-01-M

NUCLEAR REGULATORY COMMISSION

Documents Containing Reporting or Recordkeeping Requirements; Office of Management and Budget Review

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the Office of Management and Budget review of information collection.

SUMMARY: The Nuclear Regulatory Commission has recently submitted to the Office of Management and Budget (OMB) for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

1. Type of submission, new, revision, or extension: Extension.

2. The title of the information collection: 10 CFR Part 71—Packaging and Transportation of Radioactive Material.

3. The form number if applicable: Not applicable.

4. How ofter the collection is required: Applications for package certification may be made at any time. Required reports are collected and evaluated on a continuing basis as events occur.

5. Who will be required or asked to report: All NRC specific licensees who place byproduct, source, or special nuclear material into transportation, and all persons who wish to apply for NRC approval of package designs for use in such transportation.

6. An estimate of the number of responses: 725.

7. An estimate of the total number of hours needed to complete the requirement or request: 73,417.

8. An indication of whether section 3504(h), Pub. L. 96-511 applies: Not applicable.

9. *Abstract*: NRC regulations in 10 CFR Part 71 establish requirements for packaging, preparation for shipment, and transportation of licensed material, and prescribe procedures, standards, and requirements for approval by NRC of packaging and shipping procedures for fissile material and for quantities of licensed material in excess of type A quantities.

Copies of the submittal may be inspected or obtained for a fee from the NRC Public Document Room, 1717 H Street, NW., Washington, DC 20555.

Commets and questions should be directed to the OMB reviewer, Jefferson B. Hill, (202) 395-7340.

The NRC Clearance Officer is R. Stephen Scott, (301) 492-8585.

Dated at Bethesda, Maryland, this 6th day of November 1986.

For the Nuclear Regulatory Commission.

Patricia G. Norry,

Director, Office of Administration.

[FR Doc. 86-25657 Filed 11-12-86; 8:45 am]

BILLING CODE 7590-01-M

Documents containing reporting or recordkeeping requirements; Office of Management and Budget review

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the Office of Management and Budget review of information collection.

SUMMARY: The Nuclear Regulatory Commission has recently submitted to the Office of Management and Budget (OMB) for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

1. Type of submission, new, revision, or extension: Extension.

2. The title of the information collection: 10 CFR Part 75 Safeguards on Nuclear Material—Implementation of US/IAEA Agreement.

3. The form number if applicable: Not applicable.

4. How often the collection is required: Installation information is submitted upon written notification from the Commission. Changes are submitted as occurring. Nuclear Material accounting and control information is submitted in accordance with specified instructions.

5. Who will be required or asked to report: All persons licensed by the Commission or Agreement States to posses source or special nuclear material at an installation specified on the U.S. eligible list as determined by the Secretary of State or his designee and filed with the Commission, as well as holders of construction permits and persons who intend to receive source material.

6. An estimate of the number of responses: 63.

7. An estimate of the total number of hours needed to complete the requirement or request: 4,756.

8. An indication of whether section 3504(h), Pub. L. 96-511 applies: Not applicable.

9. *Abstract:* 10 CFR Part 75 establishes a system of nuclear material accounting and control to implement the Agreement between the United States and the International Atomic Energy Agency.

Copies of the submittal may be inspected or obtained for a fee from the NRC Public Document Room, 1717 H Street, NW., Washington, DC 20555.

Comments and questions should be directed to the OMB reviewer, Jefferson B. Hill, (202) 395-7340.

The NRC Clearance Officer is R. Stephen Scott, (301) 492-8585.

Dated at Bethesda, Maryland, this 6th day of November 1986.

For the Nuclear Regulatory Commission.

Patricia G. Norry,

Director, Office of Administration.

[FR Doc. 86-25656 Filed 11-12-86; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-455]

Commonwealth Edison Co., Byron Station, Unit No. 2; Issuance of Facility Operating License

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission or NRC), has issued Facility Operating License No. NPF-60 to Commonwealth Edison Company (the licensee) which authorizes operation of the Byron Station, Unit No. 2 (the facility) at reactor core power levels not in excess of 3411 megawatts thermal in accordance with the provisions of the license, the Technical Specifications and the Environmental Protection Plan with a condition currently limiting operation to five percent of full power (170 megawatts thermal). Authorization to operate beyond five percent of full power will require specific Commission approval.

Byron Station, Unit No. 2 is a pressurized water reactor located in north central Illinois, 2½ miles east of the Rock River, 3 miles south-south-west of the town of Byron, and 17 miles southwest of Rockford, Illinois. The station is within Rockvale Township, Ogle County, Illinois. The license is effective as of the date of issuance.

The application for the License complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. The Commission has made appropriate findings as required by the Act and the Commission's regulations in 10 CFR Chapter I which are set forth in the license. Prior public notice of the overall action involving the proposed issuance of an operating license for the Byron Station was published in the **Federal Register** on December 15, 1978 (43 FR 58659).

The Commission has determined that the issuance of this license will not result in any environmental impacts other than those evaluated in the Final Environmental Statement and the Assessment of the Effect of License Duration on Matters Discussed in the Final Environmental Statement for the Byron Station, Units 1 and 2 (dated April 1982) since the activity authorized by the license is encompassed by the overall action evaluated in the Final Environmental Statement.

For further details with respect to this action, see (1) Facility Operating License No. NPF-60, with Revisions to Technical Specifications (Appendix A); (2) Facility Operating License NPF-37, dated February 14, 1985 with Technical Specifications, Appendix A, NUREG-1113 and the Environmental Protection Plan, Appendix B; (3) the report of the Advisory Committee on Reactor Safeguards, dated March 9, 1982; (4) the Commission's Safety Evaluation Report, dated February 1982 (NUREG-0876), and Supplements 1 through 7; (5) the Final Safety Analysis Report and Amendments thereto; (6) the Environmental Report and supplements thereto; (7) and the Final Environmental Statement, dated April 1982 (NUREG-0848).

These items are available for inspection at the Commission's Public Document Room located at 1717 H Street, NW., Washington, DC 20555 and at the Rockford Public Library, 215 N. Wyman Street, Rockford, Illinois. A copy of Facility Operating License NPF-60 may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of PWR Licensing-A. Copies of the Safety Evaluation Report and Supplements 1 through 7 (NUREG-0876) and the Final Environmental Statement (NUREG-0848) may be purchased at current rates from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20012-7982 or by calling (202) 275-2060 or (202) 275-2171.

Dated at Bethesda, Maryland, this 6th day of November, 1986.

For the Nuclear Regulatory Commission.

Steven A. Varga,

Director, Project Directorate #3 Division of PWR Licensing-A.

[FR Doc. 86-25659 Filed 11-12-86; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-482]

Kansas Gas and Electric Co.; Kansas City Power and Light Co.; Kansas Electric Power Cooperative, Inc.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of a schedular exemption from the requirements of Appendix E to 10 CFR Part 50 to the Kansas Gas and Electric Company, Kansas City Power & Light Company, and Kansas Electric Power Cooperative, Inc. (the licensee), for the Wolf Creek Generating Station located at the licensee's site in Coffey County, Kansas. The exemption was requested by the licensee by letter dated March 20, 1986.

Environmental Assessment

Identification of Proposed Action

The exemption will permit the licensee to defer the 1986 emergency plan exercise for as long as two months to a time period between January 1 and February 28, 1987.

Section IV.F.2 of 10 CFR Part 50, Appendix E, requires that the licensee exercise its emergency plan annually. The Wolf Creek emergency plan was previously exercised in November 1985 with state and local government participation.

The need for this exemption has arisen due to the rescheduling of the Wolf Creek refueling outage from Spring 1987 to October-November 1986 due to operation at a higher than anticipated capacity factor during the plant's first operating cycle.

Key utility personnel who are needed for the planning and conduct of the emergency plan exercise are also significantly involved in the planning and conduct of the refueling outage. Therefore, the licensee has requested a one-time exemption to permit the deferral of the 1986 exercise for up to two months.

The Need for the Proposed Action

The proposed exemption is needed to permit the licensee to complete the rescheduled refueling outage on schedule and return the unit to power operation.

Environmental Impact of the Proposed Action

The proposed exemption is schedular only. It does not involve any change to the emergency organization and plan that are in place at Wolf Creek. Therefore, the proposed exemption does not involve a significant environmental impact.

Alternative to the Proposed Action

Because the staff has concluded that there is no significant impact associated with the proposed exemption, any alternative to the exemption will have either no environmental impact or greater environmental impact.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in connection with the "Final Environmental Statement Related to the Operation of Wolf Creek Generating Station Unit 1," dated June 1982.

Agencies and Persons Consulted

The NRC staff reviewed the licensee's request that supports the proposed exemption. The NRC staff did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption.

Based upon the environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For details with respect to this action, see the request for exemption dated March 20, 1986, which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC, and at the William Allen White Library, Emporia State University, Emporia, Kansas, and at the Washburn University School of Law Library, Topeka, Kansas.

Dated at Bethesda, Maryland, this 6th day of November 1986.

For the Nuclear Regulatory Commission.

B.J. Youngblood,

Director, PWR Project Directorate No. 4, Division of PWR Licensing-A, Office of Nuclear Reactor Regulation.

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Evaluation of Agreement State Radiation Control Programs: Proposed General Statement of Policy

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed revision to general statement of policy.

SUMMARY: The Nuclear Regulatory Commission proposes to revise its general statement of policy, "Guidelines for NRC Review of Agreement State Radiation Control Programs," December 4, 1981. The proposed revision to the Guidelines which was prepared by the NRC staff incorporate minor changes to the introduction, the indicators and the guidelines for acceptable practice by Agreement States. The statement of policy informs the public of the indicators and guidelines which the Commission uses in reviewing Agreement State radiation control programs. The Commission believes that the revisions are needed and is requesting comments on them. The Commission is also requesting comment on the feasibility of developing a set of objective performance indicators for various materials licensees.

DATE: Comments are due on or before January 12, 1987.

ADDRESSES: Written comments may be submitted to the Rules and Procedures Branch, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Comments may also be delivered to Room 4000, Maryland National Bank Building, Bethesda, Maryland from 8:15 a.m. to 5:00 p.m. Monday through Friday. Copies of comments received may be examined at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Donald A. Nussbaumer, Office of State Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-7767.

SUPPLEMENTARY INFORMATION: Section 274 of the Atomic Energy Act of 1954, as amended, (Act) was enacted in 1959 to provide a statutory means by which the NRC (then the AEC) could transfer to the States part of its regulatory authority. The mechanism for the transfer of the Commission's regulatory authority is by an agreement between the Governor of a State and the Commission. Thus far, 28 States have entered into such agreements.[1]

Before entering into an agreement, the NRC is required to make a finding that the State's radiation control program is adequate to protect the public health and safety and is compatible with the Commission's program. Section 274j(1) of the Act requires the NRC to periodically review such agreements and actions taken by the States under the agreements to insure compliance with the provisions of section 274 of the Act. The purpose of the policy statement is to establish the methods and guidelines the Commission will use in

[1] Alabama, Arizona, Arkansas, California, Colorado, Florida Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Washington.

conducting the periodic reviews. Section 274j(1) of the Act also provides that the NRC may terminate an agreement with a State if the Commission finds that such termination is necessary to protect the public health and safety or the State has not complied with one or more of the requirements of section 274. Under section 274j(2) the Commission has the authority to temporarily suspend an agreement under emergency conditions.

Findings of adequacy and compatibility are currently made by the NRC staff following reviews of individual Agreement State programs in accordance with the December 4, 1981 policy statement. Such reviews are conducted on a frequency of 12 to 18 months. The results of each review are discussed with a senior management official, such as the State Health Officer (or designee), and confirmed by letter. Copies of these letters are placed in the NRC Public Document Room. The Commission is also informed of the results of individual Agreement State reviews.

The NRC staff comment letters contain as an enclosure a summary of the policy statement with emphasis on how comments concerning Category I and Category II [2] indicators affect staff findings of adequacy and compatibility. Staff findings of adequacy and compatibility are offered only when there are no significant problems in Category I Indicators. If there are minor Category I Indicator comments or Category II Indicator comments, the State is requested to respond to our comments in these areas.

When one or more significant problems in Category I Indicators are found, the State, in addition to being asked to respond to any comments, is also informed that no findings of adequacy and compatibility will be considered until a response to the comments has been received from the State and evaluated.

Since the December 4, 1981 policy statement was issued this method of implementation has been successful in helping Agreement States maintain their programs in an adequate and compatible manner. From 1981 through 1985, 108 routine reviews of State programs were performed. Full findings of adequacy and compatibility were offered by the staff in 63 cases (58%). In 15 other cases, findings of adequacy were offered by the staff but not a finding of compatibility (because of out-dated regulations) (14%). Withholding of both findings occurred in 30 cases (28%). In most of these 30 cases, State responses to significant Category I comments were found by NRC staff to satisfactorily address NRC concerns and NRC staff findings of adequacy and compatibility were subsequently offered. Follow-up reviews were performed on 5 occasions. In two instances, State actions to address significant Category I comments were undertaken but subsequent NRC reviews disclosed additional steps were still needed to fully resolve Category I problems. In these cases, the States provided additional responses that NRC staff found to be satisfactory. In no case did any Agreement State's program performance cause NRC staff to recommend to the Commission that it institute proceedings to suspend or revoke all or part of an Agreement.

NRC staff meet semi-annually with representatives of the Occupational Safety and Health Administration (OSHA) to review the status of the Agreement State program. This is done because the Occupational Safety and Health Act of 1970 does not apply when Federal agencies and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational radiological safety or health.

While overall implementation of the December 4, 1981 policy statement has been satisfactory in assuring adequate and compatible Agreement State programs, the experience to date has identified some facets of the policy statement that could benefit from undating, clarifying or other minor modifications.

The guideline document contains six major sections, each of which deals with a separate program element. These sections are: Legislation and Regulations, Organization, Management and Administration, Personnel, Licensing, and Compliance. Each program element contains "Indicators" which address specific functions within the program element. One or more recommended "Guidelines" are listed under each "Indicator."

The proposed policy statement revision spells out in somewhat greater detail NRC staff practices in handling findings of reviews, including specifying when staff offerings of adequacy and compatibility may be made and options available to the States and to the NRC staff when review results preclude such offerings. The policy statement revision incorporates staff practices of informing the Commission of the results of reviews of individual Agreement State programs and of placing copies of NRC review letters to the States into the NRC Public Document Room. Consolidated annual reports of all Agreement State review findings in one document are no longer prepared, having been discontinued in 1982.

The policy statement no longer notes Commission interest in establishing a more quantitative basis for measuring the quality and consistency of NRC reviews. No public comments were received on this issue following issuance of the 1981 Policy Statement. In 1983, the National Governors' Association report on the Agreement State program found that "the present NRC guidelines for evaluating Agreement State programs are considered adequate and offer the proper degree of flexibility in reviewing State programs for adequacy and compatibility." NRC staff of the Offices of Nuclear Material Safety and Safeguards, the Office of Inspection and Enforcement and the Office of State Programs exchange considerable information on their respective activities. They have met to discuss the subject of objective measures of performance. The staff has concluded that the indicators and associated review guidelines used in reviewing Agreement State programs are sufficiently objective and are consistent with the objectives the NRC staff uses in appraising its regional material licensing and compliance functions.

As an alternative to establishing objective performance indicators to assess the Agreement State regulatory programs, the Commission has directed the staff, in conjunction with the Agreement States to examine the feasibility of an objective performance indicator system for the various categories of materials licensees regulated by the Agreement States and the NRC. The Commission believes such a system would provide a national data base on overexposures, medical misadministration etc. and would be an

[2] Category I Indicators are those that directly affect public health and safety (e.g., quality of licensing). Category II indicators are those program elements that can lead to Category I problems if not maintained (e.g., staffing level, laboratory support). The distinction between significant and minor Category I problems provides the staff some flexibility when evaluating overall performance within an Indicator program area. For example, "Status of Inspection Program" is a Category I Indicator and contains a guideline for addressing inspection backlogs when they occur. If there is a backlog in high priority inspections and the State has not developed a plan to reduce and monitor the backlog, then the backlog is considered to be a significant problem. If the State has a plan in place to reduce the backlog (with suitable goals and benchmarks) whose progress program management is monitoring, the problem can be characterized as minor. If, in a subsequent review, there was lack of satisfactory progress in reducing the backlog, this would cause the staff to conclude the problem is significant.

indicator of how well the various Agreement States and the NRC are doing their jobs. The Agreement States and the public are invited to express their views on the feasibility of developing a set of objective performance indicators for materials licensees and to provide suggestions of what would constitute suitable indicators.

The proposed policy statement revision permits NRC staff to extend the interval between reviews to approximately 24 months in cases when no significant Category I findings are identified. Since the issuance of the 1981 policy statement, the NRC Agreement State program has been decentralized. State Agreement Representatives are present in NRC Regions I, II, IV and V where 27 of the 28 Agreement States are located. These persons not only conduct the periodic reviews but are in frequent contact with the States in these regions and thus can closely monitor events affecting the Agreement program in the States. The selective extension of review intervals will permit more effective utilization of NRC resources for Agreement State program activities.

The format of the Indicators and Guidelines has been revised to make it easier to print.

Under the Element, Legislation and Regulations, for the Indicator, "Legal Authority," the guideline addressing cases when regulatory authorities are divided between State agencies has been moved to Organization Element under the Indicator, "Location of Radiation Control Program Within State Organization," which is more appropriate.

The Category II Indicator, "Updating of Regulations" has been deleted and the guidelines under it moved to a renamed Category I Indicator, "Status and Compatibility of Regulations," Lack of findings of compatibility have almost always been caused by out-of-date State regulations. Updating of regulations has become a chronic problem for Agreement States, because State resources needed to draft revisions were not always available, because State adoption procedures for regulations have become increasingly complex, and because the model Suggested State Regulations prepared by the Conference of Radiation Control Program Directors, Inc. have not been updated in a timely fashion to reflect revisions to NRC regulations. Confusion has also arisen over the distinctions between the two Indicators and the differences in their categories. The revision combines the two into a single Category I indicator, thus emphasizing the importance of keeping the regulations up to date. A minor change to the reference to 10 CFR Part 20 was made to include the waste manifest rule (10 CFR 20.311) as a compatibility item. A reference to 10 CFR Part 61 has been added to the guideline which highlights specific Parts of NRC regulations to which State regulations should be essentially identical.

Under Management and Administration, for the Indicator, "Administrative Procedures," the guideline has been modified and expanded to make clearer what is being sought with respect to these kinds of procedures. Confusion has arisen between "administraive" procecures and procedures called for in the guidelines in the technical areas of licensing, inspection and enforcement. Under "Management," a new guideline has been added that recommends periodic audits of State regional offices or other State agency offices when these are used in an Agreement State program. A number of Agreement State programs are regional offices or use other State or local government staffs (usually for inspection).

Under "Public Information," the guideline on availability of files to the public has been modified to also note the need for provisions to protect proprietary or clearly personal information from public disclosure. Previously the guidelines only called for handling such information in accordance with State administrative procedures. Some recently enacted State "open records" legislation have in some instances, caused changes to State administrative procedures that weaken or prevent protection of such information from public disclosure. As a result, State radiation control programs may have difficulty in withholding individual personnel radiation exposure records or proprietary information relating to radiation safety when necessary to carry out their statutory responsibilities.

Under the Indicator, "Qualifications of Technical Staff," the guideline has been modified to make clear that it is desirable that the directors of radiation protection programs possess appropriate technical qualifications.

Under the Indicator, "Staffing Level," the guideline containing the value 1.0 to 1.5 person-year per hundred licenses has been modified to make clear that this staff-level guideline excludes professional effort expended for uranium mill, mill tailings and radioactive waste disposal regulation.

Under the Indicator, "Status of Inspection Program," the inspection planning guideline has been modified to also address inspection backlogs. Inspection backlogs constitute the most prevalent problem in Agreement State programs. NRC staff experience has been that when States are asked to develop plans specifically for addressing backlogs, including setting of priorities and benchmarks, progress in controlling this problem is achieved.

Under the Indicator, "Inspection Frequency," modifications have been made to the guideline to make clear that the NRC inspection priority system for materials is the minimum that is acceptable.

Under the Indicator, "Inspection Reports," revisions were made to the guideline to more clearly essential elements the reports should contain.

The Indicator, "Independent Measurements" has been retitled "Confirmatory Measurements." Minor revisions have been made to the guidelines, including addition of "micro-R-meter" to the list of desirable instrumentation.

Guidelines for NRC Review of Agreement State Radiation Control Programs

1986

Prepared by Office of State Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Introduction

Section 274 of the Atomic Energy Act was enacted by the Congress in 1959 to recognize the interests of the States in atomic energy, to clarify the respective responsibilities of State and Federal Governments, and to provide a mechanism for States to enter into formal agreements with the Atomic Energy Commission (AEC), and later the Nuclear Regulatory Commission (NRC), under which the States assume regulatory authority over byproduct, source, and small quantities of special nuclear materials, collectively referred to as agreement materials. The mechanisms by which the NPC discontinues and the States assume regulatory authority over agreement materials is an agreement between the Governor of a State and the Commission. Before entering into an Agreement, the Governor is required to certify that the State has a regulatory program that is adequate to protect the public health and safety. In addition, the Commission must perform an independent evaluation and make a finding that the State's program is adequate from the health and safety standpoint and compatible with the Commission's regulatory program.

Current Guidelines

In 1981, the Commission published a major revision of the guide for review of Agreement State programs (two earlier revisions reflected primarily minor and editorial changes). These Guidelines constitute Commission policy in the form of a document entitled "Guidelines for NRC Review of Agreement State Radiation Control Programs." This document provides guidance for evaluation of operating Agreement State programs based on over 20 years of combined AEC–NRC experience in administering the Agreement State program. In 1985, Commission staff initiated minor updating, clarifying and editorial changes reflecting the experience gained with the 1981 policy statement. The revised document will be used by the NRC in its continuing program of evaluating Agreement State programs.

The "Guidelines" contain six sections, each dealing with one of the essential elements of a radiation control program (PCP) which are: Legislation and Regulations, Organization, Management and Administration, Personnel, Licensing, and Compliance. Each section contains (a) a summary of the general significance of the program elements, (b) indicators which address specific functions within the program element, (c) categories which denote the relative importance of each indicator, and (d) guidelines which delineate specific objectives or operational goals.

Categories of Indicators

The indicators listed in this document cover a wide range or program functions, both technical and administrative. It should be recognized that the indicators, and the guidelines under each indicator, are not of equal importance in terms of the fundamental goal of a radiation control program, i.e. protection of the public health and safety. Therefore, the indicators are categorized in terms of their importance to the fundamental goal of protecting the public health and safety. Two categories are used.

Category I—Direct Bearing on Health and Safety. Category I Indicators are:

- Legal Authority
- Status and Compatibility of Regulations.
- Quality of Emergency Planning.
- Technical Quality of Licensing Actions.
- Adequacy of Product Evaluations.
- Status of Inspection Program.
- Inspection Frequency.
- Inspectors' Performance and Capability.
- Response to Actual and Alleged Incidents.
- Enforcement Procedures.

These indicators address program functions which directly relate to the State's ability to protect the public health and safety. If significant problems exist in one or more Category I indicator areas, then the need for improvements may be critical. Legislation and regulations together form the foundation for the entire program establishing the framework for the licensing and compliance programs. The technical review of license applications is the initial step in the regulatory process. The evaluation of applicant qualifications, facilities, equipment, and procedures by the regulatory agency is essential to assure protection of the public from radiation hazards associated with the proposed activities. Assuring that licensees fulfill the commitments made in their applications and that they observe the requirements set forth in the regulations is the objective of the compliance program. The essential elements of an adequate compliance program are (1) the conduct of onsite inspections of licensee activites, (2) the performance of these inspections by competent staff, and (3) the taking of appropriate enforcement actions. Another very important factor is the ability to plan for, respond effectively to, and investigate radiation incidents.

Category II—Essential Technical and Administrative Support. Category II Indicators are:

- Location of Radiation Control Program within State Organization.
- Internal Organization of Radiation Control Program.
- Legal Assistance.
- Technical Advisory Committees.
- Budget.
- Laboratory Support.
- Administrative Procedures.
- Management.
- Office Equipment and Support Services.
- Public Information.
- Qualifications of Technical Staff.
- Staffing Level.
- Staff Supervision.
- Training.
- Staff Continuity.
- Licensing Procedures.
- Inspection Procedures.
- Inspection Reports.
- Confirmatory Measurements.

These indicators address program functions which provide essential technical and administrative support for the primary program functions. Good performance in meeting the guidelines for these indicators is essential in order to avoid the development of problems in one or more of the principal program areas, i.e. those that fall under Category I indicators. Category II indicators frequently can be used to indentify underlying problems that are causing, or contributing to, difficulties in Category I indicators.

It is the NRC's intention to use these categories in the following manner. In reporting findings to State management, the NRC will indicate the category of each comment made. If no significant Category I comments are provided, this will indicate that the program is adequate to protect the public health and safety and is compatible with the NRC's program. If one or more significant Category I comments are provided, the State will be notified that the program deficiencies may seriously affect the State's ability to protect the public health and safety and that the need of improvement in particular program areas in critical. The NRC would request an immediate response. If, following receipt and evaluation, the State's response appears satisfactory in addressing the significant Category I comments, the staff may offer findings of adequacy and compatibility as appropriate or defer such offering until the State's actions are examined and their effectiveness confirmed in a subsequent review. If additional information is needed to evaluate the State's actions, the staff may request the information through follow-up correspondence or perform a follow-up or special, limited review. NRC staff may hold a special meeting with appropriate State representatives. No significant items will be left unresolved over a prolonged period. The Commission will be informed of the results of the reviews of the individual Agreement State programs and copies of the review correspondence to the States will be placed in the NRC Public Document Room. If the State program does not improve or if additional significant Category I deficiencies have developed, a staff finding that the program is not adequate will be considered and the NRC may institute proceedings to suspend or revoke all or part of the Agreement in accordance with section 274j of the Act.

Category II comments concern functions and activities which support the State program and therefore would not be critical to the State's ability to protect the public. The State will be asked to respond to these comments and the State's actions will be evaluated during the next regular program review.

It should be recognized that the categorization pertains to the

significance of the overall indicator and not to each of the guidelines within that indicator. For example, "Technical Quality of Licensing Actions" is a Category I indicator. The review of license applications for the purpose of evaluating the applicant's qualifications, facilities, equipment, and procedures is essential to assuring that the public health and safety is being protected. One of the guidelines under this indicator concerns prelicensing visits. The need for such visits depends on the nature of the specific case and is a matter of judgment on the part of the licensing staff. The success of a State program in meeting the overall objective of the indicator does not depend on literal adherence to each recommended guidline.

The "Guidelines for NRC Review of Agreement State Radiation Control Programs" will be used by the NRC staff during its onsite reviews of Agreement State programs. Such reviews are conducted at approximately 18 month intervals, or less if deemed necessary. If there are no significant Category I comments, the staff may extend the interval between reviews to approximately 24 months.

In making a finding of adequacy, the NRC considers areas of the State program which are critical to its primary function, i.e., protection of the public health and safety. For example, a State that is not carrying out its inspection program, or fails to respond to significant radiological incidents would not be considered to have a program adequate to protect the public health and safety. Basic radiation protection standards, such as exposure limits, also directly affect the State's ability to protect public health and safety. The NRC feels that it is important to strive for a high degree of uniformity in technical definitions and terminology, particularly as related to units of measurement and radiation dose. Maximum permissible doses and levels of radiation and concentrations of radioactivity in unrestricted areas as specified in 10 CFR Part 20 are considered to be important enough to require States to be essentially equivalent in this area in order to protect public health and safety. Certain procedures, such as those involving the licensing of products containing radioactive material intended for interstate commerce, also require a high degree of uniformity. If no serious performance problems are found in an Agreement State program and if its standards and program procedures are compatible with the NRC program, a finding of adequacy and compatibility is made.

Program Element: Legislation and Regulations

The effectiveness of any State radiation control program (RCP) is dependent upon the underlying authority granted the PCP in State legislation, and implemented in the State regulations. Regulations provide the foundation upon which licensing, inspection, and enforcement decisions are made. Regulations also provide the standards and rules within which the regulated must operate. Periodic revisions are necessary to reflect changing technology, improved knowledge, current recommendations by technical advisory groups, and consistency with NRC regulations. Procedures for providing input to the NRC on proposed changes to NRC regulations are necessary to assure consideration of the State's interests and requirements. The public and, in particular, affected classes of licensees should be granted the opportunity and time to comment on rule changes.

Indicators and Guidelines

Legal Authority (Category I)

- Clear statutory authority should exist, designating a State radiation control agency and providing for promulgation of regulations, licensing, inspection and enforcement.
- States regulating uranium or thorium recovery and associated wastes pursuant to the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) must have statutes enacted to establish clear authority for the State to carry out the requirements of UMTRCA.

Status and Compatibility of Regulations (Category I)

- The State must have regulations essentially identical to 10 CFR Part 19, Part 20 (radiation dose standards, effluent limits, waste manifest rule and certain other parts), Part 61 (technical definitions and requirements, performance objectives, financial assurances) and those required by UMTRCA, as implemented by Part 40.
- The State should adopt other regulations to maintain a high degree of uniformity with NRC regulations.
- For those regulations deemed a matter of compatibility by NRC, State regulations should be amended as soon as practicable but not later than 3 years.
- The RCP has established procedures for effecting appropriate amendments to State regulations in a timely manner, normally within 3 years of adoption by NRC.
- Opportunity should be provided for the public to comment on proposed regulation changes (Required by UMTRCA for uranium mill regulation.)
- Pursuant to the terms of the Agreement, opportunity should be provided for the NRC to comment on draft changes in State regulations.

Program Element: Organization

The effectiveness of any State RCP may be dependent upon its location within the overall State organizational structure. The RCP should be in a position to compete effectively with other health and safety programs for budget and staff. Program management must have access to individuals or groups which establish health and safety program priorities. The RCP should be organized to achieve a high degree of efficiency in supervision, work functions, and communications.

Indicators and Guidelines

Location of Radiation Control Program Within State Organization (Category II)

- The RCP should be located in a State organization parallel with comparable health and safety programs. The Program Director should have access to appropriate levels of State management.
- Where regulatory responsibilities are divided between State agencies, clear understandings should exist as to division of responsibilities and requirements for coordination.

Interal Organization of Radiation Control Program (Category II)

- The RCP should be organized with the view toward achieving an acceptable degree of staff efficiency, place appropriate emphasis on major program functions, and provide specific lines of supervision from program management for the execution of program policy.
- Where regional offices or other government agencies are utilized, the lines of communication and administrative control between these offices and the central office (Program Director) should be clearly drawn to provide uniformity in licensing and inspection policies, procedures and supervision.

Legal Assistance (Category II)

- Legal staff should be assigned to assist the RCP or procedures should exist to obtain legal assistance expeditiously. Legal staff should be knowledgeable regarding the RCP program, statutes, and regulations.

Technical Advisory Committees (Category II)

• Technical Committees, Federal Agencies, and other resource organizations should be used to extend staff capabilities for unique or technically complex problems.

• A State Medical Advisory Committee should be used to provide broad guidance on the uses of radioactive drugs in or on humans. The Committee should represent a wide spectrum of medical disciplines. The Committee should advise the RCP on policy matters and regulations related to use of radioisotopes in or on humans.

• Procedures should be developed to avoid conflict of interest, even though Committees are advisory. This does not mean that representatives of the regulated community should not serve on advisory committees or not be used as consultants.

Program Element: Management and Administration

State RCP management must be able to meet program goals through strong, direct leadership at all levels of supervision. Administrative procedures are necessary to assure uniform and appropriate treatment of all regulated parties. Procedures for receiving information on radiological incidents, emergency response, and providing information to the public are necessary. Procedures to provide feedback to supervision on status and activities of the RCP are necessary. Adequate facilities, equipment and support services are needed for optimum utilization of personnel resources. Laboratory support services should be administered by the RCP or be readily available through established administrative procedures.

In order to meet program goals, a State RCP must have adequate budgetary support. The total RCP budget must provide adequate funds for salaries, travel costs associated with the compliance program, laboratory and survey instrumentation and other equipment, and other administrative costs. The program budget must reflect annual changes in the number and complexity of applications and licenses, and the increase in cost due to normal inflation.

Indicators and Guidelines

Quality of Emergency Planning (Category I)

• The State RCP should have a written plan for response to such incidents as spills, overexposures, transportation accidents, fire or explosion, theft, etc.

• The Plan should define the responsibilities and actions to be taken by State agencies. The Plan should be specific as to persons responsible for initiating response actions, conducting operations and cleanup.

• Emergency communication procedures should be adequately established with appropriate local, county and State agencies. Plans should be distributed to appropriate persons and agencies. NRC should be provided the opportunity to coment on the Plan while in draft form.

• The plan should be reviewed annually by Program staff for adequacy and to determine that content is current. Periodic drills should be performed to test the plan.

Budget (Category II)

• Operating funds should be sufficient to support program needs such as staff travel necessary to the conduct of an effective compliance program, including routine inspections, followup or special inspections (including pre-licensing visits) and responses to incidents and other emergencies, instrumentation and other responses to incidents and other emergencies, instrumentation and other equipment to support the RCP, administrative costs in operating the program including rental charges, printing costs, laboratory services, computer and/or word processing support, preparation of correspondence office equipment, hearing costs, etc. as appropriate.

• Principal operating funds should be from sources which provide continuity and reliability, i.e., general tax, license fees, etc. Supplemental funds may be obtained through contracts, cash grants, etc.

Laboratory Support (Category II)

• The RCP should have laboratory support capability inhouse, or readily available through established procedures, to conduct bioassays, analyze environmental samples, analyze samples collected by inspectors, etc. on a priority established by the RCP.

Administrative Procedures (Category II)

• The RCP should establish written internal policy and administrative procedures to assure that program functions are carried out as required and to provide a high degree of uniformity and continuity in regulatory practices. These procedures should address internal processing of license applications, inspection policies, decommissioning and license termination, fee collection, contacts with communication media, conflict of interest policies for employees, exchange-of-information and other functions required of the program. Administrative procedures are in addition to the technical procedures utilized in licensing, and inspection and enforcement.

Management (Category II)

• Program management should receive periodic reports from the staff on the status of regulatory actions (backlogs, problem cases, inquiries, regulation revisions).

• RCP management should periodically assess workload trends, resources and changes in legislative and regulatory responsibilities to forecast needs for increased staff, equipment, services and fundings.

• Program management should perform periodic reviews of selected license cases handled by each reviewer and document the results. Complex licenses (major manufacturers, large scope-Type A Broad, potential for significant releases to environment) should receive second party review (supervisory, committee, consultant). Supervisory review of inspections, reports and enforcement actions should also be performed.

• When regional offices or other government agencies are utilized, program management should conduct periodic audits of these offices.

Office Equipment and Support Services (Category II)

• The RCP should have adequate secretarial and clerical support. Automatic typing and Automatic Data Processing and retrieval capability should be available to larger (greater than 300–400 licenses) programs. Similar services should be available to regional offices, if utilized.

• Professional staff should not be sued for fee collection and other clerical duties.

Public Information (Category II)

• Inspection and licensing files should be available to the public consistent with State administrative procedures. It is desirable, however, that there be provisions for protecting from public disclosure proprietary information and information of a clearly personal nature.

• Opportunity for public hearings should be provided in accordance with UMTRCA and applicable State administrative procedure laws.

Program Element: Personnel

The RCP must be staffed with a sufficient number of trained personnel. The evaluation of license applications and the conduct of inspections require

staff with in-depth training and experience in radiation protection and related subjects. The staff must be adequate in number to assure licensing, inspection, and enforcement actions of appropriate quality to assure protection of the public health and safety. Periodic training of existng staff is necessary to maintain capabilities in a rapidly changing technological environment. Program management personnel must be qualified to exercise adequate supervision in all aspects of a State radiation control program.

Indicators and Guidelines

Qualifications of Technical Staff (Category II)

• Professional staff should have bachelor's degree or equivalent training in the physical and/or life sciences. Additional training and experience in radiation protection for senior personnel including the director of the radiation protection program should be commensurate with the type of licenses issued and inspected by the State.

• Written job descriptions should be prepared so that professional qualifications needed to fill vacancies can be readily identified.

Staffing Level (Category II)

• Professional staffing level should be approximately 1–1.5 person-year per 100 licenses in effects. RCP must not have less than two professionals available with training and experience to operate RCP in a way which provides continuous coverage and continuity.

• For States regulating uranium mills and mill tailings, current indications are that 2–2.75 professional person-years' of effort, including consultants, are needed to process a new mill license (including in situ mills) or major renewal, to meet requirements of Uranium Mill Tailings Radiation Control Act of 1978. This effort must include expertise in radiological matters, hydrology, geology, and structural engineering.[1]

Staff Supervision (Category II)

• Supervisory personnel should be adequate to provide guidance and review the work of senior and junior personnel.

• Senior personnel should review applications and inspect licenses independently, monitor work of junior personnel, and participate in the establishment of policy.

• Junior personnel should be initially limited to reviewing license applications and inspecting small programs under close supervision.

Training (Category II)

• Senior personnel should have attended NRC core courses in licensing orientation, inspection procedures, medical practices and industrial radiography practices. (For mill States, mill training should also be included.)

• The RCP should have a program to utilize specific short courses and workshops to maintain appropriate level of staff technical competence in areas of changing technology.

Staff Continuity (Category II)

• Staff turnover should be minimized by combinations of opportunities for training, promotions, and competitive salaries.

• Salary levels should be adequate to recruit and retain persons of appropriate professional qualifications. Salaries should be comparable to similar employment in the geographical area.

• The RCP organization structure should be such that staff turnover is minimized and program continuity maintained through opportunities for promotion. Promotion opportunities should exist from junior level to senior level or supervisory positions. There also should be opportunity for periodic increases compatible with experience and responsibility.

Program Element: Licensing

It is necessary in licensing byproduct, source, and special nuclear materials that the State regulatory agency obtain information about the proposed use of nuclear materials, facilities and equipment, training and experience of personnel, and operating procedures appropriate for determining that the applicant can operate safely and in compliance with the regulations and license conditions. An acceptable licensing program includes: preparation and use of internal licensing guides and policy memoranda to assure technical quality in the licensing program (when appropriate, such as in small programs, NRC Guides may be used); prelicensing inspection of complex facilities; and the implementation of administrative procedures to assure documentation and maintenance of adequate files and records.

Indicators and Guidelines

Technical Quality of Licensing Actions (Category I)

• The RCP should assure the essential elements of applications have been submitted to the agency, and that these elements meet current regulatory guidance for describing the isotopes and quantities to be used, qualifications of persons who will use material, facilities and equipment, and operating and emergency procedures sufficient to establish the basis for licensing actions.

• Prelicensing visits should be made for complex and major licensing actions.

• Licenses should be clear, complete, and accurate as to isotopes, forms, quantities, authorized uses, and permissive or restrictive conditions.

• The RCP should have procedures for reviewing licenses prior to renewal to assure that supporting information in the file reflects the current scope of the licensed program.

Adequacy of Product Evaluations (Category I)

• RCP evaluations of manufacturer's or distributor's data on sealed sources and devices outlined in NRC, State of appropriate ANSI Guides, should be sufficient to assure integrity and safety for users.

• The RCP should review manufacturer's information in labels and brochures relating to radiation health and safety, assay, and calibration procedures for adequacy.

• Approval documents for sealed source or device designs should be clear, complete and accurate as to isotopes, forms, quantities, uses, drawing identifications, and permissive or restrictive conditions.

Licensing Procedures (Category II)

• The RCP should have internal licensing guides, checklists, and policy memoranda consistent with current NRC practice.

• License applicants (including applicants for renewals) should be furnished copies of applicable guides and regulatory positions.

• The present compliance status of licensees should be considered in licensing actions.

• Under the NRC Exchange-of-Information program, evaluation sheets, service licenses, and licenses authorizing distribution to general licensees should be submitted to NRC on a timely basis.

• Standard license conditions comparable with current NRC standard license conditions should be used to expedite and provide uniformity in the licensing process.

• Files should be maintained in an orderly fashion to allow fast, accurate retrieval of information and documentation of discussions and visits.

[1] Additional guidance is provided in the Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement (46 FR 7540, 36969 and 48 FR 33376).

Program Element: Compliance

Periodic inspections of licensed operations are essential to assure that activities are being conducted in compliance with regulatory requirements and consistent with good safety practices. The frequency of inspections depends on the amount and the kind of material, the type of operation licensed, and the results of previous inspections. The capability of maintaining and retrieving statistical data on the status of the compliance program is necessary. The regulatory agency must have the necessary legal authority for prompt enforcement of its regulations. This may include, as appropriate, administrative remedies, orders requiring corrective action, suspension or revocation of licenses, the impounding of materials, and the imposing of civil and criminal penalties.

Indicators and Guidelines

Status of Inspection Program (Category I)

- State RCP should maintain an inspection program adequate to assess licensee compliance with State regulations and license conditions.
- The RCP should maintain statistics which are adequate to permit Program Management to assess the status of the inspection program on a periodic basis information showing the number of inspections conducted, the number overdue, the length of time overdue and the priority categories should be readily available.
- At least semiannual inspection planning for number of inspections to be performed, assignments to senior vs. junior staff, assignments to regions, identification of special needs and periodic status reports. When backlogs occur, the program should develop and implement a plan to reduce the backlog. The plan should identify priorities for inspections and establish target dates and milestones for assessing progress.

Inspection Frequency (Category I)

- The RCP should establish an inspection priority system. The specific frequency of inspections should be based upon the potential hazards of licensed operations, e.g., major processors, and industrial radiographers should be inspected approximately annually-smaller or less hazardous operations may be inspected less frequently. The minimum inspection frequency including for initial inspections should be no less than the NRC system.

Inspectors' Performance and Capability (Category I)

- Inspectors should be competent to evaluate health and safety problems and to determine compliance with State regulations. Inspectors must demonstrate to supervision an understanding of regulations, inspection guides, and policies prior to independently conducting inspections.
- The compliance supervisor (may be RCP manager) should conduct annual field evaluations of each inspector to assess performance and assure application of appropriations and consistent policies and guides.

Response to Actual and Alleged Incidents (Category I)

- Inquiries should be promptly made to evaluate the need for onsite investigations.
- Onsite investigations should be promptly made of incidents requiring reporting to the Agency in less than 30 days. (10 CFR 20.403 types).
- For these incidents not requiring reporting to the Agency in less than 30 days, investigations should be made during the next scheduled inspection.
- Onsite investigations should be promptly made of non-reportable incidents which may be of significant public interest and concern, e.g., transportation accidents.
- Investigations should include indepth reviews of circumstances and should be completed on a high priority basis. When appropriate, investigations should include reenactments and time-study measurements (normally within a few days). Investigation (or inspection) results should be documented and enforcement action taken when appropriate.
- State licensees and the NRC should be notified of pertinent information about any incident which could be relevant to other licensed operations (e.g., equipment failure, improper operating procedures).
- Information on incidents involving failure of equipment should be provided to the agency responsible for evaluation of the device for an assessment of possible generic design deficiency.
- The RCP should have access to medical consultants when needed to diagnose or treat radiation injuries. The RCP should use other technical consultants for special problems when needed.

Enforcement Procedures (Category I)

- Enforcement Procedures should be sufficient to provide a substantial deterrent to licensee noncompliance with regulatory requirements. Provisions for the levying of monetary penalties are recommended
- Enforcement letters should be issued within 30 days following inspections and should employ appropriate regulatory language clearly specifying all items of noncompliance and health and safety matters identified during the inspection and referencing the appropriate regulation or license condition being violated.
- Enforcement letters should specify the time period for the licensee to respond indicating corrective actions and actions taken to prevent re-occurrence (normally 20–30 days). The inspector and compliance supervisor should review licensee reponses.
- Licensee responses to enforcement letters should be promptly acknowledged as to adequacy and resolution of previously unresolved items.
- Written procedures should exist for handling escalated enforcement cases of varying degrees.
- Impounding of material should be in accordance with State administrative procedures.
- Opportunity for hearings should be provided to assure impartial administration of the radiation control program.

Inspection Procedures (Category II)

- Inspection guides consistent with current NRC guidance, should be used by inspectors to assure uniform and complete inspection practices and provide technical guidance in the inspection of licensed programs. NRC Guides may be used if properly supplemented by policy memoranda, agency interpretations, etc.
- Written inspection policies should be issued to establish a policy for conducting unannounced inspections, obtaining corrective action, following up and closing out previous violations, interviewing workers and observing operations, assuring exit interviews with management, and issuing appropriate notification of violations of health and safety problems.
- Procedures should be established for maintaining licensees' compliance histories.
- Oral briefing of supervisors or the senior inspector should be performed upon return from nonroutine inspections.
- For States with separate licensing and inspection staffs procedures should be established for feedback of information to license reviewers.

Inspection Reports (Category II)

• Findings of inspections should be documented in a report describing the scope of inspections, substantiating all items of noncompliance and health and safety matters, describing the scope of licenses' programs, and indicating the substance of discussions with licensee management and licensee's response.

• Reports should uniformly and adequately document the result of inspections including confirmatory measurements, status of previous noncompliance and identify areas of the licensee's program which should receive special attention at the next inspection. Reports should show the status of previous noncompliance and the results of confirmatory measurements by the inspector.

Confirmatory Measurements (Category II)

• Confirmatory measurements should be sufficient in number and type to ensure the licensee's control of materials and to validate the licensee's measurements.

• RCP instrumentation should be adequate for surveying license operations (e.g., survey meters, air samples, lab counting equipment for smears, identification of isotopes, etc).

• RCP instrumentation should include the following types: GM Survey Meter, 0–50 mr/hr; Ion Chamber Survey Meter, several r/hr; micro-R-Survey meter; Neutron Survey Meter, Fast and Thermal; Alpha Survey Meter, 0–1000,000 c/m; Air Samplers, Hi and Lo Volume; Lab Counters, Detect 0.001 uc/wipe; Velometers; Smoke Tubes; Lapel Air samplers.

• Instrument calibration services or facilities should be readily available and appropriate for instrumentation used. Licensee equipment and facilities should not be used unless under a service contract. Exceptions for other State Agencies, e.g., a State University, may be made.

• Agency instruments used for surveys and confirmatory measurements should be calibrated within the same time interval as required of the licensee being inspected.

Dated at Washington, DC this 6th day of November 1986.

For the Nuclear Regulatory Commission,

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 86–25655 Filed 11–12–86; 8:45 am]

BILLING CODE 7590-01-M

PEACE CORPS

Agency Information Collection Activities Under OMB Review

ACTION: Notification of revision and extension request of Peace Corps' form PC 1502, volunteer application form.

SUMMARY: The information collection form described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Peace Corps is requesting approval of proposed revisions relating to legal, security, and medical requirements, and a three-year extension for using the form.

SUPPLEMENTARY INFORMATION: The form is completed voluntarily by applicants for the Peace Corps program and it provides basic information concerning background, education, qualifications, language skills, preference, etc. This information is necessary for Peace Corps staff to perform the initial screening between qualified and unqualified candidates, for selection from among the qualified, and finally for proper placement of the potential volunteers in suitable programs and settings.

Title and Agency Number: Peace Corps Volunteer Application, Form Number PC–1502.

Office: Volunteer Recruitment and Selection.

Frequency of Collection: On occasion.

General Description of Respondents: Individuals applying for Peace Corps Service.

Estimated Number of Respondents: 14,000 annually.

Estimated Hours for Respondents To Furnish Information: One hour each.

Respondents Obligation To Reply: Voluntary.

Comments: Interested persons are invited to submit comments regarding this form by name. These comments should be sent to Francine Picoult, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Room 3235, Washington, DC 20503. Comments or a notification of intent to comment should be received on or before November 28, 1986.

FOR FURTHER INFORMATION CONTACT: James Duke, Management Analyst, Office of Volunteer Recruitment and Selection, Peace Corps, 806 Connecticut Avenue, NW., Room M–900, Washington, DC 20526, telephone (202) 254–8387.

This is not a proposal to which 44 U.S.C. 3504(h) applies.

This notice is issued in Washington, DC on November 6, 1986.

Linda Rae Gregory,

Associate Director for Management.

[FR Doc. 86–25514 Filed 11–12–86; 8:45 am

BILLING CODE 6051-0-M

OFFICE OF PERSONNEL MANAGEMENT

Proposed Information Collection Submitted to OMB for Clearance

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, Chapter 35), this notice announces a proposed information collection from the public that was submitted to OMB for clearance. RI 34–1, Financial Resources Questionnaire, will be used by the Office of Personnel Management to ascertain the ability of individuals to reimburse the Government as a result of overpayments made from the Civil Service Retirement and Disability Fund. For copies of this proposal call James M. Farron, Agency Clearance Officer, on (202) 632–7714.

DATE: Comments on this proposal should be received within 10 working days from the date of this publication.

ADDRESSES: Send or deliver comments to:

James M. Farron, Agency Clearance Officer, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6410, Washington, DC 20415

and

Katie Lewin, Information Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3235, New Executive Office Building, NW., Washington, DC 20503

FOR FURTHER INFORMATION CONTACT: James L. Bryson, (202) 632–5472.

U.S. Office of Personnel Management.

Constance Horner,

Director.

[FR Doc. 86–25660 Filed 11–12–86; 8:45 am]

BILLING CODE 6325-01-M

Proposed Extention of RI Form 20–56

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice

announces a proposed extension of information collection from the public. RI Form 20-56, Addendum to OPM Form 1496A, Application for Deferred Annuity (for persons separated on or after October 1, 1956), was developed by the Office of Personnel Management for use by former Federal employees in applying for deferred annuities as established under 5 U.S.C. 8338. For copies of this proposal call James M. Farron, Agency Clearance Office, on (202) 632-7714.

DATE: Comments on this proposal should be received on or before November 24, 1986.

ADDRESSES: Send or deliver comments to:

James M. Farron, Agency Clearance Officer, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6410, Washington, DC 20415

and

Katie Lewin, Information Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3235, New Executive Office Building, NW., Washington, DC 20503

FOR FURTHER INFORMATION CONTACT: James L. Bryson, (202) 632-5472.

U.S. Office of Personnel Management.

Constance Horner,

Director.

[FR Doc. 86-25661 Filed 11-12-86; 8:45 am]

BILLING CODE 6325-01-M

POSTAL SERVICE

Privacy Act of 1974, System of Records

AGENCY: Postal Service.

ACTION: Advance Notice of Proposed Routine Use and Final Notice of Minor Change to Purpose section.

SUMMARY: The purposes of this document are to propose the addition of a routine use and to modify the statement of purpose to existing Postal Service system of records USPS 200.030.

EFFECTIVE DATE: Comments on Part 1 must be received on or before December 15, 1986. Part 2 is effective November 13, 1986.

ADDRESS: Comments on this proposed system change may be mailed to the Records Officer, U.S. Postal Service, 475 L' Enfant Plaza, SW., Washington, DC 20260-5010 or delivered to Room 8121 at the above address between 8:15 a.m. and 4:45 p.m. Comments received may also be inspected during the above hours in Room 8121.

FOR FURTHER INFORMATION CONTACT: Rubenia Carter (202-268-4872).

SUPPLEMENTARY INFORMATION: (1) The Postal Service proposes to add an additional routine use to system USPS 200.030, Non-Mail Monetary Claims—Tort Claims Records. The proposal does not reflect a change in the disclosure of information from this system, but rather more accurately describes the Postal Service's practice of releasing information to independent contractors from this system for the purpose of obtaining professional medical assistance and any other required assistance when needed in connection with matters involving a claim filed against the Postal Service. This proposal would apply to the extent that relevant records maintained in system USPS 200.030 would be released to independent contractors, retained by the Postal Service, for the purpose of either examining claimants to determine if claimed injuries relate to Postal Service accidents or for the purpose of obtaining the opinion of expert witnesses. This routine use would also allow for the disclosure of pertinent records to independent contractors for the purpose of analyzing bills, hospital transcripts, medical reports, accident reports, investigative reports, witness statements or any other information contained in a file in order to provide the Postal Service with opinions and advice as to whether injuries claimed relate to the accidents involved, whether the related bills are consistent with acceptable medical services and to provide the Postal Service with other opinions and conclusions for purposes of determining appropriate action. The proposed new routine use is necessary to assure that Postal Service application of the Privacy Act of 1974, Pub. L. 93-579, is accommodated with the obligations of the Postal Service to settle and defend against tort claims made against the Postal Service under the Federal Tort Claims Act.

A complete statement of the existence and character of system USPS 200.030 appeared in the **Federal Register** on March 15, 1983, 48 FR 10998. As required by 5 U.S.C. 552a(e)(11), interested persons are invited to submit comments on this proposal. Final notice regarding the proposed use will be given after the time for public comment has elapsed. The proposed routine use follows:

"11. May be disclosed to independent contractors retained by the Postal Service to provide advice in connection with the settlement or defense of claims filed against USPS."

(2) The Postal Service has decided to rewrite the Purpose section to system USPS 200.030. This rewrite does not reflect changes in the operations or functions of the system. The second sentence of the Purpose section as written makes reference to an external disclosure that has been properly reported in Routine Use 5 of this system. Therefore to more accurately describe the Purpose of maintaining records in this sytem, the second sentence has been deleted as noted below. The following constitutes final notice of this change:

Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

Change to Read: Purpose—"Used by attorneys and other employees of the Postal Service to consider, settle and defend against tort claims made against the USPS under the Federal Tort Claims Act."

Fred Eggleton,

Assistant General Counsel Legislative Division.

[FR Doc. 86-25542 Filed 11-12-86; 8:45 am]

BILLING CODE 7710-12-M

Privacy Act of 1974; Systems of Records

AGENCY: Postal Service.

ACTION: Advance and final notices of records systems changes.

SUMMARY: The purpose of this document is to provide information for public comment concerning the Postal Service's proposal to add two new routine uses to system USPS 050.020, Finance Records—Payroll System, and to publish final notice of an editorial revision to two existing routine uses to that system.

DATE: Any interested party may submit written comments on Part 2 of this notice regarding the proposed new routine uses. Comments must be received on or before December 15, 1986. Part 1 is effective November 13, 1986.

ADDRESS: Comments may be mailed to Records Officer, U.S. Postal Service, 475 L' Enfant Plaza, SW., Washington, DC 20260-5010, or delivered to Room 8121 at that address between 8:15 a.m. and 4:45 p.m. where they will be available for inspection during those hours.

FOR FURTHER INFORMATION CONTACT: Betty E. Sheriff, Records Office (202) 268-5158.

SUPPLEMENTARY INFORMATION: The Postal Service hereby publishes final and advance notice of certain changes to its system USPS 050.020—Finance Records—Payroll System, as follows:

Part 1 makes an editorial revision to existing routine use Nos. 26 and 28; and Part 2 proposes two new routine uses permitting the discretionary disclosure of data from this system to (a) agencies having child support enforcement responsibilities for the purpose of locating absent parents; and (b) the Department of Defense for the purpose of identifying employees who are subject to dual compensation restrictions.

PART 1—Final Notice—Editorial Revision to Routine Uses

The Postal Service published on September 24, 1984, (49 FR 37487) and on July 16, 1985, (50 FR 28862) final notice of routine use Nos. 26 and 28, respectively, in connection with its plans to disclose certain employee information from system USPS 050.020 for computer matching operations conducted either by the Postal Service or by requesting Federal agencies or non-Federal entities. The Postal Service has determined that it is necessary to make an editorial revision to these routine uses. The revision reflects no change in the operation or function of the described system, but merely makes clear that uses are intended to permit the Postal Service to act either as the matching agency or as the source agency in connection with authorized computer matching programs. The following constitutes final notice of the revision.

USPS 050.020

System name: Finance Records—Payroll System.

Routine uses of records maintained in this system, including categories of users and the purposes of such uses:

* * * * *

26. Disclosure of information about current or former postal employees may be made to requesting states under approved computer matching efforts in which either the Postal Service or the requesting State acts as the matching agency, but limited to only those data elements considered relevant to making a determination of employee participation in and eligibility under unemployment insurance programs administered by the States (and by those States to local governments); to improve program integrity; and to collect debts and overpayments owed to those governments and their components.

28. Disclosure of information about current or former postal employees may be made to requesting Federal agencies or non-Federal entities under approved computer matching efforts in which either the Postal Service or the requesting entity acts as the matching agency, but limited to only those data elements considered relevant to making a determination of employee participation in and eligibility under particular benefit programs administered by those agencies or entities or by the Postal Service; to improve program integrity; and to collect debts and overpayments owed under those programs.

* * * * *

PART 2—Proposed New Routine Uses

The Postal Service has received a number of requests for its participation in computer matching programs to be conducted for the purpose of locating absent parents who owe child support obligations. The requesting agencies are charged with the responsibility of establishing, enforcing, and administering child support obligations; seeking enforcement of child support orders; and collecting child support owed to public assistance programs as a result of benefits paid to dependents. To avoid needless burden and delays in the processing of these requests, the Postal Service has determined it appropriate to establish a general routine use to permit disclosure to these agencies whose program management purpose is the same. Accordingly, proposed routine use 32 permits the disclosure of limited information to these agencies for the purpose of locating absent parents against whom they are enforcing or seeking to enforce a child support obligation and to take the appropriate administrative or legal action to secure support from the delinquent absent parent.

Proposed routine use No. 33 will permit the Postal Service to furnish information about its current and former employees to the Department of Defense (DOD) for the purpose of identifying employees who are subject to dual compensation restrictions. The Dual Compensation Act, Pub. L. No. 88–448, section 201, 78 Stat. 484 (1964) (codified as amended at 5 U.S.C. 5532 (1982)), requires certain reductions in the retired pay of former members of the military who hold civilian positions in the Government. The match will identify retired military postal employees whose dual compensation exceeds that permitted by law. DOD will take administrative action to adjust pay, collect overpayment or take other appropriate action.

The above described matches will be conducted in accordance with the Office of Management and Budget's Revised Supplemental Guidelines for Conducting Matching Programs (47 FR 21656, May 19, 1982). The Postal Service will obtain a signed agreement from the requesting agency specifying that the information disclosed by the Postal Service will be used for purposes of the computer match and for no other purposes and specifying that the information will be safeguarded against unauthorized disclosure. Disclosure of information will be limited to only that necessary to make a thorough analysis for determining the employee's status for purposes of the matching program. The Postal Service retains the authority under each proposed routine use to withhold specific data elements if it is believed that those elements are not germane to the purpose of such analysis. The mere existence of an individual's match between the requesting agency's file and the Postal Service's Payroll System file will not of itself, or without the individual's prior opportunity to respond, be the cause of any benefit reduction or legal collection action.

Disclosure under the proposed routine uses is compatible with the Postal Service's personnel management responsibility for oversight of its employees' conduct, particularly with regard to the requirement that employees comport themselves in a proper manner and not obtain financial benefits in a fraudulent manner.

System USPS 050.020 last appeared on August 13, 1986, in 51 FR 29028. Accordingly, it is proposed to add new routine uses 32 and 33 as follows:

* * * * *

"32. Disclosure of information about current or former postal employees may be made to requesting Federal agencies or non-Federal entities under approved computer matching efforts in which either the Postal Service or the requesting entity acts as the matching agency, but limited to only those data elements considered relevant to identifying those employees who are absent parents owing child support obligations and to collecting debts owed as a result thereof.

"33. Disclosure of information about current or former postal employees may be made on a semi-annual basis to the Department of Defense (DOD) under approved computer matching efforts in which either the Postal Service or DOD acts as the matching agency, but limited to only those data elements considered relevant to identifying retired military employees who are subject to restrictions under the Dual Compensation Act as amended (5 U.S.C. 5532), and for taking subsequent actions to reduce military retired pay or collect

debts and overpayments, as appropriate."

* * * * *

Fred Eggleston,

Assistant General Counsel Legislative Division.

[FR Doc. 86-25543 Filed 11-12-86; 8:45 am]

BILLING CODE 7710-12-M

THE PRESIDENT'S COMMISSION ON WHITE HOUSE FELLOWSHIPS

Extension of Deadline for Accepting Applications

November 7, 1986.

AGENCY: President's Commission on White House Fellowships.

ACTION: Notice.

SUMMARY: The President's Commission on White House Fellowships has extended the deadline for applications for White House Fellowships from November 15, 1986, to December 15, 1986.

DATE: The closing date for applications for White House Fellowships is December 15, 1986.

FOR FURTHER INFORMATION CONTACT: President's Commission on White House Fellowships, 712 Jackson Place, NW., Washington, DC 20503, (202) 395-4522.

Dated: November 7, 1986.

Linda L. Tarr,

Director, President's Commission on White House Fellowships.

[FR Doc. 86-25651 Filed 11-12-86; 8:45 am]

BILLING CODE 6325-01-M

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

White House Science Council (WHSC); Meeting

The White House Science Council, the purpose of which is to advise the Director, Office of Science and Technology Policy (OSTP), will meet on November 20 and 21, 1986 in Room 5104, New Executive Office Building, Washington, DC. The meeting will begin at 6:00 p.m. on November 20, recess and reconvene at 8:00 a.m. on November 21. Following is the proposed agenda for the meeting:

(1) Briefing of the Council, by the Assistant Directors of OSTP, on the current activities of OSTP.

(2) Briefing of the Council by OSTP personnel and personnel of other agencies on proposed, ongoing, and completed panel studies.

(3) Discussion of composition of panels to conduct studies.

The November 20 session and a portion of the November 21 session will be closed to the public.

The briefing on some of the current activities of OSTP necessarily will involve discussion of material that is formally classified in the interest of national defense or for foreign policy reasons. This is also true for a portion of the briefing on panel studies. As well, a portion of both of these briefings will require discussion of internal personnel procedures of the Executive Office of the President and information which, if prematurely disclosed, would significantly frustrate the implementation of decisions made requiring agency action. These portions of the meeting will be closed to the public pursuant to 5 U.S.C. 552b(c) (1), (2), and 9(B).

A portion of the discussion of panel composition will necessitate the disclosure of informaton of a personal nature, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Accordingly, this portion of the meeting will also be closed to the public, pursuant to 5 U.S.C. 552b(c)(6).

Because of the security in the New Executive Office Building, persons wishing to attend the open portion of the meeting should contact Annie L. Boyd, Secretary, White House Science Council at (202) 456-7740, prior to 3:00 p.m. on November 19. Ms. Boyd is also available to provide specific information regarding time, place and agenda for the open session.

Jerry D. Jennings,

Executive Director, Office of Science and Technology Policy.

October 22, 1986.

[FR Doc. 86-25721 Filed 11-12-86; 8:45 am]

BILLING CODE 3170-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-23768; File Nos. SR-Amex-85-1; SR-NYSE-85-25]

Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc. and American Stock Exchange, Inc. to Amend the Exchanges' Rules Relating to Approved Persons of Specialists

I. Introduction and Summary

The American ("Amex") and New York ("NYSE") Stock Exchanges have proposed to amend their rules to ease restrictions imposed on approved persons [1] or member organizations [2] affiliated with specialists or specialist units in order to facilitate entry into the specialist business by retail broker-dealers, among others.

No Amex or NYSE rules prohibit a retail broker-dealer from owning or controlling a specialist unit on an exchange; however, relatively few retail member firms on the Amex or the NYSE are affiliated with specialist units [3] because any activities that an approved person might have in specialty securities would be subject to the restrictions that these Exchanges place on specialists. Currently, the Amex and NYSE prohibit approved persons affiliated with specialists from, among other things: (1) Trading specialty securities, (2) trading options on specialty securities (other than for hedging purposes), (3) accepting orders in specialty securities from institutions, the issuer, and its insiders, (4) performing research and advisory

[1] In general, the term "approved person" refers to a person who is not a member of the exchange but controls a member organization, or is engaged in the securities business and is either controlled by or under common control with a member organization.

[2] The NYSE proposal eases restrictions on approved persons, the Amex proposal eases restrictions on approved persons and member organizations. The NYSE, however, interprets its definition of approved person to encompass member organizations. Therefore, throughout this Release, the discussion is intended to implicitly recognize that member organizations are encompassed by the Amex and NYSE proposals.

[3] Drexel Burnham Lambert, Inc. ("Drexel") and Bear, Stearns & Co. ("Bear Stearns") are the two retail trading firms that are affiliated with specialist units on the Amex floor. Bear Stearns is also affiliated with a specialist unit on the NYSE floor. In addition, the following NYSE specialist firms do retail business either directly or through an affiliate: Asiel & Co.; Ernst & Co.; Purcell, Graham & Co., Inc.; A.C. Partners; Spear, Leeds & Kellogg; and Quick & Reilly Spec. Corp.

The regional exchanges do not place similar restrictions on approved persons affiliated with specialist units. The Philadelphia ("Phlx"), Pacific ("PSE"), Boston ("BSE") and Midwest ("MSE") Stock Exchanges currently have a number of major retail firms associated with specialist units on their floors. Drexel and Dean Witter are affiliated with speicalist units on the Phlx. Retail trading firms with affiliated specialist units on the PSE include Shearson/American Express, Inc.; Goldberg Securities; Wedbush, Noble, Cooke, Inc. ("Wedbush"); Moseley Securities Corp.; Jefferies & Co.; AGF Securities; Crowell Weedon & Co.; Easton & Co.; Bateman Eichler, Hill Richards, Inc.; Trading Co. of the West; Mitchum Jones & Templeton, Inc.; ABD Securities, Inc.; Merrill Lynch & Co., Inc. ("Merrill"); the Pershing Division of Donaldson Lufkin Jenrette Securities, Inc.; and Seidler Amdec Securities, Inc. Affiliated specialist units on the BSE are Dean Witter Reynolds, Inc. ("Dean Witter"); Drexel; Fidelity Brokerage Services; and Josephthal & Co., Inc. Specialist units on the MSE that are affiliated with retail firms include Mesirow, Wed-Marsh, Inc.; Wilson-Chicago Corp.; Goldberg Securities; Freehling & Co.; ABD Securities Corp.; Stifel, Nicolaus & Co., Inc.; Niehoff & Co.; K.J. Brown; Nomura Securities International, Inc.; Yamaichi International (America), Inc.; and First Options of Chicago, Inc.

services with respect to specialty securities, (5) "popularising" specialty securities [4] and (6) engaging in business transactions with a company in whose stock the specialist is registered.

Under the proposals, if an approved person were to establish an organizational separation, a so-called "Chinese Wall," between itself and an associated specialist unit in conformity with guidelines published by the Exchanges, it would be exempt from these restrictions.[5] Because these proposals raise basic questions regarding the regulation of specialist trading activity and informational advantages as well as the workability of a Chinese Wall in this context, the Commission issued a release describing the proposals and soliciting comments on the issues raised.[6] In response, the Commission received 13 comment letters, including two from the NYSE. Six commentators objected to the proposals,[7] and six supported the proposals.[8]

The Commission believes that the NYSE and Amex proposals have the potential to increase the capitalization of exchange specialist units and therefore may improve the depth and liquidity of specialist market making activity. The Commission recognizes, however, that significant conflicts of interest can arise between an approved person of a specialist unit and the unit itself which, if not addressed by appropriate Chinese Wall procedures and the monitoring and surveillance of the continuing adequacy of such procedures, could result in potential manipulative market activity and informational advantages benefitting the approved person, the specialist unit, or the customers of either. Nevertheless, the Commission believes that the procedures the Amex and NYSE intend to implement with respect to approving and monitoring Chinese Wall procedures address these concerns. In addition, the Commission notes that proposed Exchange sanctions for approved persons' failure to maintain an adequate Chinese Wall will be severe,[9] and can serve to deter inappropriate conduct. The Commission, therefore, has determined to approve the Amex and NYSE proposals.

II. Descriptions of the Rule Proposals

Amex's proposed changes to its Rules 190 and 193 [10] and NYSE's proposed new Rule 98 [11] would exempt an approved person from a number of current Amex and NYSE restrictions if the person established, and the Exchange approved, an organizational separation between the person and the affiliated specialist unit on the floor.

An organizational separation would have to be established in conformity with guidelines published by the Exchange.[12] If an approved person affiliated with a specialist unit established such a separation, the approved person would be exempt from the prohibitions of the relevant Exchange rules, and would be permitted to: (1) Trade specialty securities (Amex Rule 170(e); NYSE Rule 104, 104.13), (2) trade options on specialty securities (Amex Rules 190(b) and 175; NYSE Rule 105), (3) accept orders in specialty securities from the issuer, its insiders and institutions (Amex Rules 190(b) and 950(k); NYSE Rules 104 and 113), (4) perform research and advisory services with respect to specialty securities (Amex Rule 190, Commentary; NYSE Rule 113.20), (5) "popularize" specialty securities (Amex Rule 190, Commentary; NYSE Rule 113.20), and (6) engage in business transactions with a company in whose stock the specialist is registered. (Amex Rule 190(a); NYSE Rule 460).

Although the Amex's filing will permit approved persons to participate in an underwriting as manager of the offering, the NYSE's filing prohibits approved persons from acting as the managing underwriter of an offering of stock, or securities convertible into that stock, of an issuer in whose securities the specialist is registered.[13]

In addition, both the Amex and NYSE amended their filings to clarify the procedures that would apply if market sensitive information were passed between an approved person and the affiliated specialist. A specialist who becomes privy to market sensitive information must communicate that fact promptly to his firm's compliance officer. The specialist must seek a determination from the compliance officer as to what procedures the specialist should follow after receipt of such information.

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[4] The "popularizing" restriction generally prohibits specialists, their member organizations and their corporate parents from making recommendations and providing research coverage regarding their specialty securities.

[5] Amex Rule 193(d) and NYSE Rule 98(c) further provide that where the approved person controls, is controlled by, or is under common control with a person other than the affiliated specialist, an exemption will only be available if a Chinese Wall is established according to the Guidelines between the approved person, the affiliated specialist, and such other person.

[6] Securities Exchange Act Release No. 22396 (September 11, 1985), 50 FR 37925 ("Proposal Release").

[7] Letters from Frederick A. Klingenstein, Chairman, Wertheim & Co. Inc. ("Wertheim"), to John Wheeler, Secretary, SEC, dated October 2, 1985 ("Wertheim Letter"); Richard B. Fisher, President, Morgan Stanley & Co., Inc. ("Morgan Stanley"), to John Wheeler, dated October 16, 1985 ("Morgan Stanley Letter"); S.L. Prendergast, Corporate Vice President and Treasurer, AT&T, to John Wheeler, dated October 18, 1985 ("AT&T Letter"); Edward W. Wedbush, President, Wedbush, to John Wheeler, dated October 18, 1985 ("Wedbush Letter"); Brian Riddell, Executive Vice President, BSE, to John Wheeler, dated January 30, 1986 ("BSE Letter"); and Walter E. Auch, Chairman and Chief Executive Officer, Chicago Board Options Exchange ("CBOE"), to John Wheeler, dated February 14, 1986 ("CBOE Letter"). The CBOE, on October 29, 1986, filed a second letter that reemphasized its objectives to the proposal. Letter from Alger B. Chapman, Chairman and Chief Executive Officer, CBOE, to John S.R. Shad, Chairman, SEC.

[8] Letters from Leland B. Paton, Executive Vice President, Prudential-Bache Securities ("Prudential-Bache"), to John Wheeler, dated October 17, 1985 ("Prudential-Bache Letter"); Frederick H. Joseph, Vice Chairman of the Board, Chief Executive Officer, Drexel, to John Wheeler, dated October 31, 1985 ("Drexel Letter"); William A. Schreyer, Chairman and Chief Executive Officer, Merrill, to John Wheeler, dated November 1, 1985 ("Merrill Letter"); Sam Scott Miller, Vice President, General Counsel and Secretary, Paine Webber Group, Inc. ("Paine Webber"), to John Wheeler, dated November 4, 1985 ("Paine Webber Letter"); Robert M. Gardiner, Chairman and Chief Executive Officer, Dean Witter Reynolds, Inc. ("Dean Witter"), to John Wheeler, dated November 5, 1985 ("Dean Witter Letter"); and James E. Buck, Secretary, NYSE, to John Wheeler, dated November 11, 1985 ("NYSE November 11 Letter"); and James E. Buck, Secretary, NYSE, to John Wheeler, dated April 8, 1986 ("NYSE April 8 Letter").

[9] The Amex and NYSE Guidelines provide regulatory sanctions, including the potential withdrawal of the registration of one or more stocks of the affiliated specialist or the withdrawal of one or more of the exemptions provided by Amex Rules 190 and 193 and NYSE Rule 98.

[10] On January 30, 1985, Amex filed the proposed changes to Rules 190 and 193 with the Commission. On March 19, 1985, Amex filed Amendment No. 1 to the proposed rule change incorporating guidelines for establishing an Exchange-approved "Chinese Wall" between an approved person and the specialist unit on the floor. To provide notice of the proposal and to solicit public comment, the amended filing was published in the Federal Register. Securities Exchange Act Release No. 21916 (April 2, 1985), 50 FR 14058.

[11] The NYSE filed its proposal with the Commission on June 20, 1985. Notice of the proposal was provided in Securities Exchange Act Release No. 22183 (June 28, 1985), 50 FR 27875. In conjunction with its filing of the current proposed rule change, the NYSE withdrew a pending proposed rule change (File No. SR-NYSE-78-59) to relieve approved persons of members and member organizations from the provisions of certain NYSE rules, including Rules 98, 104.13, 113 and 113.20.

[12] The organizational separation guidelines of each Exchange outline the minimum requirements that an approved person would be expected to demonstrate to provide for a "functional separation" of its retail and specialist activity. A firm seeking exemptive relief would be required to obtain the prior written approval of the Exchange confirming that it had complied with these guidelines in establishing its Chinese Wall and that it had established proper compliance and audit procedures to ensure the Wall's maintenance.

[13] The NYSE's prohibition would not apply to non-convertible debt securities.

The Exchange require further that the compliance officer keep a written record of each such request received from a specialist. The record must include all pertinent facts, including a description of the information received by the specialist, the determination made by the compliance officer and the basis for such determination. If the "book" is given up to another member of the specialist unit or an independant specialist unit, the Exchange must be immediately informed and record must be kept of the time the specialist reacquired the book and the reasons for the compliance officer's determination that the reacquisition was appropriate. [14]

III. Summary of Comments

Because the current restriction imposed on specialists' relationships with approved persons reflect potential conflict of interest, market manipulation and competitive concerns, the Commission issued a release describing the proposed rule changes and requesting comment on the issues raised by the proposals. [15] Twelve commentators responded. [16]

A. Objections to the Proposals

Six commentators [17] raised objections to the proposals, stating that the Chinese Wall would prove ineffective in alleviating potential conflicts of interest.[18] In particular, commentators were concerned that the primary roles and activities of the retail broker-dealers and their respective specialist units would conflict.[19] They feared a Chinese Wall would be ineffective in ensuring independence of operations [20] and disrupt upstairs operations.[21] Several commentators also questioned the possible effectiveness of surveillance of a Chinese Wall.[22]

Two commentators were concerned that by permitting this affiliation the present order flow determinations would be altered, adversely affecting other retail broker-dealers, unaffiliated specialists, and regional exchanges.[23] These commentators contend that institutions would channel their orders to those broker-dealers affiliated with specialists in an effort to obtain a better execution.[24] They also assert that retail broker-dealers would direct order flow in specialist stocks to their affiliated specialist unit, thereby undermining the willingness of these broker-dealers to send their orders to the best market for the security and further concentrating order flow in the primary markets.[25]

B. Support for the Proposal

The six commentators [26] the proposals viewed the Chinese Wall as effective in preventing the exchange of material, non-public information among departments and avoiding conflicts of interest. Commentators supported this view by pointing to the success of similar Chinese Wall procedures utilized by affiliated firms on the regional exchanges and the success of their own Chinese Walls, created to separate sensitive activities such as investment banking and research, trading and sales areas. [27] Some stated that a retail

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[14] The NYSE and Amex Guidelines also caution members that any trading by any person while in possession of material, non-public information received as a result of a breach of the internal controls required by the Guidelines may violate Rules 10b-5 and 14e-3 under the Securities Exchange Act of 1934 (the "Act") [17 CFR 240.10b-5 and 240.14e-3 (1986)], NYSE Rule 104, Amex Rule 170, just and equitable principles of trade or one of more other provisions of the Act or of Exchange rules. The Guidelines state that the Exchanges intend to review carefully any trading which occurs after a breach in the Wall has occurred with a view toward identifying any such violation.

[15] *See* Proposal Release, *supra* note 6. In its Release, the Commission asked a series of questions concerning the potential benefits of the proposals, necessary internal controls, potential unfair competitive advantages, appropriate trading restrictions and equal regulation issues, among others. The Commission requested that the commentators address whether: (1) The proposed procedures for establishing the Wall would be adequate; (2) the procedures for maintaining the Wall would be adequate; (3) the procedures for auditing the maintenance of the Wall would be adequate; and (4) particular restrictions presently applicable to an approved person should continue to apply to the approved person notwithstanding the creation of the Wall.

[16] A summary of the comment letters, and the letters themselves, are available for inspection and copying in the Commission's Public Reference Section in Washington, DC. (*See* File Nos. SR-Amex-85-1 and SR-NYSE-85-25).

[17] *See* note 7, *supra*.

[18] Comments previously had been submitted to the NYSE in response to the NYSE's Special Membership Bulletin discussing the possibility of retail firms acting as specialists and outlining possible proposed Rule 98 to regulate such activity. The NYSE received 12 comment letters from 13 commentators. Eight of the 12 commentators supported the rule change [Ernst & Co.-Homans & Co.-Ware & Keelips-Victor, Inc.; Paine Webber; Mesirow & Company; A.B. Tompane & Co.; Prudential-Bache Securities; Dean Witter; Stephen Peck (RPN Partners) and Donald Stott (Wagner, Stott & Co.); and Merrill]; and three expressed opposition [J. Streicher & Co.; Wertheim; and Morgan Stanley]. In one letter [Securities Industry Association ("SIA")], a position was not stated. In general, the commentators who supported the rule believed that the rule would strengthen the specialist system by attracting new sources of capital which would improve the liquidity and quality of NYSE markets and would enhance competition among specialists on the Exchange. The proposal also was cited as a practical and effective approach for handling conflicts and other regulatory issues that might arise from such combinations without imposing inappropriate regulatory burdens. In Merrill's view, the existing framework of specialist regulation and the system of stock allocation (which, in part, is based on the specialist unit's evaluation by floor brokers as measured by a quarterly questionnaire) also would serve as protection against abusive practices.

Those in opposition to the rule, however, stressed the unworkability of the Chinese Wall concept, contending that it would not satisfactorily address conflict of interest concerns, and that it might result in an undue concentration of member organizations in the specialist business on the Exchange, as well as in institutional investors directing order flow in a particular stock only to a member organization associated with the specialist member organization registered in that stock. J. Streicher & Co., for instance, stated that the proposal would impose unfair competitive conditions upon established specialist units. In the view of Wertheim, the proposal would aggravate the current problem of declining public participation in the securities markets by adding to the reality as well as to the perception of conflicts of interest.

The SIA did not take a position but instead outlined concerns and comments expressed by members of its Board of Directors. These concerns included questions about the impact that this would have on the market structure of the NYSE's floor, and on the public's perception of the manner in which the Exchange operates, as well as the potential conflicts of interest between the Exchange and the specialist unit. On the other hand, the SIA cited the need for new entrants to attract new capital and the belief that conflicts of interest potentially could be controlled.

[19] Wertheim and Morgan Stanley Letters, *supra* note 7.

[20] BSE, Wedbush and Wertheim Letters, *supra* note 7.

[21] Wertheim Letter, *supra* note 7.

[22] BSE and Wertheim Letters, *supra* note 7.

[23] Wertheim and CBOE Letters, *supra* note 7.

[24] Wertheim Letter, *supra* note 7.

[25] CBOE Letter, *supra* note 7. In this regard, the CBOE also suggested that the Commission "(i) ascertain the percentage of order flow in particular [national market system ("NMS")] stocks each large retail firm commands . . . (ii) assess the extent to which each such firm's order flow would permit it . . . to maintain the dominance of the existing primary market specialist; and (iii) evaluate the likely effect of the Specialist Affiliation Proposals on inter-market competition in the context of the goals of a [NMS]." CBOE Letter, *supra* note 7 at 4. The NYSE, in its April 8 letter to the Commission, responded to the CBOE, stating that the CBOE's "concerns are highly speculative and unfounded." The NYSE stated that its proposals would assure that specialists would continue to be adequately capitalized, and that continuing deep and liquid NYSE markets would be achieved "without sacrificing market integrity or the protection of investors." The NYSE indicated that there is no evidence suggesting that firms affiliated with specialist units would ignore "best execution" responsibilities, and that, as long as member firms provide for the "best execution" for customers' orders, customers will not be adversely affected by the NYSE's proposal and firms would be justified in sending those orders to the NYSE.

[26] *See* note 8, *supra*.

[27] Paine Webber, Drexel and Merrill Letters, *supra* note 8.

broker-dealer would not put its reputation in jeopardy, or risk losing its specialist franchise, by permitting the Chinese Wall to be loosely enforced.[28] Furthermore, several commentators pointed out that the presence of other regulatory factors, such as NYSE Rules 115 (prohibiting disclosure of orders on the specialists' books), 91 (taking or supplying securities named in order), 92 (limitation on members' trading because of customers' orders), and rules governing priority of order left on the specialist's "book," will act to restrict improper behavior by both the retail broker-dealer and its affiliate.[29]

Several commentators emphasized that it was in the public interest to allow the affiliation in order to provide additional and permanent capital to the Exchange market making function.[30] They concluded that the entry of diversified firms into the specialist business would stimulate competition in specialist activity. This, plus the increase in capital, could improve liquidity of exchange markets.[31] The result would be to strengthen further the already strong exchange market system.[32]

IV. Discussion

A. Benefits Resulting From The Proposals

The increasing institutionalization of the markets in recent years has imposed additional pressure on primary market specialists to ensure market liquidity. As more institutions have shifted to active trading of their portfolios, both the aggregate volume[33] and average size of trades[34] have increased substantially. Moreover, with the growth of derivative stock products and the use by many market professionals of various arbitrage and hedging strategies the frequency of large surges of selling or buying pressure has increased. While upstairs block positioning firms serve a critical function in offsetting institutional order imbalances, the Commission also believes that well-capitalized specialists are critical to orderly functioning of the markets. The Exchanges' proposals will increase the capital base upon which specialists may draw and should enhance their ability to maintain fair and orderly markets. The Commission also agrees with the NYSE that the proposals will increase specialist competition for allocations of new listings which should in turn enhance the quality of markets on the Exchanges. For these reasons, the Commission has concluded that substantial benefits may be obtained from the proposals.

B. Adequacy of the Wall

The Commission previously had recognized the use of Chinese Walls in a number of instances regarding the establishment of an organizational separation between different departments of a broker-dealer as one of several means of preventing the interdepartmental communication of material, non-public information.[35]

For example, the Commission has recognized that in view of the diverse functions performed by a multi-service firm and the material, non-public information that may be obtained by any one department of the firm, the firm often may be required to restrict access to information to the Department receiving it, in order to avoid potential liability under sections 10(b) and 14(e) of the Act[36] and Rules 10b–5 and 14e–3 thereunder.[37] Accordingly, the Commission has indicated that the creation of an effective Chinese Wall would enable broker-dealers to continue to maintain multiple services in a single operation, thereby economically benefitting the firm and enabling it to provide enhanced services to customers.[38] Similarly, the Commission believes that an organizational separation imposed between an approved person and affiliated specialist member organization can effectively be established in connection with the Amex and NYSE proposals.

Nevertheless, some commentators have suggested that the precautions built into the Exchanges' proposed Chinese Wall procedures will not adequately restrict the potential for conflicts of interest and market manipulation in view of the strong incentives of affiliated specialists and their approved persons to exploit their time, place and informational advantages. Specifically, commentators have stated that the desire of the specialist for information,[39] the monetary incentives of the approved person[40] and the numerous opportunities to communicate material, non-public information, particularly where non-disclosure of such information otherwise would significantly harm an affiliate,[41] would render the proposed procedures ineffective in preventing market abuses arising from the affiliation of the approved person and specialist unit.

The Commission believes that Chinese Walls, with effective controls, may be effective in restricting information flow between the various departments of broker-dealers. The current proposals do, however, present a new variable which has not been

[28] Drexel and Merrill Letters, *supra* note 8.

[29] Merrill and NYSE November 11 Letters, *supra* note 8.

[30] Drexel, Paine Webber, and NYSE November 11 Letters, *supra* note 8. Prudential-Bache stated that it would enhance the specialist system to have well-capitalized firms affiliated with specialist firms, noting that the presence of institutional investors has increased demands on the specialists' limited capital. Prudential-Bache Letter, *supra* note 8.

[31] Drexel and Paine Webber Letters, *supra* note 8.

[32] NYSE November 11 Letter, *supra* note 8. The NYSE also argues that its proposal will enhance intra-market competition by encouraging high-quality specialist performance, which is the basis upon which the newly listed NYSE securities are allocated. The proposal enhances inter-market competition, according to the NYSE, by permitting affiliations that are currently permitted on regional exchanges, but not subject to restrictions under current NYSE rules. The NYSE views such a regulatory disparity as imposing an unjustified burden on competition.

[33] For example, the shares traded on the NYSE in 1985 (27.5 billion) more than doubled the number of shares traded in 1980 (11.3 billion). The value of these shares traded in 1985 ($970.4 billion) almost tripled the value of the shares traded in 1980 ($374.9 billion). *NYSE Fact Book* (1986) at 6.

[34] In 1985, the average size of reported trades on the NYSE was 1878 shares, whereas, in 1980, the average size of reported trades was 872 shares. Furthermore, trades of blocks of 1,000 shares and over increased from 19.9% of total shares traded in 1980 to 33.1% of total shares traded in 1985. *Id.* a 10.

[35] *See* SEC. Institutional Investor Study, H.R. Doc. No. 9264, 92d Cong., 1st Sess. 2539 (1971) ("Institutional Investor Study"). The Study urged financial institutions to "consider the necessity of segregating information flows arising from a business relationship with a company as distinct from information received in an investor or shareholder capacity." The Commission notes that the so-called Chinese Wall solution to the problem of multiservice firms, with conflicting duties, acquiring confidential information has been used in a variety of circumstances. *See, e.g.*, Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225 (2d Cir. 1977) (accounting firms); Herzel & Colling, The Chinese Wall Revisited, 6 *Corp. L. Rev.* 116 (1983) (banks); and Comment, The Chinese Wall Defense to Law-Firm Disqualification, 128 *U. Penn. L. Rev.* 677 (1980) (law firms).

[36] 15 U.S.C. 78j(b) and 78n(e) (1982).

[37] *See* Securities Exchange Act Release No. 17120 (September 4, 1980) ("Rule 14e–3 Release"), 45 FR 60410. Rule 14e–3(a) establishes a duty to "disclose or abstain from trading" for any person who is in possession of material information that relates to a tender offer by another person, when he knows or has reason to know that the information is non-public and was acquired directly or indirectly from that person or the issuer of the securities subject to the tender offer. Rule 14e–3(b) exempts a multi-service institution from liability under Rule 14e–3(a) to the extent that it has implemented reasonable procedures to prevent the purchase or sale of any security, or the causing of a purchase or sale of any security, while in the possession of material, non-public information relating to a tender offer in violation of Rule 14e–3(a) and the individual(s) making the investment decision(s) did not know such information.

[38] *Supra* note 37, 45 FR at 60416.

[39] *See* Wedbush Letter, *supra* note 7.

[40] *See* Wertheim Letter, *supra* note 7.

[41] *See* Morgan Stanley Letter, *supra* note 7.

addressed in other contexts. Previously, Chinese Walls generally have been designed to isolate material, non-public information regarding a discrete transaction such as an underwriting or tender offer. In contrast, these proposals are designed to address an ongoing relationship between the specialist and the approved person. The Commission believes, however, that the Guidelines prepared by the Exchanges effectively address the potential for market abuses resulting from this ongoing relationship. For example, the proposed Guidelines of both the Amex and NYSE call for procedures to be established by participating approved persons to ensure, among other things: (1) The confidentiality of the specialist's book; (2) that the approved person can have no influence on specific specialist trading decisions; (3) material, non-public corporate or market information obtained by the approved person from the issuer is not made available to the specialist; (4) that clearing and margin financing information regarding the specialist is routed only to employees engaged in such work and managerial employees engaged in overseeing operations of the approved persons and specialist entities. The effectiveness of the procedures set forth in the Guidelines is reinforced by the Exchanges' existing surveillance of specialists and the marketplace as well as the specialist's highly visible position in the marketplace.[42] These factors, along with the specialist's existing statutory duty to maintain a fair and orderly market, should combine to enhance the effectiveness of the proposed Chinese Wall.[43]

C. Surveillance of the Wall

The structural adequacy of the Wall is, of course, only one part of evaluating whether the procedures established by the Amex and NYSE adequately will detect and deter potential improper activity by either the approved person or the specialist.

Appropriate surveillance procedures are critical to ensure that the Wall is maintained.

The Exchanges have submitted to the Commission proposed procedures for monitoring the Wall consisting of: (1) Examination of the Chinese Wall procedures established by broker-dealers seeking exemptions under the proposals, and (2) surveillance of proprietary trades effected by each approved person and its affiliated specialist member organization.[44]

The Amex and NYSE will conduct periodic examinations of the approved person's Chinese Wall procedures to ensure that an organizational separation between the approved person and specialist organization has been created and thereafter maintained. Second, the Amex and NYSE will monitor the trading activities of approved persons and affiliated specialists—in order to check for possible trading while in possession of material, non-public information—by reviewing as a routine matter on a day-to-day basis, as well as periodically, trading and comparison reports generated by the Amex and NYSE surveillance departments regarding the activities of approved persons and affiliated specialists.[45]

D. Approved Person as Managing Underwriter

As indicated above, pursuant to proposed Rule 98, the NYSE would prohibit approved persons from acting as the managing underwriter of an offering of stock, or securities convertible into that stock, of an issuer in whose securities the specialist is registered, while the Amex would permit approved persons to participate in an underwriting as manager of the offering. The NYSE stated that its proscription against managing underwriter activities by the approved person of a specialist was based on the Exchange's concern that

> the possible public perception of a potential conflict of interest between an approved person, acting as underwriter, and its associated specialist member organization, acting as market-maker, . . . is likely to focus most particularly on instances where the approved person is acting as a managing underwriter, and thus has a greater financial stake in the successful outcome of the distribution than a syndicate or selling group member.[46]

The NYSE states that it is not seeking to provide exemptive relief "at this time" for an approved person to act as a managing underwriter in order to "minimize any possible concerns that might arise in this area." [47]

The Commission received six comments addressing this issue. The NYSE reiterated its belief that its proposed restriction is intended to address a possible public perception of a potential conflict of interest between an approved person and an associated specialist when the approved person acts as managing underwriter.[48] Morgan Stanley suggested that the NYSE's proposed restriction addresses some concerns raised by the proposals, but that, on the whole, excessive conflicts remain.[49] Merrill, Pine Webber, Drexel,

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[42] For example, the specialist's, as well as the approved person's, proprietary trades are recorded and monitored. Furthermore, a specialist's performance is evaluated by both the exchange and the floor members for purposes of the allocation and reallocation of issuers' stock.

[43] Both the Amex and NYSE proposals would allow an approved person to use an affiliated broker, as well as an unaffiliated broker, for its proprietary trades in the securities trade by an affiliated specialist. Such trades must be executed in compliance with the requirements of section 11(a) of the Act [15 U.S.C. 78k(a) (1982)] relating to trading by members of the exchange, brokers and dealers, and Rules 11a-1 and 11al-1(T) thereunder [17 CFR 240.11a-1 and 240.11a1-1(T) (1986)]. Section 11(a)(1) of the Act prohibits exchange members from effecting transactions for the member's account on such exchange, provided that, under section 11(a)(l)(G)(i), the member is exempt from such prohibition if it is "primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, and acting as broker . . . and whose gross income normally is derived principally from such business and related activities," and under section 11(a)(i)(G)(ii), the member's proprietary transactions are effected in compliance with Commission rules, including rules ensuring that such transactions "yield priority, parity, and precedence in execution to orders for the account of persons who are not members or associated with members of the exchange." Pursuant to Rule 11a1-1(T) under the Act, a transaction for a member's account will be deemed to yield priority, parity and precedence to orders for the account of non-members if the transaction complies with specified execution requirements. In addition, the Commission notes that transactions by approved persons that are not otherwise exempt under section 11(a) may be subject to the provisions of Rule 11a2-2(T) of the Act [17 CFR 240.11a2-2(T) (1986)], the so-called "effect versus execute" rule, which requires execution of an order for a member's account by a member not associated with the initiating member.

[44] The Amex and the NYSE have requested that these procedures be accorded confidential treatment by the Commission.

[45] If a breach of the Wall did occur (*e.g.*, an employee of the approved person communicated confidential information to an employee of the specialist), the employee receiving this information would be obligated to report the breach to the Compliance Department of the approved person. The Compliance Department would, in turn, be obligated to determine whether the information was material and, if so, what arrangements might be made to avoid violating the Amex and NYSE Rule against trading while in possession of material, non-public information. As a general matter, the Commission expects that if an individual specialist is in receipt of market sensitive information via its approved person, he will, at a minimum, pass the book in the specialty stock to another specialist within the same firm who is not in possession of such information. In addition, the compliance officer should be responsible for determining when the specialist may recover the book and recommence trading the specialty stock at issue.

[46] File No. SR-NYSE-85-25, NYSE proposal, at 11. The functions of the managing underwriter, who will have originated an offering through the underwriter's contact with the issuer, and the one or more broker-dealers that the managing underwriter may invite to serve as co-managers, include the following: (1) To assemble the syndicate that will participate in the underwriting commitment; (2) to maintain the records for the syndicate; and (3) to stabilize the aftermarket. *See* Institutional Investor Study, *supra* note 35, at 2519-20. The NYSE's prohibition also would apply to co-managers and to the managing underwriter's or co-manager's participation in a shelf offering.

[47] File No. SR-NYSE-85-25, NYSE proposal, at 11.

[48] *See* NYSE November 11 Letter, *supra* note 8.

[49] *See* Morgan Stanley Letter, *supra* note 7.

and Prudential-Bache supported the Amex approach and objected to the NYSE's proposed prohibition.[50] These commentators argued that the Chinese Wall would serve adequately to limit potential conflicts of interest and that the proposed surveillance measures and penalties effectively would deter any violations.

The Commission agrees that the potential conflict of interest between the approved person and the specialist is the primary area of concern arising under these proposals. Potential problems related to conflicts of interest may be of greater concern when an approved person acts as managing underwriter for the issuer of a speciality security in view of the number of close contacts between a managing underwriter, the issuer, other syndicate participants, and the specialist. Such contacts may help to create greater risks of misuse of information.[51]

Section 6(b)(5) of the [52] Act requires that the rules of an exchange be "designed to prevent fraudulent and manipulative acts . . . and, in general, to protect investors and the public interest." On the other hand, section 6(b)(5) also requires that exchange rules not "permit unfair discrimination between . . . brokers, or dealers . . .," and section 6(b)(8) of the Act requires that exchange rules not impose any "burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[53] Accordingly, the Commission must balance the potential reduced risks of abuse [54] resulting from the managing underwriter prohibition against the argument by integrated broker-dealers that the prohibition imposes an unnecessary competitive burden on their ability to enter the specialist business.[55]

In weighing these arguments, the Commission believes that the managing underwriter prohibition cannot be viewed in isolation from the broader NYSE initiative. Proposed Rule 98 represents a substantial expansion of the opportunities for integrated retail broker-dealer firms—and others—to enter the specialist business. As noted above, that expansion itself requires the Commission and the NYSE to balance potentially greater risks of abuses with potential enhancement of market liquidity. In light of the novel issues raised by this major change, the Commission does not believe that the NYSE's decision to restrict the activities of approved persons in the context where the potential for abuse may be greatest is unfair or inapprpriate at this time.[56]

The Commission has not determined, however, that the NYSE's proposed restriction is a prerequisite to ensuring the efficacy of the NYSE's Chinese Wall procedures.[57] The Commission notes that the Amex would promote competition by permitting approved persons of specialist units to compete for managing underwriter positions. The Commission notes that the affiliated specialist unit must "hand off the book" during the approved person's participation in an underwriting for the appropriate period pursuant to Rule 10b-6 under the Act.[58] In light of this requirement and the Amex's compliance and surveillance procedures discussed above, the Commission believes that the Amex proposal is consistent with the Act.

Even though the Commission does not believe that the NYSE's proposed restriction on an approved person acting as a managing underwriter is strictly necessary (and, therefore, is prepared to approve the Amex proposal as submitted), the Commission believes that the Act allows an SRO sufficient flexibility to proceed cautiously in implementing potentially significant structural changes in its marketplace.[59]

The Commission does expect, however, that the NYSE will closely monitor trading under Rule 98 in order to determine whether the restriction on managing underwriter participation should be removed in the future. Furthermore, both the Amex and the NYSE have agreed to review the implementation of this program and report their findings to the Commission after the program has been operational for two years. The Commission expects that such a report will not only assess the adequacy and efficacy of the Chinese Wall procedures, but also will discuss the need for the managing underwriter restriction.

E. Industry Concentration

Some commentators expressed concern that, if adopted, the proposals could lead to substantial concentration of capital and market making activities in a smaller number of market participants. For example, one commentator stated that "[d]iversification of activities and sources of capital has been a unique strength of the industry" and questioned the impact greater concentration of capital would have on the auction market.[60] In addition, it was suggested that the consolidation of market resources under the proposal would "continue" the public perception that individual investors are at a significant disadvantage relative to highly capitalized financial institutions, institutional investors, and market professionals.

[50] *See* Merrill, Paine Weber, Drexel, and Prudential-Bache Letters, *supra* note 8.

[51] *See* Morgan Stanley Letters, *supra* note 7. *Cf.* SIA Letter, *supra* note 18.

[52] 15 U.S.C. 78f(b) (1982).

[53] An exchange rule that imposes a competitive burden is inconsistent with section 6(b)(8) of the Act unless it furthers some other regulatory objective. *See* Clement v. SEC, 674 F.2d 641 (7th Cir. 1982).

[54] The Commission does not believe that the NYSE's expressed "public perception" concerns provide a basis under the Act for approval of the Rule.

[55] The Commission notes that, in assessing the competitive implications of self-regulatory organization ("SRO") and Commission action, the Commission is required to balance competitive consequences "against other regulatory criteria and considerations," and is not required "to justify that such actions be the least anticompetitive manner of achieving a regulatory objective." Senate Comm. on Banking, Housing & Urb. Affs., *Report to Accompany S. 249: Securities Acts Amendments of 1975*, S. Rep. No. 75, 94th Cong., 1st Sess., 13 (1975) ("Senate Report"). *See* Bradford National Clearing Corp. v. SEC, 590 F.2d 1085, 1105-06 (D.C. Cir. 1978).

[56] Integrated broker-dealer firms still would be able to participate in an underwriting as a non-manager. Only where the potential for concern is greatest would the NYSE prohibition apply to the approved person.

[57] *See* text accompanying note 59, *infra*.

[58] Rule 10b-6 [17 CFR 240.10b-6 (1986)], prohibits an underwriter and its affiliates, including an affiliated specialist unit, from bidding for or purchasing the security being distributed or any related security during a distribution. Rule 10b-6(a)(3)(xi) excepts from that prohibition bids or purchases by an underwriter of the security being distributed prior to the the applicable cooling-off period specified by the Rule. Thus, the underwriter and its affiliated specialist unit could not bid for or purchase the security being distributed or a related security as of the commencement of the cooling-off period until the completion of the distribution. In the case of stock with a minimum market price of $5 per share and a public float of 400,000 shares, the Rule 10b-6 cooling-off period is two business days. For all other securities, the cooling-off period is nine business days. *See* Rule 10b-6(a)(3)(xi) and (c)(7).

[59] The Commission notes that the possibility that the NYSE may seek to modify its proscription in light of its experience under Rule 98, and that the NYSE has stated in its comment letter that "[it was] not seeking *at this time* to provide exemptive relief as to managing underwriting arrangements" (emphasis added). Further, the NYSE has stated that it "has not concluded that there is such an inherent conflict of interest in the managing underwriter/specialist relationship so as to justify the managing underwriter restriction in any event, irrespective of possible public perception concerns." NYSE November 11 Letter, *supra* note 8, at 15.

The Commission notes that it has the flexibility to make distinctions among various SROs and marketplaces and it is not required to apply strictly uniform regulatory requirements to all SROs. *See* Senate Report, *supra* note 55, at 7.

[60] *See* Morgan Stanley Letter, *supra* note 7. The Commission notes the increasing consolidation of specialist units and the contraction in the number of specialist units on the exchange floors in recent years. In 1964, for example, 360 NYSE members were registered as specialists and organized into 110 specialist units. Currently, the NYSE has 400 specialists organized into 58 specialist units.

Concerns about increasing concentration within the securities industry have been prevalent at least since the introduction of negotiated commission rates in 1975. Nevertheless, concentration *per se* is not proscribed by the Act. Even so, in view of the competition standard in the Act,[61] the Commission, of course, would be concerned if a structural change in the market were likely to lead to increased concentration and it was reasonably foreseeable that such concentration was likely to lead to reduced competition within the securities industry.

The Commission has identified no evidence that the proposals will cause substantial industry concentration of retail business. Furthermore, if the proposals do result in industry specialist concentration, there still will be competition among these specialists for allocations of newly listed issues as well as competition with specialists in other markets. Thus, the Commission does not believe that the possibility of some additional specialists concentration, without reasonably likely adverse consequences,[62] is a sufficient reason to disapprove these proposals.

F. Effect on the National Market System

The CBOE has suggested that the proposals would have an adverse impact on the regional exchanges because an approved person affiliated with a specialists unit on a primary exchange would direct its order flow in specialty stocks to its affiliate, and, furthermore, would direct order flow in non-speciality stocks to that exchange because of the firm's interest in the success of its affiliated specialists marketplace. The result, according to the CBOE, could be a "deadening of intermarket competition . . . ."[63]

The Commission does not agree with the CBOE that the Amex and NYSE proposals imperil the goals of the NMS.[64] While a firm may choose to route some order flow to an affiliated specialist, the Commission expects that those firms will recognize their continuing obligation to provide their customers with best execution of their orders.[65] In addition, the Commission notes that while the addition of a specialist unit could be a new profit center for a major retail firm, it might contribute only a small percentage of that firm's gross revenues.[66] The Commission does not believe that a major firm will permit a relatively minor affiliate to dictate how it handles retail agency orders in securities in which the affiliate does not even specialize. Moreover, to the extent there is any competitive impact, all exchanges have the ability to attract retail firms to specialize in their marketplace. Accordingly, the Commission does not believe that the Amex and NYSE should be precluded from seeking to attract retail firm capital to their trading floors in the fear that by so doing retail firms will cease to determine where to send their order flow in a "neutral" fashion. Indeed, if such were the goal, the Commission would, in turn, have to prohibit retail firms from acting as specialists on the regional stock exchanges.

G. Equal Regulation of Primary and Regional Exchanges

In the Proposal Release,[67] the Commission noted that regional stock exchanges have not been required to adopt restrictions similar to those of the Amex and the NYSE on approved persons of specialist units primarily because of their limited trading volume and because they are not the primary exchange market for most securities traded on those exchanges.[68]

The NYSE believes that the current regulatory disparity between the primary and regional exchanges will continue to encourage diversified firms that desire to enter the specialist business, without disrupting their other lines of business, to become specialists on a regional exchange rather than on the NYSE.[69] The NYSE believes such a disparity imposes a two-fold burden on competition: (1) As between the NYSE and other market centers, and (2) as between existing NYSE specialist member organizations and diversifies firms that desire to enter the specialist business on the NYSE market. The NYSE believes the Commission should "reassess its traditional position in this area," and that the NYSE's proposal provides a "fairer competitive balance. . . ."[70] Indeed, the NYSE states that diversified firms that have regional exchange specialist operations are diverting order flow in their specialty stocks to the regional exchanges, and that regional specialists are becoming "active and significant competitors for the order flow generated by other broker-dealer organizations."[71]

As discussed above, the BSE believes that different regulations for the regionals as compared to the primary exchanges are appropriate because the regional exchanges account for limited trading volume and generally price their orders based on the primary market.[72]

The Commission agrees that the recent increase in acquisitions of regional specialist operations by diversified brokerdealer firms, particularly by large retail firms,[73] has increased concerns arising from the regulatory disparities between regional and primary exchanges in the regulation of affiliations between specialist operations and diversified broker-dealer firms. While, as the BSE notes, overall regional exchange volume is small compared to primary market volume,[74] and regional exchange pricing of orders is generally derived from primary market quotations, the diversion by a large retail broker-dealer of all or a significant portion of order flow in specialty stocks to an affiliated regional specialist could raise certain regulatory concerns similar to those raised by such affiliations on the primary exchanges. Moveover, even if regional exchange

[61] *See e.g.*, Sections 6(b)(8), 11A, and 23(a) of the Act [15 U.S.C. 78f(b), 78k-1, and 78w(a) and (1982)].

[62] For example, over the last two decades retail broker-dealers became the dominant market makers in the OTC market, displacing the traditional wholesale market makers. Nevertheless, the Commission has detected no decrease in the level of competitive market making; rather, such competition appears to be more vigorous than ever.

[63] CBOE Letter, *supra* note 7, at 3. *See* notes 23–25, *supra*, and accompanying text.

[64] *See* Section 11A of the Act.

[65] *See* Securities Exchange Act Release No. 15671 (March 22, 1979), 44 FR 20360, 20363 n.30.

[66] During the last quarter of 1985, although the gross revenue of NYSE retail broker-dealers reached $11.7 billion, the gross revenue of NYSE specialists was $115 million, or less than 1% of the retail firms' revenues.

[67] Proposal Release, *supra* note 6.

[68] Because the large majority of stocks traded on the regional exchanges are listed on the Amex or NYSE, and are traded on the regionals pursuant to unlisted trading privileges granted by the Commission under section 12(f) of the Act [15 U.S.C. § 78e (1982)], traditionally the Commission has not required regional exchange specialists to operate under the same regulatory regime as primary market specialists. *See, e.g.*, Securities Exchange Act Release No. 7465 (November 23, 1964), at 3; SEC, *Report of Special Study of the Securities Markets*, 88th Cong., 1st Sess., H. Doc. No. 95, pt. 2, at 167.

[69] *See* File No. SR-NYSE-85-25, NYSE proposal, at 15.

[70] *See* NYSE November 11 Letter, *supra* note 8, at 18–19. The NYSE, however, stated that it was "not necessarily suggesting that there should be absolute 'equality' of regulation between the NYSE and the regional exchanges," and that "[e]ven under the NYSE's functional regulation proposal, NYSE specialist member organizations and diversified organizations associated with them would be subject to more stringent regulations than exist on regional exchanges." *Id.* at 19.

[71] *Id.* at 18.

[72] BSE Letter, *supra* note 7, at 3–4.

[73] *See* note 3, *supra*.

[74] In 1985, for example, the regional exchanges, including the MSE, Phlx, PSE, BSE, and the Cincinnati Stock Exchange, Inc., accounted for approximately 13% of share volume in NYSE listed stocks, and 24% of total transaction volume reported through the Consolidated Transaction Reporting System.

specialists continue to set their prices based on primary market quotations, a regional specialist affiliated with an integrated retail firm could obtain significant access to material, non-public information.

The Commission understands that a number of firms with regional specialist operations have established Chinese Wall procedures between the specialist and its affiliated firm. Nevertheless, such procedures have not necessarily been adopted by all specialist affiliates, have not been adopted pursuant to any specific regional exchange requirements, and have not been subject to specific exchange surveillance and oversight. The Commission believes it is desirable for the regional exchanges to consider requiring specialists affiliated with integrated firms to establish an adequate Chinese Wall and generally to review the efficacy of their surveillance and compliance procedures regarding those specialists. Accordingly, the Commission has instructed the Commission staff to write to the regional exchanges requesting that they review the current procedures followed by retail firms acting as specialists on their floors with a view toward evaluating whether additional regulatory requirements and surveillance procedures are appropriate.[75]

H. Trading Restrictions

Rule 10a–1 under the Act,[76] the short sale rule, requires a broker-dealer firm and its affiliates to "net" their respective stock positions to determine whether the positions were, in the aggregate, net long or net short for purposes of determining their compliance with Rule 10a–1.[77] The Amex and NYSE have requested that the Commission issue a no-action position to the effect that, if a firm has established an appropriate Chinese Wall pursuant to Rules 193 or 98, it would not be required to aggregate the approved person's position with the position of the affiliated specialist.[78] Merrill also requested similar interpretive relief regarding Rule 10b–4 under the Act,[79] regarding analogous aggregation requirements with respect to that Rule's restrictions on short tendering of securities.[80] The primary reason stated by commentators for not requiring aggregation of the specialist's and approved person's positions is that continuous contact between the specialist and the approved person for the purpospe of determining their aggregate net position would require regular violations of the required Chinese Wall.[81] In addition, one commentator suggested that a requirement that positions be "netted" could impede the specialist's ability to meet its market making obligations because the specialist could then become subject to the restrictions of Rule 10a–1 because of independent, unrelated activities of the approved person.[82]

The Commission agrees that it would be inconsistent with the Chinese Wall procedures envisioned by the Amex and NYSE proposals to require a specialist and an approved person routinely or during the course of a tender offer to exchange information to determine whether the entities' proprietary positions were, in the aggregate, net long or short for purposes of Rules 10a–1 and 10b–4.[83] The Commission, therefore, believes it is appropriate, as a general matter, to except specialists and approved persons from the aggregation requirements of those Rules. Nevertheless, because interpretive relief is justified by the Chinese Wall established by the approved person, the Commission believes that such relief should be conditioned upon the satisfactory implementation of these programs. Therefore, the Commission's staff will issue a no-action letter to except those approved persons who have established Chinese Walls in accordance with either Amex Rule 193 or NYSE Rule 98, and their affiliated specialists, from the aggregation requirement of Rules 10a–1 and 10b–4 under the Act. With respect to those broker-dealers which currently operate affiliated specialists on regional stock exchanges, the Commission's staff will develop appropriate review procedures in conjunction with its review of the Chinese Wall procedures of those firms and the regional exchanges' surveillance programs concerning those procedures.

V. Conclusion

For the reasons stated above, the Commission finds that the Amex and NYSE proposed rule changes are consistent with the requirements of the Act applicable to a national securities exchange and, in particular, with the requirements of section 6 of the Act and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to section 19(b)(2) of the Act, that the proposed rule changes be, and hereby are, approved.

Dated: November 3, 1986.

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[75] The staff has requested the PSE, Phlx, MSE and BSE, among other things, to detail the procedures each exchange has implemented for surveillance of compliance with Chinese Wall procedures that have been established by firms affiliated with exchange specialists.

[76] 17 CFR 240.10a–1 (1986). Rule 10a–1 prohibits the short sale of any exchange-traded security (1) below the price at which the last regular way sale of the security was affected on the exchange (*i.e.*, on a minus tick), or (2) at such price unless the price is above the next preceding different price at which the last regular way sale was effected (*i.e.*, on a zero minus tick). The purpose of Rule 10a–1 is to "(1) allow relatively unrestricted short selling in an advancing market; (2) prevent short selling at successively lower prices, thus eliminating short selling as a tool for driving the market down; [and] (3) prevent short sellers from accelerating a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers." Securities Exchange Act Release No. 22414 (September 16, 1985), 50 FR 38671, 38672 n. 11.

[77] Rule 3b–3 under the Act (17 CFR 240.3b–3 (1986)), defines the phrase "short sale" as "any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller " The Rule provides further that "a person shall be deemed to own securities only to the extent that he has a net long position in such securities."

[78] In addition, three firms have submitted such no-action requests to the Commission. See letters from Sheldon I. Goldfarb, Reavis & McGrath (council for Spear, Leeds & Kellogg and Spear, Leeds & Kellogg Securities, Inc.), to Brandon Becker, Assistant Director, Division of Market Regulation, dated October 29, 1985; James B. Bragg, Vice President Legal Department, Paine Webber, to Brandon Becker, dated November 27, 1985; Valentina R. Stum, Senior Counsel, Merrill Lynch Capital Markets, to Brandon Becker, dated December 9, 1985 ("Merrill Lynch Capital Markets Letter").

[79] 17 CFR 240.10b–4 (1986).

[80] Merrill Letter, *supra* note 8, at 9. Merrill also has requested the Commission to "explore the possibility of providing interpretative relief under . . . Section 16(d) by expanding the exemption afforded thereunder to positions acquired by a specialist in the ordinary conduct of trading activities incident to the establishment and maintenance of a market in a listed security." *Id.* Merrill also requested "interpretive guidance . . . in clarifying that contemporaneous positions in a particular security held by a specialist unit and affiliated trading areas will not be viewed as purchases made by a 'group' under section 13(d) of the Act." *Id.*

[81] *Id.* The Guidelines under proposed Rule 98 and Rule 193 contemplate that the approved person could establish business goals for the specialist and maintain general oversight of the specialist. Both Rules, however, strictly preclude the exchange of information between the specialist and the approved person regarding day-to-day trading decisions.

[82] Merrill Lynch Capital Markets Letter, *supra* note 78, at 2.

[83] In contrast, it is less clear that compliance with an aggregation requirement for purposes of the insider trading restriction under Section 16 of the Act (*i.e.*, the profit recapture provisions which attach to a 10% owner of an issuer's securities and related aggregation requirements) and the definition of the term "group" under section 13(d) of the Act, is impracticable or inconsistent with the Chinese Wall procedures envisioned by the proposals. More importantly, even if relief from those provisions were appropriate, it may be necessary to consider legislative action to provide such relief. Therefore, the Commission takes no position, at this time, regarding the availability of such relief.

By the Commission.
Shirley E. Hollis,
Assistant Secretary.
[FR Doc. 86-25567 Filed 11-12-86; 8:45 am]
BILLING CODE 8010-01-M

[Release No. 34-23774; File No. SR-PSE-86-22]

Self-Regulatory Organizations; Pacific Stock Exchange, Inc., Order Granting Accelerated Effectiveness of Proposed Rule Change

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on September 29, 1986, the Pacific Stock Exchange Incorporated ("PSE" or the "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items, I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Currently, a diseminated best bid or offer may be the result of an order represented by a Floor Broker. The proposed Options Floor Procedure Advice ("OFPA") will make it the responsibility of the Floor Broker holding such an order to instruct the Order Book staff to remove the bid or offer if (1) the bid or offer is cancelled; or (2) the order representing such best bid or offer has been filed in its entirety.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B) and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

The purpose of the proposed rule change is to ensure that disseminated markets are always current and accurate. There are many occasions when a disseminated bid or offer represents an order being held by a Floor Broker in the trading crowd. It has only been custom that such Floor Broker sees to the cancellation of such dissemination when the order is cancelled or filled to its entirety. The proposed OFPA will allow the Exchange to enforce this custom.

The PSE believes that this requirement is specifically in keeping with section 6 of the Act because it will foster cooperation with persons engaged in regulating and processing information with respect to transactions. The proposal will help to remove impediments to and assist in perfecting the mechanism of a free and open market. It will also provide additional protection for investors and the public interest.

(B) Self-Regulatory Organizations' Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes a burden on competition.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange requests that the proposed rule change be given accelerated effectiveness pursuant to section 19(b)(2) of the Act because it involves implementation of a practice which has a material impact on the dissemination of accurate options quotation information and on the public interest in listed options.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, the requirements of Section 6 and the rules and regulations thereunder.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication thereof because the rule will allow the Exchange to enforce a practice which has a material impact on the dissemination of accurate options quotation information.

IV. Solicitation of Comments

Interested persons are invited to submit written, data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above mentioned, self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by December 4, 1986.

It is Therefore Ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change referenced above be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: November 4, 1986.

Shirley E. Hollis,
Assistant Secretary.
[FR Doc. 86-25627 Filed 11-12-86; 8:45 am]
BILLING CODE 8010-01-M

[Release No. IC-15397; File No. 811-3783]

Application and Opportunity for Hearing; CNA Money Market Fund, Inc.

November 5, 1986.

Notice is hereby given that CNA Money Market Fund, Inc., CNA Plaza, Chicago, Illinois 60685, registered as an open-end, diversified, management investment company under the Investment Company Act of 1940 (the "Act"), filed an application on Form N-8F on September 11, 1986, pursuant to section 8(f) of the Act, for an order declaring that Applicant has ceased to be an investment company. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below.

The application states that on June 27, 1983, Applicant, a Maryland corporation filed its initial registration statement under the Securities Act of 1933 and under the Act for an indefinite amount of securities pursuant to Rule 24f-2. The applicant states a pre-effective amendment was filed on or about September 20, 1984. The applicant further states that the registration never became effective and, therefore, no public offerings were commenced. Applicant states that within the last eighteen months it has not transferred any of its assets to a separate trust, the beneficiaries of which were or are

securityholders of applicant. According to Applicant, its highest month end net asset value was $29,442,846.31 on November 30, 1985, and that since that date, distributions were made to its shareholders. Applicant further states that its Board of Directors authorized the filing of Form N-8F on February 21, 1986, and February 22, 1986 was the date on which distributions were begun in connection with the winding up of CNA Money Market Fund, Inc.

Applicant states that it has retained no assets; it has no debts; it is not a party to any litigation or administrative proceeding. Applicant states that it has no securityholders and is not now engaged, not does it propose to engage in any business activities other than those necessary for the winding up of its affairs.

Notice is further given that any interested person wishing to request a hearing on the application may, not later than December 1, 1986, at 5:30 p.m., do so by submitting a written request, and the specific issues, if any, of fact or law that are disputed. Such request should be addressed: Secretary, Securities and Exchange Commission, Washington, DC 20549. A copy of such request should be served personally or by mail upon Applicant at the address stated above. Proof of such service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed with the request. After said date, an order disposing of the application will be issued unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 86-25628 Filed 11-12-86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-15400 (File No. 812-6484)]

The Chase Manhatten Bank, N.A., Application for Order Permitting Foreign Custody Arrangements

November 5, 1986.

Notice is hereby given that the Chase Manhattan Bank, N.A. ("Chase"), 1 Chase Manhattan Plaza, New York, NY 10081, filed an application on September 23, 1986, for an order, pursuant to section 6(c) of the Investment Company Act of 1940 ("Act"), exempting any investment company registered under the Act, other than an investment company registered under section 7(d) of the Act ("Company"), Chase and Banco Chase Manhattan, S.A. ("Banco Chase") from the provisions of section 17(f) of the Act to permit Chase, as custodian of the securities and other assets of a company ("Securities"), or as subcustodian of the Securities as to which any other entity is acting as custodian, and such other entity for which Chase so acts, to deposit, or to cause or permit the deposit of, such Securities in Banco Chase in Brazil, subject to certain conditions. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below, and to the Act and the rules thereunder for the text of the relevant provisions.

According to the application, on November 20, 1981, the Commission granted an order (Investment Company Act Release No. 12053) to permit Chase, as custodian of the Securities of a company or as subcustodian of such Securities as to which any other entity is acting as custodian, and such other entity for which Chase so acts, to deposit or to cause or permit the deposit of such Securities in foreign banks and foreign securities depositories under certain conditions. Chase states that such order was amended (Investment Company Act Release No. 14184, October 9, 1984) to conform to certain conditions in Rule 17f-5 under the Act adopted by the Commission on September 7, 1984 (Investment Company Act Release No. 14132) (the order, as amended, is referred to herein as the "Existing Order").

Chase now proposes to deposit Securities in Brazil with Banco Chase, a wholly-owned subsidiary of Chase that is regulated in Brazil as a banking institution by Commissao De Valores Mobiliarios. Chase states that, as of December 31, 1985, the shareholders' equity of Banco Chase was less than the equivalent of U.S. $100,000,000, the minimum required in order for a foreign bank subsidiary of a U.S. bank or bank holding company to be considered an eligible foreign custodian under the Existing Order.

Therefore, Chase requests an order permitting Chase to deposit Securities in Brazil with Banco Chase so long as such deposit is made in accordance with an agreement, which agreement would be required to remain in effect at all times during which Banco Chase did not meet the shareholders' equity requirement of the Existing Order, among (a) the Company or a custodian of the Securities of the Company for which Chase acts as subcustodian, (b) Chase and (c) Banco Chase, pursuant to the terms of which Chase would act as the custodian or subcustodian, as the case may be, of the Securities of the Company and Banco Chase would be delegated such duties and obligations of Chase thereunder as would be necessary to permit Banco Chase to hold in custody the Securities of the Company in Brazil, provided that such delegation would not relieve Chase of any responsibility to the Company for any loss due to such delegation, except such loss as may result from political risk (e.g. exchange control restrictions, confiscation, expropriation, nationalization, insurrection, civil strife or armed hostilities) and other risk of loss (excluding bankruptcy or insolvency of Banco Chase) for which neither Chase nor Banco Chase would be liable under the Existing Order (e.g., despite the exercise of reasonable care, loss due to Acts of God, nuclear incident and the like). Chase undertakes, as an express condition to the requested order, to comply with all terms of the Existing Order, except the shareholders' equity requirement.

According to the application, the Existing Order requires the custody agreement between Chase and any foreign custodian to provide that Chase will indemnify and hold a company whose securities are held pursuant to such agreement harmless from and against any loss occurring as the result of the failure of a foreign custodian holding such Securities to exercise reasonable care with respect to the safekeeping of such Securities to the same extent that Chase would be required to indemnify and hold such Company harmless if Chase itself were holding such Securities in New York. Chase states that such indemnity provides financial support to contractual responsibility in addition to that afforded by the shareholders' equity of a foreign bank and that the agreements of Chase with respect to Banco Chase will afford protection significantly beyond such indemnification. Chase also states that it maintains a Bankers Blanket Bond, which provides standard fidelity and non-negligent loss coverage with respect to securities which may be held in the offices of Chase's subsidiary banks and the offices of non-affiliated foreign banks which may be utilized as subcustodians by Chase. Chase represents that it will maintain such coverage so long as it is available at reasonable cost.

Pursuant to the Existing Order, Chase

states that it must warrant to each Company that the established procedures to be followed by each foreign bank holding such Company's Securities, in the opinion of Chase after due inquiry, afford protection for such Company's Securities that is at least equal to that afforded by Chase's established procedures with respect to similar securities held by Chase in New York. Chase also states that in selecting a subcustodian under the Existing Order, it takes into consideration the financial strength of the subcustodian, its general reputation and standing in the country in which it is located, its ability to provide efficiently the custodial services required and the relative costs for the services to be rendered.

Chase represents that it has taken the foregoing factors into consideration in its selection of Banco Chase to act as a subcustodian. Chase believes that Banco Chase has financial resources totally adequate to meet its contractual responsibilities as subcustodian of Chase and that it enjoys an excellent reputation in Brazil. Chase submits that, based upon the protections provided by the Existing Order and the qualifications of Banco Chase outlined above, the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

NOTICE IS FURTHER GIVEN that any interested person wishing to request a hearing on the application may, not later than December 1, 1986, at 5:30 p.m., do so by submitting a written request setting forth the nature of his interest, the reason for such request, and the specific issues, if any, of fact or law that are disputed, to the Secretary, Securities and Exchange Commission, Washington, DC 20549. A copy of such request shall be served personally or by mail upon Chase at the address stated above. Proof of such service (by affidavit, or in the case of an attorney-at-law, by certificate) shall be filed with the request. After said date an order disposing of the application will be issued as of course unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 86-25629 Filed 11-12-86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-15399; (812-6379)]

PaineWebber Inc., et al.; Application for an Order Permitting Certain Affiliated Transactions

November 5, 1986.

Notice is hereby given that The Municipal Bond Fund, The Municipal Bond Trust and the PaineWebber Pathfinders Trust ("Trusts"), and PaineWebber Incorporated, sponsor of the Trusts ("Sponsor", collectively with Trusts, "Applicants"), 1285 Avenue of the Americas, New York, NY 10021, filed an application on May 12, 1986, and an amendment thereto on October 21, 1986, for an order, pursuant to sections 6(c) and 17(b) of the Investment Company Act of 1940 ("Act") exempting Applicants from section 17(a)(2) of the Act, to the extent necessary, to permit the Trusts to sell certain portfolio securities through independent clearing brokers to purchasers, which may include the Sponsor. Applicants also request that such relief extend to future unit investment trusts sponsored by the Sponsor, subject to the same terms and conditions set forth in the application. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below, and to the Act for the relevant provisions thereof.

According to the application, each Trust is a registered unit ivestment trust under the Act that issues series ("Series"), each of which is separately registered under the Securities Act of 1933 ("1933 Act") with respect to the sale of units ("Units") that represent a fractional undivided interest in such Series. Applicants state that each Series of the Trust invests in securities consisting of debt obligations of states, municipalities, public authorities and other public subdivisions ("Municipal Bonds"). Applicants also state that the Municipal Bonds are exempt from registration under the 1933 Act and that the interest on each such Bond, in the opinion of Bond counsel, is exempt from federal income taxation.

Applicants state that the trustee for the Trusts ("Trustee") is not permitted to vary investments or to purchase Municipal Bonds except to purchase replacement Municipal Bonds for failed contracts. The Trustee is authorized to sell securities prior to maturity when necessary to meet expenses, in order to meet redemption obligations to Unitholders, or, as directed by the Sponsor, in the event of certain material adverse credit developments, such as defaults of amounts due or default on amounts due on other securities of the same issuer, a decline in prices, or the occurrence of other market developments which, in the Sponsor's opinion, would make retention of the Municipal Bonds detrimental to the interests of Unitholders.

According to the application, municipal bonds are traded after initial issuance in a dealer market in which there is no single obtainable price. Applicants state that when the sale of Municipal Bonds is necessary there are two principal methods whereby the Trustee may sell such Bonds. First, the Trustee may approach a number of dealers and sell to the dealer making the highest bid. Or, the Trustee may place an order to sell Municipal Bonds with one dealer ("Introducing Dealer"), who retains an unaffiliated broker ("Clearing Broker") to communicate the availability of the Bonds through one of two wire services to 300–400 dealers. Pursuant to a prior order (Investment Company Act Release No. 14371, February 21, 1985), the Sponsor is permitted to act as Introducing Dealer when Municipal Bonds are sold through a wire system by the Clearing Broker.

Applicants state that experience has shown that the use of a wire service generally produces a higher price because it results in much better exposure of the offerings of Municipal Bonds to potential purchasers in a market that is widely competitive and anonymous. The wire services announce offers over the wire, specifying the security, principal amount offered, and any price and timing limitation, but neither the ultimate seller nor the Introducing Dealer acting on its behalf are revealed. Applicants represent that the Clearing Broker coordinates the receipt of all bids and selects the highest bidder.

According to the application, instructions to sell Municipal Bonds come from an officer of the Sponsor's Unit Trust Department, which is part of the Sponsor's Consumer Markets Group. Applicants represent that although Municipal Bonds deposited in a Series may be acquired from the Sponsor's Capital Markets Group, which is among the largest underwriters of, and dealers in, municipal securities, the personnel and operations of the Unit Trust Department and the Capital Markets Group are entirely separate and the Capital Markets Group will not have any involvement in administering or monitoring the Trusts' portfolios and will not solicit any sales from the Trusts' portfolios. Applicants state that personnel of the Capital Markets Group may be consulted from time to time

about the quality of a Municipal Bond held by a Series.

Applicants note that because section 17(a)(2) of the Act generally prohibits affiliated persons of a registered investment company from purchasing securities from such registered investment company, the Clearing Brokers have been instructed not to accept any bids received from the Sponsor or its affiliates. Applicants state that excluding the Trusts from receiving such bids, notwithstanding that the market reached by the wire services is both widely competitive and anonymous, may frequently cause the Trusts to be denied the best available price. Therefore, Applicants request an order, pursuant to sections 6(c) and 17(b) of the Act, to permit the Trusts to sell Municipal Bonds through a wire service to the highest bidder, including the Sponsor.

Applicants contend that the Sponsor's role as Introducing Dealer will not affect the anonymity or fairness of the contemplated affiliated transactions. In this regard, Applicants state that the transactions will be effected blindly through the Clearing Brokers, who in all cases will be an independent party. Applicants state that when selling a Trust's Municipal Bonds, the Sponsor's Consumer Markets Group would act as Introducing Dealer and the Sponsor's Capital Markets Group would act as purchasing dealer, and that both departments have separate personnel, location, facilities, credit analysts and purposes and will not consult with each other concerning the sale or purchase of any Municipal Bond. Applicants assert that the objective that the Sponsor as Introducing Dealer may have in selling a Municipal Bond (*e.g.*, to meet redemption obligations, to pay Trust expenses, as well as credit or market factors) would have no relation to the objective that the Sponsor as purchasing dealer would have in purchasing such Municipal Bond (*e.g.*, for a subsequent purchaser wanting to purchase such security). Finally, the Clearing Brokers will be instructed to obtain the best available price and therefore the Sponsor, as purchasing dealer, could not purchase a Muncipal Bond unless its bid were higher than the best price available from unaffiliated purchasing dealers.

Applicants agree that in order to minimize the possibilities of over-reaching in Municipal Bonds transactions, the following conditions will apply to the requested order: (1) The Unit Trust Department of the Sponor will not advise its Capital Markets Group or the municipal securities dealer department of any other broker-dealer when giving instructions to sell a Municipal Bond; (2) The Clearing Broker will be independent of the Sponsor in all cases; (3) Offers will be made through a major wire service in municipal bonds and will be kept open for three hours after initial appearance on the wire, which time period will not be reduced to less than two hours in the discretion of the Clearing Broker in a declining market; (4) The Sponsor's bid will be accepted only if a minimum of three bids are received from persons other than the Sponsor or its affiliates; (5) The Trustee will be instructed not to inquire as to the identify of a bidding purchasing dealer, and if it receives such information, will not transmit it to the Sponsor or any agent thereof; and (6) Clearing Brokers effecting the sales will be instructed to obtain the best available price and execution and will instruct the wire services not to report any bid from the Sponsor unless it is higher than the best price available from unaffiliated broker-dealers.

Applicants assert that sale of the Trusts' Municipal Bonds through the means of an independent wire services subject to the conditions described above will enable the Trusts to obtain the highest available price without eliminating the significant segment of possible buyers represented by the Sponsor's Capital Markets Group. Applicants further assert that the proposed terms and conditions of the contemplated affiliated transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, are consistent with the policies of the Trusts as recited in their registration statements and reports filed under the Act. Applicants also assert that the requested exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Notice is further given that any interested person wishing to request a hearing on the application may, not later than December 1, 1986, at 5:30 p.m., do so by submitting a written report setting forth the nature of his interest, the reasons for his request, and the specific issues, if any, of fact or law that are disputed, to the Secretary, Securities and Exchange Commission, Washington, DC 20549. A copy of the request should be served personally or by mail upon Applicant(s) at the address stated above. Proof of service (by affidavit or, in the case of attorney-at-law, by certificate) shall be filed with the request. After said date, an order disposing of the application will be issued unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 86-25626 Filed 11-12-86; 8:45 am]

BILLING CODE 8010-01-M

[File No. 22-16039]

Application and Opportunity for Hearing

Notice is Hereby Given that LTV Corporation ("Applicant") has filed an applicaton pursuant to clause (ii) of section 310(b)(1) of the Trust Indenture Act of 1939 ("Act") for a finding by the Securities and Exchange Commission ("Commission") that the successor trusteeship of Valley Fidelity Bank and Trust Company ("Fidelity") under four indentures of the Applicant heretofore qualified under the Act, is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify Fidelity from acting as trustee under any of such indentures.

Section 310(b) of the Act provides, in pertinent part, that if a trustee under an indenture qualified under the Act has or shall acquire any conflicting interest, it shall, within 90 days after ascertaining that it has such conflicting interest, either eliminate such conflicting interest or resign. Subsection (1) of such section provides, in effect, that with certain exceptions, a trustee under a qualified indenture shall be deemed to have a conflicting interest if such trustee is trustee under another indenture under which any other securities of the same issuer are outstanding. However, under clause (ii) of said Subsection (1), there shall be excluded from the operation of this provision another indenture under which other securities of the issuer are outstanding if the issuer shall have sustained the burden of proving, on application to the Commission and after opportunity for hearing thereon, that trusteeship under such qualified indenture and such other indenture is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify such trustee from acting as trustee under either of such indentures.

The Applicant alleges that: 1. The Applicant has outstanding 9-¼%

Sinking Fund Debentures due February 1, 1997 ("9–¼% Debentures") issued under an indenture date as of February 1, 1977 ("1977 Indenture"), between the Applicant and MBank of Dallas, National Association ("MBank"), as Trustee, which 1977 Indenture was heretofore qualified under the Act. The 9–¼% debentures were registered under the Securities Act of 1933 ("1933 Act").

2. The Applicant has outstanding 13–⅞% Sinking Fund Debentures due December 1, 2002 ("13–⅞% Debentures") issued under an indenture date as of December 1, 1982 ("1982 Indenture"), between the Applicant and MBank, as Trustee, which 1982 Indenture was heretofore qualified under the Act. The 13–⅞% Debentures were registered under 1933 Act.

3. The Applicant has outstanding 14% Sinking Fund Debentures due August 15, 2004 ("14% Debentures") issued under an indenture date as of August 15, 1984 ("1984 Indenture"), between the Applicant and MBank, as Trustee, which 1984 Indenture was heretofore qualified under the Act. The 14% Debentures were registered under the 1933 Act.

4. The Applicant has outstanding 10⅝% Senior Reset Notes due March 15, 1999 ("10⅝ Notes") and 15% Senior Notes due January 15, 2000 ("15% Notes") issued under an indenture dated as of May 30, 1986 ("1986 Indenture"), between the Applicant and MBank, as Trustee, which 1986 Indenture was qualified under the Act. The 10⅝% Notes and the 15% Notes were exempt for registration under the 1933 Act.

5. On September 30, 1986, Fidelity was appointed as successor trustee to MBank under the 1977 Indenture, the 1982 Indenture, the 1984 Indenture and the 1986 Indenture (collectively, the "Indentures").

6. The Applicant is in default under the Indentures by virtue of having filed on July 17, 1986, a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, and its failure to make any interest payments due on the 9¼% Debentures, the 13⅞% Debentures, the 14% Debentures, the 10⅝ Notes and the 15% Notes (collectively, the "Securities") after such date.

7. The Applicant's obligations under the Indentures and the Securities issued thereunder are wholly unsecured and rank *pari passu inter se*.

8. In the opinion of the Applicant, the provisions of the Indentures are not so likely to involve a material conflict of interest so as to make it necessary in the public interest or for the protection of any holder of any of the Debentures issued under the Indentures to disqualify Fidelity from acting as successor trustee under any of the Indentures.

The Applicant has waived notice of hearing, any right to a hearing on the issues raised by its application, and all rights to specify procedures under the Rules of Practice of the Commission which the respect to its application.

For a more detailed account of the matters of fact and law asserted, all persons are referred to said Application File No. 22–16039, which is a public document on file in the offices of the Commission at the Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

Notice is Further Given that any interested person may, not later than November 30, 1986, submit to the Commission his views or any substantial facts bearing on this application or the desirability of a hearing thereon. Any such communication or request should be addressed: Secretary, Securities and Exchange Commission, 450 Fifth St., NW. Washington, DC 20549, and should state briefly the nature of the interest of the person submitting such information or requesting the hearing, the reasons for the request, and the issues of fact and law raised by the application which he desires to controvert. Persons who request the hearing or advice as to whether the hearing is ordered will receive all notices and orders issued in this matter, including the date of hearing (if ordered) and any postponements thereof. At any time after such date, an order granting the application may be issued upon request or upon the Commission's own motion.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 86–25562 Filed 11–12–86; 8:45 am]

BILLING CODE 8010–01–M

[Release No. IC–15394; (File No. 811–1607)]

Resources Growth Fund; Proposal to Terminate Registration Under the Act

November 4, 1986.

Notice is hereby given that the Commission proposes, pursuant to section 8(f) of the Investment Company Act of 1940 ("Act"), to declare by order upon its own motion that Resources Growth Fund, Inc. ("Fund"), registered under the Act as an open-end, diversified, management company, has ceased to be an investment company as defined in the Act.

Information contained in the files of the Commission indicates that the Fund was organized on November 30, 1967, and that it registered under the Act on February 23, 1968 by filing a Form N–8A. In mid-1983, the Fund's contract with its investment adviser, Resources Capital Corporation ("RCC"), expired. This contract was not renewed because, for reasons unrelated to the Fund, RCC had determined not to continue its operations. RCC withdrew its registration as an investment adviser effective July 17, 1984. Thereafter, all but one of the directors of the Fund resigned, leaving Mr. Bruce Glaspell, the president of the Fund, as its only remaining director.

By August 15, 1983, all investment activity of the Fund had been terminated, and the proceeds of portfolio liquidation in the amount of $75,902.60 had been placed with Wells Fargo Bank, San Francisco. This amount, together with a checking account balance of $6,510.83 was thereafter transferred to Manufacturers Hanover Trust Company, San Francisco. In August, 1983, Mr. Glaspell retained Kenneth M. Christison, Esq. to wind-up the Fund's affairs in an orderly manner, by means of a voluntary redemption of outstanding shares. Arrangements were made for payment of the Fund's liabilities. Thereafter, a March 12, 1984 letter ("letter") was sent to shareholders advising them of these circumstances and encouraging them to tender their shares for redemption because the Fund's size made it uneconomical to resume operations. This letter also stated that, with respect to shareholders who could not be located, or who for any reason did not respond to this letter, any monies remaining in the Fund's account with Manufacturers Hanover Trust Company would escheat to the State of California after a period of seven years from the termination of the redemption period, according to procedures prescribed by California law. However, any shareholder would be able to request redemption during the seven year period. Further, the letter represented that as required by the Act, the books and records of the Fund would be retained for a period of six years under the control of Mr. Christison's law firm and could be reviewed by any shareholder. Finally, the letter advised shareholders that upon completion of the redemption period, it was Mr. Glaspell's intention that the Fund, a a corporate entity, be legally dissolved.

As a result of the letter, twenty shareholders requested and received redemptions of $72,808.78 for 5,909.808

shares. Twenty shareholders could not be located, leaving a total of $10,886.68 for 883.666 shares unredeemed. In 1984, this remaining balance was placed in a trust account at Crocker Bank, Tiburon-Belvedere #113, CA 94920, bearing the name "Resources Growth Fund, Inc., Kenneth M. Christison, Trustee." Crocker Bank has since been acquired by Wells Fargo Bank, which presently maintains the trust account at the aforementioned location, in the amount, approximately, of $12,000 for remaining shareholders of the Fund, and will continue to do so during the escheatment period. On the basis of the foregoing, it appears that the Fund is no longer an investment company.

Section 8(f) of the Act provides, in pertinent part, that whenever the Commission, on its own motion, finds that a registered investment company has ceased to be an investment company, it shall be so declare by order and upon the taking effect of that order, the registration of that investment company shall cease to be in effect.

Notice is further given that any interested person wishing to request a hearing on the application may, not later than November 18, 1986, at 5:30 p.m., do so by submitting a written request setting forth the nature of his interest, the reasons for his request, and the specific issues, if any, of fact or law that are disputed, to the Secretary, Securities and Exchange Commission, Washington, DC 20549. A copy of the request should be served personally or by mail upon Applicant at the address stated above. Proof of service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed with the request. After said date an order disposing of the application will be issued unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 86-25565 Filed 11-12-86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-15396; File No. 812-6450]

Application and Opportunity for a Hearing; SAFECO Life Insurance Co., et al.

November 5, 1986.

Notice is hereby given that SAFECO Life Insurance Company (the "Company"), SAFECO Resource Variable Account B (the "Account"), and SAFECO Securities, Inc., SAFECO Plaza, Seattle, Washington 98185, (referred to collectively as "Applicants"), filed an application on August 8, 1986, and amendments thereto on September 8, and October 9, 1986, for an order of the Commission pursuant to section 6(c) of the Investment Company Act of 1940 (the "Act") granting exemptions from sections 26(a)(2) and 27(c)(2) of the Act to permit the deduction of mortality and expense risk changes from the assets of the Account in connection with the issuance of certain variable annuity contracts ("Contracts"). All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below, and to the Act and rules thereunder for the text of the relevant provisions.

Applicants state that the Company is a Washington stock life insurance company. Applicants state that SAFECO Securities, Inc. is the principal underwriter of the Account. Applicants also state that the Account was established by the Company on February 6, 1986, in accordance with the provisions of Washington insurance law, and that it is a separate investment account to which owners of the Contracts may allocate purchase payments to support benefits payable under the Contracts. Applicants further state that the Account is registered under the Act as a unit investment trust and will invest assets related to the Contracts solely in shares of SAFECO Resources Series Trust.

Applicants state that the Contracts are group contracts which provide for a surrender charge upon a partial or total surrender of a Contract or participant account prior to the annuity date. Applicants state that this charge applies only to purchase payments, made in the five certificate years preceding the year of surrender. The amount is equal to 9 percent of the amount withdrawn in the first two certificate years with respect to each purchase payment and declining by 1 percent in each of the next four certificate years thereafter such that, on a first-in-first-out basis, there is only a 5% charge applicable to amounts withdrawn in the sixth and subsequent certificate years; no charge is applied to amounts withdrawn representing purchase payments five certificate years prior to the surrender date. Applicants also state that the surrender charge may be insufficient to cover all costs relating to the distribution of the Contracts.

Applicants state that an administrative charge of $15.00 will be assessed against a participant's accumulation account value in each calendar year prior to the annuity date. This charge, according to the Applicants, is guaranteed not to increase about $25.00 for the life of the Contract and is assessed in equal amounts against each Division of the Account in which a participant has accumulations. Applicants state that this charge is designed to reimburse the Company for certain expenses incurred in establishing and maintaining the records relating to participant accounts and to a Contract participating in the Account.

Applicants state that a charge is assessed against Account assets at an annualized rate of 1.25 percent of the average daily net asset value of the Account attributable to the Contracts. According to the application, 0.75 prcent of this charge is intended to compensate the Company for assuming the risk that its actuarial estimate of mortality rates may prove erroneous (i.e., the risk that a participant may receive annuity benefits for a period longer than that reflected in the Contract's annuity rates or may die at a time when the death benefit guaranteed by the Contract is higher than the accumulation value of the participant's accumulation account); and 0.50 percent of this charge is intended to compensate the Company for assuming the risk that administrative charges, which are guaranteed not to increase, may prove insufficient to cover expenses actually incurred. Applicants represent that accumulation amounts used to purchase annuity benefits are applied at annuity rates guaranteed in the Contract. Applicants state that the annuity tables contained in the Contracts are based on the 1983 Group Annuity Mortality Table, projected, with an age setback of one year if the annuity payment begins in the year 2000–2009, two years if the annuity payment begins in the year 2010–2019 and an additional one year setback for each additional ten years following.

Applicants represent that charges for the Company's assumption of mortality and expense risks, which are guaranteed not to increase, are reasonable in relation to the risks assumed and guarantees provided in the Contracts. Applicants submit that this representation is based upon an analysis of the mortality risks, (taking into consideration such factors as the guaranteed annuity purchase rates) the expense risks (taking into consideration charges against separate account assets for other than mortality and expense risks) and the estimated costs, now and in the future, of certain contract features. Applicants state that the Company has incorporated its analysis into a memorandum which it will

maintain and make available to the Commission or its staff upon request.

Applicants represent that under certain circumstances, profit derived from the mortality and expense risk charge may be viewed as providing for a portion of the costs relating to distribution of the Contracts. Applicants state that the Company has concluded that there is a reasonable likelihood that the proposed distribution financing arrangement will benefit the Account, the owners of the Contracts and participants thereunder. Applicants state that the Company has taken into consideration, among other things, that the sales load is imposed only if a contractowner surrenders the Contract and that, in the interim, those funds are invested on behalf of contractowners and participants. Applicants represent that the bases for the Company's conclusion have been incorporated into a memorandum, which the Company will maintain and make available to the Commission or its staff upon request.

The Company represents that the assets of the Account will be invested only in a management investment company which undertakes, in the event it should adopt a plan for financing distribution expenses pursuant to Rule 12b-1 under the Act, to have such plan formulated and approved by a board of directors, the majority of whom are not "interested persons" of the management company within the meaning of section 2(a)(19) of the Act.

Applicants request exemption from sections 26(a)(2) and 27(c)(2) to the extent necessary to deduct from the Account a daily asset charge for mortality and expense risks which amounts to an aggregate of 1.25% per annum (consisting of approximately .75% for mortality risks and approximately .50% for expense risks).

Notice is further given that any person wishing to request a hearing on the application may, not later than December 1, 1986, at 5:30 p.m., do so by submitting a written request setting forth the nature of his or her interest, the reasons for the request, and the specific issues, if any, of fact or law that are disputed. Such request should be addressed to: Secretary, Securities and Exchange Commission, Washington, DC 20549. A copy of the request should be served personally or by mail upon Applicants at the address stated above. Proof of service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed with the request. After said date, an order disposing of the application will be issued unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 86-25563 Filed 11-12-86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-15393; File No. 812-6468]

Universal BIDCO Corp.; Filing of Application Pursuant to Section 6(c) of the Act for an Order Exempting Applicant From all Provisions of the Act

November 4, 1986.

Notice is hereby given that Universal BIDCO Corporation ("Applicant"), 1400 North Woodward Avenue, Suite 100, Birmingham, Michigan 48011, a Michigan corporation which is seeking to be licensed as a "business and industrial development corporation" under Act No. 89 of the Michigan Public Acts of 1986 ("BIDCO Act"), filed an application on August 29, 1986, and an amendment thereto on October 21, 1986, pursuant to section 6(c) of the Investment Company Act of 1940 ("Act"), requesting an order exempting Applicant from all provisions of the Act. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below, and to the Act for the text of the applicable provisions thereof.

Applicant represents that the BIDCO Act and Applicant's licensure thereunder are part of an economic development incentive for the State of Michigan. Applicant states that its purposes are mandated by statute to render financial and management assistance to business firms primarily in the State of Michigan. To this end, Applicant will engage in debt financing, equity financing and leasing transactions designed to furnish innovative financing to deserving businesses which may otherwise be unable to obtain conventional bank financing. Applicant will have the power to make loans, invest in securities, and own real and personal property and lease the same to other businesses. It is anticipated that Applicant will provide financing and management assistance principally to entities doing business in Michigan. Applicant anticipates that the majority of its investments will be in medium terms loans, similar to commercial loans. Unlike typical investment companies regulated under the Act, Applicant argues that its investments in securities will be almost exclusively limited to direct acquisitions from the issuer in transactions not involving any public offering. Other than obligations of the United States and highly rated debt obligations of publicly-held domestic corporations, Applicant does not propose to acquire any significant investments in securities in public trading markets. Furthermore, Applicant expressly represents that it will not make any investment in the voting securities of any Small Business Investment Company licensed under the Small Business Investment Act ("SBIC"), unless such SBIC limits its investments to those in businesses located primarily in Michigan.

It is further stated that Applicant will operate as a for-profit corporation with a single class of voting common stock. Applicant's common stock will initially be distributed in an offering made only to accredited investors as defined in Rule 501(a), and pursuant to Rule 506, of Regulation D under section 4(2) of the Securities Act of 1933 ("1933 Act"). Applicant states that subscribers for its shares in this private placement will be required to represent that they are acquiring the shares for purposes of investment and not for resale. The common shares will be subject to substantial restrictions on transfer, will bear a restrictive legend to that effect, and no public active trading market is expected to develop for such common shares absent an underwritten distribution registered under the 1933 Act. Applicant will offer 800,000 common shares, $.10 par value, at a price of $5.00 per share, in such offering. Shareholders will have one vote for each share held, and will elect all of Applicant's directors.

Applicant anticipates that it may in the future make one or more subsequent offerings of its common shares to increase its capital base; it is stated that if such a subsequent offering is effectuated pursuant to an effective registration statement under the 1933 Act, a public trading market might develop for such common shares. Applicant represents that in any public offering registered under the 1933 Act, it will implement reasonable procedures designed to limit purchasers in such offering, as well as purchasers in any secondary trading market which might develop, to those who would be deemed to be sophisticated investors, who are capable of understanding and assuming the risks involved in an investment in Applicant's securities.

Applicant concedes that it may fall within the Act's definition of an investment company because it expects that its loans and investments will be represented by debt, equity and other

securities issued by businesses to which it renders management and financial assistance, and that the value of such securities acquired by Applicant may exceed 40% of the value of Applicant's total assets. Applicant anticipates having more than 100 beneficial owners of its common shares. Applicant contends, however, that its requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes and policies of the Act.

In support of that assertion, Applicant states that it will, pursuant to the BIDCO Act, be subject to pervasive regulation by the State of Michigan designed to protect investors, in and lenders to, Applicant, including the Michigan Uniform Securities Act. Such regulation also includes supervisory control by the Michigan Financial Institutions Bureau of: (i) The character, fitness and financial standing of Applicant's directors, officers and controlling persons; (ii) minimum capital requirements; (iii) conflicts of interest; (iv) the acquisition of other businesses (v) dividend policy; (vi) the redemption of Applicant's shares; (vii) change in control of, or disposition of, Applicant's business; and (viii) financial soundness of the Applicant. Applicant will be required to make annual, and may be required to make other, periodic reports to the Michigan Financial Institutions Bureau, and is subject to required annual examinations of its business and assets by the Bureau.

Notice if further given that any interested person wishing to request a hearing on the application may, not later than November 24, 1986, at 5:30 p.m., do so by submitting a written request setting forth the nature of his interest, the reasons for his request, and the specific issues, if any, of fact or law that are disputed, to the Secretary, Securities and Exchange Commission, Washington, DC 20549. A copy of the request should be served personally or by mail upon Applicant at the address stated above. Proof of Service, (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed with the request. After said date, an order disposing of the application will be issued unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 86-25564 Filed 11-12-86; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #6463]

Declaration of Disaster Loan Area; Idaho

Caribou County, Idaho, constitutes a disaster area because of severe damage to crops due to frost and winter kill, which occurred on October 15, 1985. Eligible small businesses without credit available elsewhere and small agricultural cooperatives without credit available elsewhere may file applications for economic injury assistance until the close of business on August 3, 1987, at the address listed below: Disaster Area 4 Office, Small Business Administration, 77 Cadillac Drive, Suite 158, P.O. Box 13795, Sacramento, California 95853-4795

or other locally announced locations.

The interest rate for eligible small business concerns without credit elsewhere is 4 percent, and 10.5 percent for eligible small agricultural cooperatives without credit available elsewhere.

(Catalog of Federal Domestic Assistance Program No. 59002)

Dated: November 3, 1986.

Charles L. Heatherly,

Acting Administrator.

[FR Doc. 86-25550 Filed 11-12-86; 8:45 am]

BILLING CODE 8025-01-M

Region X Advisory Council; Public Meeting

The U.S. Small Business Administration, Region X Advisory Council, located in the geographical area of Seattle, Washington, will hold a public meeting at 9:00 a.m., on Tuesday, December 2, 1986, in Room 166 of the Jackson Federal Building, 915 2nd Avenue, Seattle, Washington, to conduct a briefing on the following:

1. Results of the White House Conference
2. Results of State Small Business Conference
3. Review of SBA programs
4. Ways to improve Washington State's participation in small business

For further information, write or call John Talerico, District Director, U.S. Small Business Administration, 915 2nd Avenue, Room 1792, Seattle, Washington 98174 (206) 442-2786.

Jean M. Nowak,

Director, Office of Advisory Councils.

November 4, 1986.

[FR Doc. 86-25551 Filed 11-12-86; 8:45 am]

BILLING CODE 8025-01-M

[License No. 09/09-0239]

Brentwood Capital Corp.; Filing of an Application for an Exemption Under the Conflict of Interest Regulation

Notice is hereby given that Brentwood Capital Corporation (Brentwood), 11661 San Vicente Boulevard, Los Angeles, California 90049, a Federal License under the Small Business Investment Act of 1958, as amended (the Act), has filed an application with the Small Business Administration (SBA) pursuant to § 107.903(b) of the Regulations governing small business investment companies (13 CFR 107.903(b) (1986)) for an exemption from the provisions of the cited Regulation.

Subject to SBA approval, Brentwood Capital Corporation proposes to provide funds to Protype Corporation, 8655 Tamarack Avenue, Sun Valley, California 91352 for working capital use.

The proposed financing is brought within the purview of § 107.903(b) of the Regulations because Brentwood Associates IV, an associate of Brentwood, owns greater than 10 percent of Protype Corporation and therefore Protype Corporation is considered an Associate of Brentwood Capital Corporation as defined by § 107.3 of the Regulations.

Notice is hereby given that any interested person may, not later than fifteen (15) days from the date of publication of this Notice, submit written comments on the proposed transaction to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 L Street, NW., Washington DC 20416.

A copy of this Notice will be published in a newspaper of general circulation in the Sun Valley, California area.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

Dated: November 6, 1986.

[FR Doc. 86-25549 Filed 11-12-86; 8:45 am]

BILLING CODE 8025-01-M

[Application No. 02/02-5500]

Manhattan Central Capital Corp.; Application for a License to Operate as a Small Business Investment Company

An application for a license to operate as a small business investment company (SBIC) under the Small Business Investment Act of 1958, as amended,

(the Act), 15 U.S.C. 661 et. seq.), has been filed by Manhattan Central Capital Corp., (Applicant) with the Small Business Administration (SBA), pursuant to 13 CFR 107.102 (1986).

The officers, directors and shareholders of the Applicant are as follows:

Name and address	Title or relationship	Percentage of shares owned
David Choi, 22 Holly Drive, Shorthills, NJ 07078.	President, Director	25
Kun Sang Guak, 441 Buchanan Avenue, Staten Island, NY 10314	Vice President, Director	25
Hi Cho Pyun, 46 North Henry Street, Brooklyn, NY 11222.	Vice President, director	25
Kow Su Lee, 7004 Boulevard East, Guttenburg, NJ 07093.	Secretary, Director	25
Vincent Sabella, 1867 51st Street, Brooklyn, NY 11204.	Manager	0

The Applicant, a New York corporation, with its principal place of business at 38 West 32nd Street, New York, New York 10001, will begin operations with $1,00,000 of paid-in Capital and paid-in surplus. The Applicant will initially conduct its activities in the State of New York.

Matters involved in SBA's consideration of the Application include the general business reputation and character of the proposed owners and management, and the probability of successful operations of the new company under their management, including profitability and financial soundness in accordance with the Small Business Investment Act and the SFA Rules and Regulations.

Notice is nereby given that any person may, not later than 30 days from the date of publicatin of this Notice, submit written comments on the proposed SBIC to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 "L" Street, NW., Washington, DC 20416.

A copy of this Notice shall be published in a newspaper of general circulation in New York, New York.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: November 3, 1986.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 86-25546 Filed 11-12-86; 8:45 am]

BILLING CODE 8025-01-M

[License No. 06/06-0239]

Mapleleaf Capital Corp.; Filing of Application for Transfer of Ownership and Control

Notice is hereby given that an application has been filed with the Small Business Administration pursuant to § 107.601 of the Regulations governing small business investment companies (13 CFR 107.601 (1986)) for Transfer of Ownership and Control of Mapleleaf Capital Corporation (Licensee), 55 Waugh Drive, Suite 710, Houston, Texas 77007, a Federal Licensee under the Small Business Investment Act of 1958 (the act) as amended (15 U.S.C. 661 et seq.).

Pursuant to an agreement dated October 25, 1986, Vestcap Inc. (Vestcap) will acquire 100 percent of the issued and outstanding stock of the Licensee. Vestcap is a Texas corporation located at 55 Waugh Drive, Suite 710, Houston, Texas 77007. Vestcap is seventy-five percent owned by Sunwestern Investment Fund (Sunwestern) and twenty-five percent owned by Edward M. Fink. Sunwestern and its affiliates presently own and manage two other Licensees, Sunwestern Capital Corporation and Sunwestern Ventures Company (formerly Gill Capital Corporation).

The officers, directors and indirect shareholders of the Licensee will be as follows:

Name	Title or Relationship	Percentage of Shares Owned
Edward M. Fink, 55 Waugh Drive #710, Houston, Texas 77007	President, Clef, Exec. Off. & Indirect Shareholder.	25% of Vestcap.
Bernadette Obermeier, 55 Waugh Drive #710, Houston, Texas 77007	Secretary & Treasurer.	
Thomas W. Wright, Three Forest Plaza, 12221 Merit Drive #1680, Dallas, Texas 75251	Director	
James F. Leary, Three Forest Plaza, 12221 Merit Drive, #1680, Dallas, Texas 75251		
Chris Carmouche, Dickerson, Early, Hamel & Pennock, 2300 Citicorp, 1200 Smith, Houston, Texas 77002	Director	
Noel Mascarenhas, Rotan Mosle, Post Office Box 3226, Houston, Texas 77253	Director	
Sunwestern Investment Fund, Three Forest Plaza, 12221 Merit Drive, Suite 1680, Dallas, Texas 75251	Indirect Shareholder.	75% of Vestcap.

The Licensee will retain its corporate name and location. Matters involved in SBA's consideration of the application include the general business reputation and character of the proposed owners and management, and the probability of successful operations of the new company under their management including profitability and financial soundness in accordance with the Small Business Investment Act and the SBA Rules and Regulations.

Notice is further given that any person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed SBIC to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 "L" Street, NW., Washington, DC 20416.

A copy of the Notice shall be published in newspapers of general circulation in Houston, Texas.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: November 5, 1986.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 86-25547 Filed 11-12-86; 8:45 am]

BILLING CODE 8025-01-M

Region VI Advisory Council; Public Meeting

The U.S. Small Business Administration, Region VI Advisory Council located in the geographical area of Houston, Texas, will hold a public meeting from 9:30 a.m. until 3:00 p.m., Friday, December 5, 1986, at the Marriott Hotel, at the Astrodome, in the Chaparral Ballroom South, located at 2100 South Braeswood at Greenbriar, Houston, Texas 77030, to discuss such matters as may be presented by members, staff of the Small Business Administration and others attending.

For further information, write or call Donald D. Grose, District Director, U.S. Small Business Administration, 2525 Murworth, Suite 112, Houston, Texas 77054, (713) 660-4409.

Jean M. Nowak,

Director, Office of Advisory Councils.

November 4, 1986.

[FR Doc. 86-25548 Filed 11-12-86; 8:45 am]

BILLING CODE 8025-01-M

Shipping Coordinating Committee, Subcommittee on Safety of Life at Sea, Working Group on Safety of Navigation; Meeting

The Working Group on Safety of Navigation of the Subcommittee on Safety of Life at Sea (SOLAS) will conduct an open meeting on December 18, 1986, at 9:30 a.m. in Room 3442 of the Department of Transportation

Headquarters, 400 Seventh Street, SW., Washington, DC 20590.

The purpose of the meeting is to discuss the advance papers received and the U.S. position for Session 33 scheduled for January 12–16, 1987. Items of principal interest on the agenda for this session are:

—Routing of Ships
—Problems related to deep-draft vessels
—Matters concerning search and rescue
—Amendment of regulations V/2(a) and V/3(b) of SOLAS
—Removal of disused offshore platforms
—Infringement of safety zones around offshore structures
—Method of supplying heading information at the emergency steering position
—World-wide navigation system
—Electronic chart display systems
—Navigational aids and related equipment

Members of the general public may attend up to the seating capacity of the room.

For further information or for documentation pertaining to the SOLAS meeting, contact Mr. Edward J. LaRue, Jr., U.S. Coast Guard Headquarters (G-NSS-2), 2100 Second St. SW., Washington, DC 20593-0001, Telephone: (202) 267-0416.

Dated: November 3, 1986.

William H. Dameron,

Executive Secretary, Shipping Coordinating Committee.

[FR Doc. 86-25622 Filed 11-12-86; 8:45 am]

BILLING CODE 4710-07-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Order 86-11-15; Dockets 36253 and 41638]

Aviation Proceedings; Proposed Revocation of the Section 401 Certificates of Cascade Airways, Inc.; Secretary, DOT.

AGENCY: Office of the Secretary, DOT.

ACTION: Notice of order to show cause.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order revoking the certificates of Cascade Airways, Inc., issued under section 401 of the Federal Aviation Act.

DATE: Persons wishing to file objections should do so no later than December 1, 1986.

ADDRESSES: Responses should be filed in Dockets 36253 and 41638 and addressed to the Documentary Services Division, Department of Transportation, 400 7th Street, SW., Room 4107, Washington, DC 20590, and should be served on the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Janet A. Davis, Special Authorities Division, P-47, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590, (202) 366-2340.

Dated: November 7, 1986.

Matthew V. Scocozza,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 25650 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-62-M

[Order 86-11-14]

Aviation Proceedings; Fitness Determination of Midcontinent Airlines, Inc.

AGENCY: Department of Transportation.

ACTION: Notice of commuter air carrier fitness determination—order to show cause.

SUMMARY: The Department of Transportation is proposing to find that Midcontinent Airlines, Inc. is fit, willing and able to provide commuter air service under section 419(c)(2) of the Federal Aviation Act and is capable of providing reliable essential air service at Norfolk and Columbus, Nebraska, and Yankton, South Dakota.

Responses: All interested persons wishing to respond to the Department of Transportation's tentative fitness determination and reliability findings should file their responses with the Service Analysis Division I, P-63, Department of Transportation, 400 7th Street, SW., Room 5100, Washington, DC 20590, and serve them on all persons listed in Attachment A to the order. Responses shall be filed no later than November 24, 1986.

FOR FURTHER INFORMATION CONTACT: John McCamant, Service Analysis Division I, P-63, Department of Transportation, 400 7th Street, SW., Washington, DC. 20590 (202) 366-1057.

Dated: November 7, 1986.

Matthew V. Scocozza,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 86-25649 Filed 11-12-86; 8:45 am]

BILLING CODE 4910-02-M

Federal Aviation Administration

Cargo Compartment Fire Detection Instruments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability of technical standard order (TSO) and request for comments.

SUMMARY: The proposed TSO-Clc prescribes the minimum performance standards that cargo compartment fire detection instruments must meet to be identified with the marking "TSO-Clc."

DATE: Comments must identify the TSO file number and be received on or before February 20, 1987.

ADDRESS: Send all comments on the proposed technical standard order to:

Technical Analysis Branch, AWS-120, Aircraft Engineering Division, Office of Airworthiness—File No. TSO-Clc, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591

Or Deliver Comments To: Federal Aviation Administration, Room 335, 800 Independence Avenue SW., Washington, DC 20591.

Comments received on the proposed technical standard order may be examined, before and after the comment closing date, in Room 335, FAA Headquarters Building (FOB-10A), 800 Independence Avenue, SW., Washington, DC 20591, weekdays except Federal holidays, between 8:30 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Ms. Bobbie J. Smith, Technical Analysis Branch, AWS-120, Aircraft Engineering Division, Office of Airworthiness, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, Telephone (202) 267-9546.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on the proposed TSO listed in this notice by submitting such written data, views, or arguments as they desire to the above specified address. All communications received on or before the closing date for comments specified above will be considered by the Director of Airworthiness before issuing the final TSO.

How To Obtain Copies

A copy of the proposed TSO-Clc may be obtained by contacting the person under "FOR FURTHER INFORMATION

CONTACT." TSO–Clc references Society of Automotive Engineers, Inc. (SAE), Aerospace Standard (AS) Document No. AS 8036, dated April 1, 1985, for the minimum performance standard, Radio Technical Commission for Aeronautics (RTCA) Document No. DO–160B, dated July 1984, for the environmental standard, and DO–178, for the computer software requirements, dated March 1985. SAE AS Document No. AS 8036 may be purchased from the Society of Automotive Engineers, Inc., 400 Commonwealth Drive, Warrendale, PA 15096. RTCA/DO–160B and DO–178A may be purchased from the Radio Technical Commission for Aeronautics Secretariat, One McPherson Square, Suite 500, 1425 K Street NW., Washington, DC 20005.

Issued in Washington, DC, on November 3, 1986.

Thomas E. McSweeny,

Manager, Aircraft Engineering Division, Office of Airworthiness.

[FR Doc. 86–25535 Filed 11–12–86; 8:45 am]

BILLING CODE 4910–13–M

National Highway Traffic Safety Administration

[Docket No. EX86–1; Notice 2; Docket No. EX86–2; Notice 2]

Panther Motor Car Co. Ltd., Carrozzeria Bertone; Petitions for Temporary Exemption From Federal Motor Vehicle Safety Standard No. 208

On July 31, 1986, the National Highway Traffic Safety Administration published notices of receipt of petitions from Panther Motor Car Co. Ltd. of England, and Carrozzeria Bertone S.p.A. of Italy, for temporary exemptions from the passive restraint requirements of Federal Motor Vehicle Safety Standard No. 208 *Occupant Restraint Systems* (51 FR 27482).

The vehicle for which Panther requested exemption is the Kallista, an open roadster in the style of the 1930s. Bertone's product is the X1/9, an open vehicle of contemporary design. On April 12, 1985, the agency proposed alternative occupant crash protection requirements for convertible-type passenger cars (50 FR 14589) beginning with the 1990 model year which would not involve the use of automatic restraints. In reponse to that proposal, the agency has recently amended Standard No. 208 to exempt convertibles from the automatic restraint requirement during the phase-in period September 1, 1986–September 1, 1989 (51 FR 37028). In a subsequent ruling NHTSA will determine whether to apply the automatic restraint requirement to convertibles manufactured after September 1, 1989, or whether to apply a dynamic test requirement to the manual safety belts used in those vehicles.

The recent agency action in exempting convertibles has mooted the petitions by Panther and Bertone for temporary exemptions from the automatic restraint requirements for their Kallista and X1/9 convertible passenger cars. Accordingly, these dockets are being closed without further action by the agency.

(Sec. 3, Pub. L. 92–548, 86 Stat. 1159 (15 U.S.C. 1410); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on: October 31, 1986.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 25540 Filed 11–12–86; 8:45 am]

BILLING CODE 4910–59–M

UNITED STATES INFORMATION AGENCY

United States Advisory Commission on Public Diplomacy; Meeting

A meeting of the U.S. Advisory Commission on Public Diplomacy will be held November 19, 1986, in Room 600, 301 4th Street, SW., Washington, DC from 11:15 a.m. to 12:00 noon.

The Commission will meet with Mr. Carl Gershman, President, National Endowment for Democracy and Mr. John Richardson, Chairman, National Endowment for Democracy to discuss Endowment policies and programs.

Please call Gloria Kalamets, (202) 485–2468, if you are interested in attending the meeting since space is limited and entrance to the building is controlled.

Dated: November 5, 1986.

Bruce N. Gregory,

Staff Director.

[FR Doc. 86–25619 Filed 11–12–86; 8:45 am]

BILLING CODE 8230–01–M

Sunshine Act Meetings

Federal Register
Vol. 51, No. 219
Thursday, November 13, 1986

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

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 5:30 p.m. on Thursday, November 6, 1986, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session, by telephone conference call, to:

(A)(1) receive bids for the purchase of certain assets of and the assumption of the liability to pay deposits made in The Home Bank, Savannah, Missouri, Savannah, Missouri, which was closed by the Commissioner of Finance for the State of Missouri on Thursday, November 6, 1986; (2) accept the bid for the transaction submitted by United Missouri Bank of St. Joseph, St. Joseph, Missouri, an insured State nonmember bank; (3) approve the application of United Missouri Bank of St. Joseph, St. Joseph, Missouri, for consent to purchase certain assets of and assume the liability to pay deposits made in the The Home Bank, Savannah, Missouri, Savannah, Missouri, for consent to establish the sole office of the Home Bank, Savannah, Missouri, as a branch of United Missouri Bank of St. Joseph, and for consent to exercise full trust powers; and (4) provide such financial assistance, pursuant to section 13(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)(2)), as was necessary to facilitate the purchase and assumption transaction;

(B)(1) receive bids for the purchase of certain assets of and the assumption of the liability to pay deposits made in First Stock Yards Bank, St. Joseph, Missouri, which was closed by the Commissioner of Finance for the State of Missouri on Thursday, November 6, 1986; (2) accept the bid for the transaction submitted by the Bank of St. Joseph, St. Joseph, Missouri, an insured State nonmember bank; (3) approve the application of the Bank of St. Joseph, St. Joseph, Missouri, for consent to purchase certain assets of and assume the liability to pay deposits made in First Stock Yards Bank, St. Joseph, Missouri, and for consent to establish the two offices of First Stock Yards Bank as branches of the bank of St. Joseph; and (4) provide such financial assistance, pursuant to section 13(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)(2)), as was necessary to facilitate the purchase and assumption transaction;

(C)(1) receive bids for the purchase of certain assets of and the assumption of the liability to pay deposits made in The Citizens State Bank, Donna, Texas, which was closed by the Banking Commissioner for the State of Texas on Thursday, November 6, 1986; (2) accept the bid for the transaction submitted by Raymondville State Bank, Raymondville, Texas, an insured State nonmember bank; (3) approve the application of Raymondville State Bank, Raymondville, Texas, for consent to purchase certain assets of and assume the liability to pay deposits made in The Citizens State Bank, Donna, Texas, and for consent to establish the sole office of The Citizens State Bank as a branch of Raymondville State Bank; and (4) provide such financial assistance, pursuant to section 13(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)(2)), as was necessary to facilitate the purchase and assumption transaction;

(D) adopt a resolution making funds available for the payment of insured deposits made in the The First National Bank and Trust Company of Enid, Enid, Oklahoma, which was closed by the Deputy Comptroller of the Currency, Office of the Comptroller of the Currency, on Thursday, November 6, 1986; and

(E) consider a request for financial assistance pursuant to section 13(c) of the Federal Deposit Insurance Act.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Chairman L. William Seidman, concurred in by Director Robert L. Clarke (Comptroller of the Currency), 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 pursuant to subsections (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)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

Dated: November 7, 1986.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 86-256911 Filed 11-10-86; 12:16 pm]

BILLING CODE 6714-01-M

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, November 18, 1986, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g
Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration
Internal personnel rules and procedures or matters affecting a particular employee

* * * * *

DATE AND TIME: Thursday, November 20, 1986, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Setting of dates of future meetings
Correction and approval of minutes
Draft Advisory Opinion 1986-35 (Reconsideration), Marshall Hurley on behalf of Coble for Congress, Again
Draft Advisory Opinion 1986-38—Donald R. Vaughan on behalf of W. David Stedman
Revised explanation and justification of regulations: 11 CFR 110.1 and 110.2
FY '87 management plan
Routine administrative matters

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Information Officer, 202-376-3155.

Marjorie W. Emmons,

Secretary of the Commission.

[FR Doc. 86-25730 Filed 11-10-86; 3:09 am]

BILLING CODE 6715-01-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

November 6, 1986.

TIME AND DATE: 10:00 a.m., Thursday, November 13, 1986.

PLACE: Room 600, 1730 K Street, NW., Washington, DC.

STATUS: Open.

MATTER TO BE CONSIDERED: The Commission will consider and act upon the following:

1. Mohave Concrete and Materials, Inc., Docket No. WEST 86-14-M. (Issue include consideration of Mohave's request that the Chief Administrative Law Judge's finding of default and order to pay the proposed civil penalties be set aside.)

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 20 CFR 2706.150(a)(3) and 2706.160(e).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653-5629.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 86-25689 Filed 11-10-86; 11:46 am]

BILLING CODE 6735-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of November 10, 17, 24, and December 1, 1986.

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington DC.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of November 10

Monday, November 10

2:00 p.m.
Briefing on Thermal Hydraulic Research Program (Public Meeting)

Friday, November 14

10:00 a.m.
Briefing on Improving Effectiveness of Intial Startup Programs (Public Meeting)
11:30 a.m.
Affirmation Meeting (Public Meeting) (if needed)

Week of November 17—Tentative

Wednesday, November 19

10:00 a.m.
Discussion of Pending Investigations (Closed—Ex. 5 & 7) (Postponed from October 31)
2:00 p.m.
Briefing in Advanced of Publication of Draft NUREG-1150 (Source Term) (Public Meeting)

Thursday, November 20

10:00 a.m.
Briefing on Initiatives to Improve Maintenance Performance (Public Meeting) (Postponed from November 6)
2:00 p.m.
Periodic Meeting with NUMARC (Public Meeting)
3:30 p.m.
Affirmation Meeting (Public Meeting) (if needed)

Friday, November 21

10:00 a.m.
Discussion/Possible Vote on Davis Besse Restart (Public Meeting)
1:30 p.m.
Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

Week of November 24—Tentative

Wednesday, November 26

10:00 a.m.
Affirmation Meeting (Public Meeting) (if needed)

Week of December 1—Tentative

Thursday, December 4

3:30 p.m.
Affirmation Meeting (Public Meeting) (if needed)

ADDITIONAL INFORMATION

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6) was held on November 6.
Affirmation of "Braidwood—Draft Order for Resolution of Dispute Between Braidwood Board and OI Over Disclosure of Investigation Information" (Public Meeting) was postponed from November 6 to November 7.
Affirmation of "Licensing Decision for Perry-1" (Public Meeting) is scheduled for November 7.

TO VERIFY THE STATUS OF MEETING CALL (RECORDING): (202) 634-1498.

CONTACT PERSON FOR MORE INFORMATION: Robert McOsker (202) 634-1410.

Robert B. McOsker,

Office of the Secretary.

November 6, 1986.

[FR Doc. 86-25654 Filed 11-7-86; 8:45 am]

BILLING CODE 7590-01-M

POSTAL RATE COMMISSION

Amended Notice of Meeting

TIME AND DATE: 10:00 a.m. on November 19, 1986.

PLACE: Room 300, 1333 H Street, NW., Washington, DC 20268-0001.

STATUS: Closed.

MATTERS TO BE CONSIDERED: The Notice published in Volume 51, No. 215, **Federal Register**, p. 40370, November 6, 1986, is amended under "**MATTERS TO BE CONSIDERED**" to read: To consider motions to dismiss the Complaint of the Sacramento Bee, et al, which is Docket No. C86-2, and to consider motions to dismiss the Complaint of the United Parcel Service, which is Docket No. C86-3.

CONTACT PERSON FOR MORE INFORMATION: Charles L. Clapp, Secretary, Postal Rate Commission, Room 300, 1333 H Street, NW; Washington, DC 20268-0001, Telephone (202) 789-6840.

Charles L. Clapp,

Secretary.

[FR Doc. 25762 Filed 11-10-86; 3:48 pm]

BILLING CODE 7715-01-M

RAILROAD RETIREMENT BOARD

Notice is hereby given that the Railroad Retirement Board will hold a meeting on November 19, 1986, 9:00 a.m., at the Board's meeting room on the 8th floor of its headquarters building, 844 Rush Street, Chicago, Illinois, 60611. The agenda for the meeting follows:

Portion Open to the Public

(1) Proposed Changes in the RULA Regulations
(2) Board Order 75-3
(3) Final Rule Regulations on Primary Insurance Amount Determinations
(4) Proposal to Recognize the Disability Programs Section
(5) Proposal Impacting Disability Programs
(6) Change in Agency Budget Request for Fiscal Year 1988
(7) Appeal of Claude J. Hahne Under the Railroad Unemployment Insurance Act
(8) Appeal of Alexander Zelinsky of the Service and Compensation Credited Under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Portion Closed to the Public

(A) Appeal from Referee's Denial of Disability Annuity, Anthony Rich.

The person to contact for more information is Beatrice Ezerski, Secretary to the Board, COM No. 312-751-4920, FTS No. 387-4920.

Dated: November 7, 1987.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 25682 Filed 11-10-86; 8:45 am]

BILLING CODE 7905-01-M

federal register

Thursday
November 13, 1986

Part II

Department of Defense

Corps of Engineers, Department of the Army

33 CFR Parts 320 through 330

Regulatory Programs of the Corps of Engineers; Final Rule

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330

Final Rule for Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Final rule.

SUMMARY: We are hereby issuing final regulations for the regulatory program of the Corps of Engineers. These regulations consolidate earlier final, interim final, and certain proposed regulations along with numerous changes resulting from the consideration of the public comments received. The major changes include modifications that provide for more efficient and effective management of the decision-making processes, clarifications and modifications of the enforcement procedures, modifications to the nationwide permit program, revision of the permit form, and implementation of special procedures for artificial reefs as required by the National Fishing Enhancement Act of 1984.

EFFECTIVE DATE: January 12, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson or Mr. Bernie Goode, HQDA (DAEN-CWO-N), Washington, DC 20314-1000, (202) 272-0199.

SUPPLEMENTARY INFORMATION:

Consolidation of Corps Permit Regulations

These final regulations consolidate and complete the six following rulemaking events affecting the Corps regulatory program:

1. *Interim Final Regulations.* These regulations contained Parts 320-330 and were published (47 FR 31794) on July 22, 1982, to incorporate policy and procedural changes resulting from legislative, judicial, and administrative actions that had occurred since the previous final regulations had been published in 1977. Because it had been almost two years since we had proposed changes to the 1977 regulations, we published the 1982 regulations as "interim final" and asked for public comments. We received nearly 200 comments.

2. *Proposed Regulatory Reform Regulations.* On May 12, 1983, we published (48 FR 21466) proposed revisions to the interim final regulations to implement the May 7, 1982, directives of the Presidential Task Force on Regulatory Relief. The Task Force directed the Army to reduce uncertainty and delay, give the states more authority and responsibility, reduce conflicting and overlapping policies, expand the use of general permits, and redefine and clarify the scope of the permit program. Since these regulations proposed changes to our existing nationwide permits and the addition of two new nationwide permits, a public hearing was held in Washington, DC, on October 12, 1983, to obtain comments on these proposed changes. As a result of the public comments received, nearly 500 in response to the proposed regulations and 22 at the public hearing, we have determined that some of the proposed revisions should be adopted and some should not. We have adopted some of the provisions that were designed to clarify policies for evaluating permit applications, to revise certain permit processing procedures, to add additional conditions to existing nationwide permits, and to modify certain nationwide permit procedures. We have not adopted some of the other proposed changes, including the two proposed new nationwide permits.

3. *Settlement Agreement Final Regulations.* On October 5, 1984, we published (49 FR 39478) final regulations to implement a settlement agreement reached in a suit filed by 16 environmental organizations in December of 1982 against the Department of the Army and the Environmental Protection Agency (*NWF v. Marsh*) concerning several provisions of the July 22, 1982, interim final regulations. The court approved the settlement agreement on February 10, 1984, and on March 29, 1984, we published (49 FR 12660) the implementing proposed regulations. We received over 150 comments on these proposed regulations covering a full range of views. Those comments which were applicable to the provisions of the March 29, 1984, proposals were considered and addressed in the final regulations published on October 5, 1984. The remaining comments have been considered in the development of the final regulations we are issuing today.

In the October 5, 1984, final rule there were several new provisions relating to the 404(b)(1) guidelines. In 33 CFR 320.4(a)(1) we clarified the fact that no 404 permit can be issued unless it complies with the 404(b)(1) guidelines.

If a proposed action complies with the guidelines, a permit will be issued unless the district engineer determines that it will be contrary to the public interest. In 33 CFR 323.6(a) we stated that district engineers will deny permits for discharges which fail to comply with the 404(b)(1) guidelines, unless the economic impact on navigation and anchorage necessitates permit issuance pursuant to section 404(b)(2) of the Clean Water Act. Although no 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated (i.e., compliance is a prerequisite to issuance), the 404(b)(1) evaluation is conducted simultaneously with the public interest review set forth in 33 CFR 320.4(a).

4. *Proposed Permit Form Regulations.* On May 23, 1985, we published (50 FR 21311) proposed revisions to 33 CFR Part 325 (Appendix A), which contains the standard permit form used for the issuance of Corps permits and the related provisions concerning special conditions. This proposal provided for the complete revision of the permit form and its related provisions to make them easier for permittees to understand. General permit conditions were written in plain English and greatly reduced in number; unnecessary material was deleted; and material which is informational in nature was reformatted under a "FURTHER INFORMATION" heading. We received 18 comments on this proposal.

5. *Proposed Regulations to Implement the National Fishing Enhancement Act of 1984 (NFEA).* On July 26, 1985, we published (50 FR 30479) proposed regulations to implement a portion of the Corps regulatory responsibilities pursuant to the NFEA. Specialized procedures relative to the processing of Corps permits for artificial reefs were proposed for inclusion in Parts 322 and 325. Eight organizations commented on these proposed regulations. The NFEA also authorizes the Secretary of the Army to assess a civil penalty on any person who, after notice and an opportunity for a hearing, is found to have violated any provision of a permit issued for an artificial reef. Procedures for implementing such civil penalties will be proposed at a later date. In addition, we are hereby notifying potential applicants for artificial reef permits that the procedures contained in Part 323 relating to the discharge of dredged or fill materials and those in Part 324 relating to the transportation of dredged material for the purpose of dumping in ocean waters will be used in the processing of artificial reef permits when applicable.

6. *Proposed Regulations (Portion of Part 323 and All of Part 326.* On March 20, 1986, we published (51 FR 9691) a proposed change to 33 CFR 323.2(d), previously 323.2(j), to reflect the Army's policy regarding *de minimis* or incidental soil movements occurring

during normal dredging operations and a proposed, complete revision of the Corps of Engineers enforcement procedures (33 CFR Part 326). Seventeen comment letters were received on these proposed regulations. These comments and the resulting changes reflected in the final regulations for § 323.2(d) and Part 326 are discussed in detail below.

Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Appropriate environmental documentation has been prepared for all permit decisions. Environmental assessments for each of the nationwide permits previously issued or being modified today are available from the Corps of Engineers. You may obtain these assessments by writing to the address listed in this preamble. Considering the potential impacts, we have determined that none required an environmental impact statement.

Discussion of Public Comments and Changes

Part 320—General Regulatory Policies

Section 320.1(a)(6): In order to provide clarity to the public, we have added a provision to codify existing practice that when a district engineer makes certain determinations under these regulations, the public can rely on that determination as a Corps final agency action.

Section 320.3(o): The National Fishing Enchancement Act of 1984 has been added to the list of related laws in § 320.3.

Section 320.4: In the May 12, 1983, proposed rule and the March 29, 1984, proposed rule we proposed changes to §§ 320.4(a)(1)—public interest review, 320.4(b)(5)—effect on wetlands, 320.4(c)—fish and wildlife, 320.4(g)—consideration of property ownership, and 320.4(j)—other Federal, state or local requirements. Changes to these paragraphs were adopted in the October 5, 1984, final rule. The various comments relating to these proposals have been fully discussed in the October 5, 1984 final rule (49 FR 39478).

Section 320.4(a)(3): Many commenters objected, some strongly, to the deletion in the October 5, 1984, final regulations of the term "great weight" from § 320.4(c), the paragraph concerning the consideration of opinions expressed by fish and wildlife agencies. Many stated that fish and wildlife agencies had the expertise and knowledge to know the impact of work in wetlands; therefore, their opinions should be given strong consideration. Some commenters supported removal of the "great weight" statement expecting less value would be given fish and wildlife agency views. It is not our intention to reduce or discount the value or expertise of fish and wildlife agency comments or those of any other experts in any field. Comments also varied from support of to objection to the deletion of the "great weight" statement from the other policy statements such as energy and navigation in § 320.4. Therefore, we added a new paragraph (a)(3) to clarify our position on how we consider comments from the public, including those from persons or agencies with special expertise on particular factors in the public interest review.

Section 320.4(b)(1): One commenter objected to the placement of the word "some" in this paragraph as a rewrite of E.O. 11990 which places no qualifier on "wetlands" indicating that all wetlands are vital. We have found through experience in administering the Section 404 permit program that wetlands vary in value. While some are vital areas, others have very little value; however, most are important. We recognize that "some wetlands are vital . . ." is being read by some people as "Some wetlands are important . . ." This was not our intent. To avoid this confusion we have revised this paragraph by deleting "some wetlands are vital areas . . ." and indicating that "most" wetlands are important.

Section 320.4(b)(2)(vi): We have included in the list of important wetlands those wetlands that are ground water discharge areas that maintain minimum baseflows important to aquatic resources. Scientific research now indicates that wetlands more often serve as discharge areas than recharge areas. Those discharge areas which are necessary to maintain a minimum baseflow necessary for the continued existence of aquatic plants and animals are recognized as important.

Section 320.4(b)(2)(viii): We have included in the list of important wetlands those which are unique in nature or scarce in quantity to the region or local area.

Section 320.4(d): We have revised this paragraph to clarify that impacts from both point source and non-point source pollution are considered in the Corps public interest review. However, section 208 of the Clean Water Act provides for control of non-point sources of pollution by the states.

Section 320.4(j)(1): Clarifying language has been added to this section to eliminate confusion regarding denial procedures when another Federal, state, and/or local authorization or certification has been denied.

Section 320.4(p): Some commenters felt that environmental considerations should take precedence over other factors. Other commenters believed that guidance should be given as to who determines whether there are environmental benefits to a project. Many commenters indicated that the regulation does not define the possible range of environmental benefits that will be considered. Environmental benefits are determined by the district engineer and the district staff based on responses received from the general public, special interest groups, other government agencies and staff evaluation of the proposed activity. Defining the possible range of environmental benefits would be almost impossible to cover in the rules in sufficient detail, since circumstances vary considerably for each permit application. After considering all the comments we have decided to make the change as proposed on May 12, 1983.

Section 320.4(q): Some commenters believed that this rule would distort review criteria by inserting inappropriate economic assumptions and minimizing environmental criteria. Some commenters suggested that the Corps revise this paragraph to include a provision to challenge an applicant's economic data and that of governmental agencies as well. Other commenters believe that economic factors do not belong in these regulations since the intent of the Clean Water Act is: "to restore and maintain the chemical, physical, and biological integrity of the nation's waters"; therefore, any regulation under the CWA should have, as its primary objective, provisions which give environmental factors the greatest weight. They were concerned that this part may be applied to allow economic benefits to offset negative environmental effects. Some commenters, however, believed that the Corps should assume that projects proposed by state and local governmental interests and private industry are economically viable and are needed in the marketplace. They also believed that the Corps and other governmental agencies should not engage in detailed economic evaluations. Economics has been included in the Corps list of public interest factors since 1970. However, there has never been a specific policy on economics in the regulations. The Corps generally accepts an applicant's determination that a proposed activity is needed and will be economically viable, but makes its own decision on whether

a project should occur in waters of the U.S. The district engineer may determine that the impacts of a proposed project on the public interest may require more than a cursory evaluation of the need for the project. The depth of the evaluation would depend on the significance of the impacts and in unusual circumstances could include an independent economic analysis. The Corps will balance the economic need for a project along with other factors of the public interest. Accordingly, § 320.4(q) has been modified from the proposed rule to provide that the district engineer may make an independent review of the need for a project from the perspective of the public interest.

Section 320.4(r): Many comments were offered as to the intent, scope and implementation of the proposed mitigation policy. Comments were almost equally divided between those who felt that the policy should be expanded and those that felt it should be more limited. The issues that were raised include: mitigation should not be used to outweigh negative public interest factors; mitigation should not be integrated into the public interest review; mitigation should be on-site to the maximum extent practicable; off-site mitigation extends the range of concerns beyond those required by Section 404. A wide range of views were expressed on our proposed mitigation policy, but virtually all commenters expressed need for a policy. The Corps has been requiring mitigation as permit conditions for many years based on our regulations and the 404(b)(1) guidelines. Because of the apparent confusion on this matter, we have decided to clarify our existing policy at 320.4(r).

The concept of "mitigation" is many-faceted, as reflected in the definition provided in the Council on (Environmental Quality (CEQ) NEPA regulations at 40 CFR 1508.20. Viewing "mitigation" in its broadest sense, practically any permit condition or best management practice designed to avoid or reduce adverse effects could be considered "mitigation." Mitigation considerations occur throughout the permit application review process and are conducted in consultation with state and Federal agencies responsible for fish and wildlife resources. District engineers will normally discuss modifications to minimize project impacts with applicants at pre-application meetings (held for large and potentially controversial projects) and during the processing of applications. As a result of these discussions, district engineers may condition permits to require minor project modifications, even though that project may satisfy all legal requirements and the public interest review test without those modifications.

For applications involving Section 404 authority, mitigation considerations are required as part of the Section 404(b)(1) guidelines analysis; permit conditions requiring mitigation must be added when necessary to ensure that a project complies with the guidelines. To emphasize this, we have included a footnote to § 320.4(r) regarding mitigation requirements for Section 404, Clean Water Act, permit actions. Some types of mitigation measures are enumerated in Subpart H of the guidelines. Other laws such as the Endangered Species Act may also lead to mitigation requirements in order to ensure that the proposal complies with the law. In addition to the mitigation developed in preapplication consultations and through application of the 404(b)(1) guidelines and other laws, these regulations provide for further mitigation should the public interest review so indicate.

One form of mitigation is "compensatory mitigation," defined at 40 CFR 1508.20(e) to mean "compensating for the impact by replacing or providing substitute resources or environments." Federal and state natural resource agencies sometimes ask the Corps to require permit applicants to compensate for wetlands to be destroyed by permitted activities. Such compensatory mitigation might be provided by constructing or enhancing a wetland; by dedicating wetland acreage for public use; or by contributing to the construction, enhancement, acquisition or preservation of such "mitigation lands." Compensatory mitigation of this type is often referred to as "off-site" mitigation. However, it can be provided either on-site or off-site. Such mitigation can be required by permit conditions only in compliance with 33 CFR 325.4, and specifically with 33 CFR 325.4(a)(3). In addition to those restrictions, the Corps has for many years declined to use, and does now decline to use, the public interest review to require permit applicants to provide compensatory mitigation unless that mitigation is required to ensure that an applicant's proposed activity is not contrary to the public interest. If an applicant refuses to provide compensatory mitigation which the district engineer determines to be necessary to ensure that the proposed activity is not contrary to the public interest, the permit must be denied. If an applicant voluntarily offers to provide compensatory mitigation in excess of the amount needed to find that the project is not contrary to the public interest, the district engineer can incorporate a permit condition to implement that mitigation at the applicant's request.

Part 321—Permits for Dams and Dikes in Navigable Waters of the United States

The Secretary of the Army delegated his authority under Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 to the Assistant Secretary of the Army (Civil Works). The Assistant Secretary in turn delegated his authority under Section 9 for structures in intrastate navigable waters of the United States to the Chief of Engineers and his authorized representative. District engineers have been authorized in 33 CFR 325.8 to issue or deny permits for dams or dikes in intrastate navigable waters of the United States" under Section 9 of the Rivers and Harbors Act of 1899. This section of the regulation and §§ 325.5(d) and 325.8(a) have been revised to reflect this delegation.

Part 322—Permits for Structures or Work in or Affecting Navigable Waters of the United States

Section 322.2(a): We have revised the term "navigable waters of the United States" to reference 33 CFR Part 329 since it and all other terms relating to the geographic scope of the Section 10 program are defined at 33 CFR Part 329.

Section 322.2(b): Commenters on the definition of structures indicated that several terms needed further amplification. It was suggested that the term "boom" be defined to exclude a float boom, as would be used in front of a spillway. The term was not redefined because those dams constructed in Section 10 waters do require a permit for a float boom. However, most dams in the United States are constructed in non-Section 10 waters and do not require a permit for a boom (floating or otherwise) unless it involves the discharge of dredged or fill material. It was suggested that the term "obstacle or obstruction" be modified to reinstitute the language from the July 19, 1977, final regulations. We have adopted the suggestion which will clarify our intent that obstacles or obstructions, whether permanent or not, do require a permit; it will also assist in jurisdictional decisions on enforcement. It was suggested that "boat docks" and "boat ramps" be included in the list of structures, since these are frequently proposed structures. These have been included. It was suggested that the term "artificial gravel island" be added, as

Congress, by Section 4(e) of the Outer Continental Shelf Lands Act of 1953, extended the regulatory program to the Outer Continental Shelf, and specifically cited artificial islands as falling under Section 10 jurisdiction. This type of structure is also constructed on state lands within the territorial seas. Accordingly, artificial islands have been included.

Section 322.2(c): Two commenters discussed the definition of "work"; one stated that it was too broad and the other that it should be expanded. The present definition of the term "work" has remained unchanged for many years and has achieved general acceptance by the regulators and those requiring a permit. The present language has been retained.

Sections 322.2(f)(2) and 323.2(n)(2): Both of these sections are concerned with the definition of general permits. Several commenters expressed support for the additional criteria contained in the May 12, 1983 proposed rule. Other commenters expressed concern that the proposed criteria were illegal. Some commenters believed that the proposal would amount to a delegation of the Section 404 program to the states, and that this is not a prerogative of the Corps of Engineers. Many commenters expressed serious concern that state programs were not comprehensive enough to properly represent the public interest review. Still others objected to the proposal because there were no assurances that the state approved projects themselves were "similar in nature" or would have "minimal adverse environmental effects"; those objections extended to the proposal to assess the impacts of the differences in the State/Corps decisions. Some commenters suggested that an automatic "kick-out" provision, whereby concerned agencies could cause the Corps to require an individual application on a case-by-case basis, may provide sufficient safeguards for the proposal to go forward. Some commenters suggested that a preferred approach to reducing duplication would be for the Corps to express, in its regulations, direction for its districts to vigorously pursue joint processing, permit consolidation, pre-application consultation, joint applications, joint public notices and special area management planning. This change was proposed in 1983. At that time we believed that additional flexibility in the types of general permits which could be developed was necessary to effectively administer the regulatory program. Our experience since then has shown that the existing definitions of general permit at both of these sections is flexible enough to develop satisfactory general permits. Therefore we have decided not to adopt this proposed change. Because several definitions previously found in Part 323 have been moved to Part 328, § 323.2(n) has been redesignated § 323.2(h).

Section 322.2(g): This section adds the definition of the term "artificial reefs" from the National Fishing Enhancement Act and clarifies what activities or structures the term does not include. Two commenters suggested modifications, or clarifications, to this definition to ensure that old oil and gas production platforms can be considered for use as artificial reefs. We agree with their suggestion. The definition would include the use of some production platforms, either abandoned in place or relocated, as artificial reefs as long as they are evaluated and permitted as meeting the standards of Section 203 of the Act.

Section 322.2(h): This section was proposed to add the definition of the term "outer continental shelf" from the Outer Continental Shelf Lands Act (OCSLA). Two commenters suggested that the territorial sea off the Gulf Coast of Florida and Texas is greater than three nautical miles from the coast line. We have determined that this is not the case, and have decided not to include a definition of the term "outer continental shelf" in these regulations and to rely instead on the definition of this term that is already in the OCSLA.

Sections 322.3(a) and 322.4: Activities which do not require a permit have been moved from § 322.3 and included in § 322.4. The limitation of the applicability of Section 154 of the Water Resource Development Act of 1976 in certain waterbodies has been deleted because no such limitation exists in that Act.

Section 322.5(b): This section addresses the policies and procedures for processing artificial reef applications. One commenter suggested that the opportunity for a general permit should not be precluded by this section. A general permit for artificial reefs is not precluded by this regulation change. Furthermore, the opportunity for the issuance of general permits may be enhanced with the implementation of the National Artificial Reef Plan by the Department of Commerce.

Section 322.5(b)(1): This section cites the standards established under section 203 of the National Fishing Enhancement Act. These standards are to be met in the siting and construction, and subsequent monitoring and managing, of artificial reefs. Two commenters insisted that these should be called goals or objectives, and several commenters said that more specific guidelines or criteria are needed to evaluate proposed artificial reefs against the standards or goals. Section 204 of the Act states that the Department of Commerce will develop a National Artificial Reef Plan which will be consistent with the standards established under Section 203, and will include criteria relating to siting, constructing, monitoring, and managing artificial reefs. Specification of such criteria in these rules would be inappropriate in view of the intent of Congress to have the Department of Commerce perform this function. The National Marine Fisheries Service (NMFS), acting for the Department of Commerce, has consulted with us in developing the National Artificial Reef Plan, and we will continue to consult with them to ensure permits are issued consistent with the criteria established in that plan. The Department of Commerce announced the availability of the National Artificial Reef Plan in the **Federal Register** on November 14, 1985.

The U.S. Coast Guard was particularly concerned that these rules be more specific with regard to information and criteria that will be used to ensure navigation safety and the prevention of navigational obstructions. Section 204 of the National Fishing Enhancement Act requires that the Department of Commerce consult the U.S. Coast Guard in the development of the National Artificial Reef Plan regarding the criteria to be established in the plan. One of the standards with which the criteria must be consistent is the prevention of unreasonable obstructions to navigation. In addition, the district engineer shall consult with any governmental agency or interested party, as appropriate, in issuing permits for artificial reefs. This includes pre-application consultation with the U.S. Coast Guard, and placing conditions in permits recommended by the U.S. Coast Guard to ensure navigational safety.

Section 322.5(b) (2) and (3): These sections state that the district engineer will consider the National Artificial Reef Plan, and that he will consult with governmental agencies and interested parties, as necessary, in evaluating a permit application. Two commenters supported this coordination. The NMFS requested notification of decisions to issue permits which either deviate from or comply with the plan. Paragraph (b)(2) requires the district engineer to notify the Department of Commerce of any need to deviate from the plan. In addition, the NMFS receives a monthly list of permit applications on which the

district engineer has taken final action. This should be sufficient notification for those permits which do not deviate from the plan.

Section 322.5(b)(4): Although some commenters strongly supported this section describing the liability of permittees authorized to build artificial reefs, several expressed concern that this provision was not clearly written or required specific criteria to assist the district engineer in determining financial liability. This paragraph has been rewritten to correspond closely with the wording in the National Fishing Enhancement Act, and examples of ways an applicant can demonstrate financial responsibility have been added.

Section 322.5(g): We have revised this paragraph on canals and other artificial waterways by eliminating procedural-only provisions which are redundant with requirements in 33 CFR Parts 325 and 326.

Section 322.5(l): A new section on fairways and anchorage areas has been added. This section was formerly found at 33 CFR 209.135. We are moving this provision to consolidate all of the permit regulations on structures to this part. We will delete 33 CFR 209.135 by separate notice in the **Federal Register.**

Part 323—Permits for Discharges of Dredged or Fill Material Into Waters of the United States

Section 323.2: Several commenters supported moving the definitions relating to waters of the United States to a separate paragraph. As proposed on May 12, 1983, we have moved the term "waters of the United States" and all other terms related to the geographic scope of jurisdiction of Section 404 of the CWA to 33 CFR Part 328 which is titled "Definition of the Waters of the United States." We believe that, by setting these definitions apart in a separate and distinct Part of the regulation and including in that Part all of the definitions of terms associated with the scope of the Section 404 permit program, we are better able to clarify the scope of our jurisdiction. We have not changed any existing definitions nor added any definitions proposed on May 12, 1983. Comments related to these definitions are addressed in Part 328 below.

We have not changed the definition of fill material at § 323.2(e). However, the Corps has entered into a Memorandum of Agreement with the Environmental Protection Agency to better identify the difference between section 402 and section 404 discharges under the Clean Water Act.

Section 323.2(d)—Previously 323.2(j): The proposed modification of this paragraph states that *"de minimis* or incidental soil movement occurring during normal dredging operations" is not a "discharge of dredged material," the term defined by this paragraph.

Eight commenters raised concerns relating to this provision. Most of these supported the regulation of *"de minimis* or incidental soil movement occurring during normal dredging operations" in varying degrees. Two specifically expressed a belief that the fallback from dredging operations constituted a discharge within the intent of section 404 of the Clean Water Act. One of these stated that the proposed provision was contrary to a binding decision by the U. S. District Court for the Northern District of Ohio in *Reid* v. *Marsh,* No. C-81-690 (N. D. Ohio, 1984). Another commenter objected to the provision on the basis that it would force states that perceived a need to regulate dredging operations to regulate such activities under their National Pollutant Discharge Elimination System authority. The recommendations of the above group of commenters included the regulation of dredging activities on an individual or general permit basis or on a selective basis that would take into account the scopes and anticipated effects of the projects involved. Two commenters expressed concern over the fact that discharge activities such as the sidecasting of dredged material might be considered "soil movement" that was "incidental" to a "normal dredging operation." The final concern raised related to the list of dredging equipment cited as examples. This list was seen, alternatively, as too limited or as not limited enough in reference to the types of equipment that may be used in a "normal dredging operation." Four commenters supported the proposed provision as a reasonable interpretation of the section 404 authority of the Corps.

Section 404 clearly directs the Corps to regulate the *discharge* of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404. The purpose of dredging is to remove material from the water, not to discharge material into the water. Therefore, the fallback in a "normal dredging operation" is incidental to the dredging operation and *de minimis* when compared to the overall quantities removed. If there are tests involved, we believe they should relate to the dredging operator's intent and the result of his dredging operations. If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered as a "normal dredging operation" that is not subject to section 404.

Based on the above discussion, we have not adopted any of the recommendations relating to the revision or deletion of this provision for the purpose of bringing about the regulation of "normal dredging operations" in varying degrees. We have replaced the "or" between the words *"de minimis"* and "incidental" with a comma to more clearly reflect the fact that the incidental fallback from a "normal dredging operation" is considered to be *de minimis* when compared to the overall quantities removed. In addition, we have deleted the examples of dredging equipment at the end of the proposed provision to make it clear that *de minimis* or incidental soil movement occurring during *any* "normal dredging operation" is not a "discharge of dredged material." However, we wish to also make it clear that this provision applies only to the incidental fallback occurring during "normal dredging operations" and not to the disposal of the dredged material involved. If this material is disposed of in a water of the United States, by sidecasting or by other means, this disposal will be considered to be a "discharge of dredged material" and will be subject to regulation under section 404.

Section 323.4: We have made some minor corrections to this section to be consistent with EPA's permit exemption regulations at 40 CFR Part 233.

Part 324—Ocean Disposal

Section 324.4(c): The language of this section on the EPA review process has been rewritten to clarify the procedures the district engineer will follow when the Regional Administrator advises that a proposed dumping activity does not comply with the criteria established pursuant to section 102(a) of the Marine Protection, Research and Sanctuaries Act (MPRSA), or the restrictions established pursuant to section 102(c) thereof, in accordance with the provisions of 40 CFR 225.2(b).

Part 325—Permit Processing

Several minor changes have been made in this part. These changes involve requesting additional information from

an applicant, providing for a reasonable comment period, combining permit documentation, and documenting issues of national importance.

Section 325.1(b): This section has been rewritten to clarify the pre-application consultation process for major permit applications. No significant changes have been made in the content of this section.

Section 325.1(d)(1): One commenter on this content of applications paragraph asked that where, through experience, it has been found that specific items of additional information are routinely necessary for permit review, the district engineer should be allowed to develop supplemental information forms. Another observed that restricting production of local forms may inhibit joint permit application processes. If it becomes necessary to routinely request additional information, the Corps can change the application form, but that must be done at Corps headquarters with the approval of the Office of Management and Budget. This change does not place any additional restrictions on developing local forms. As is now the case, local forms may be developed for joint processing with a Federal or state agency.

Section 325.1(d)(8): This is a new section requiring an applicant to include provisions for siting, construction, monitoring and managing the artificial reef as part of his application for a permit. One commenter suggested that the criteria for accomplishing these activities must be completed in the National Artificial Reef Plan before establishment of such reefs can be encouraged. Another recommended that the regulation describe more specifically the information to be supplied by an applicant with regard to monitoring and maintaining an artificial reef. The plan includes general mechanisms and methodologies for monitoring the compliance of reefs with permit requirements, and managing the use of those reefs. It can be used as a guide for the information to be supplied by the permit applicant. Specific conditions for monitoring and managing, as well as for maintaining artificial reefs generally need to be site-specific and should be developed during permit processing.

The U.S. Coast Guard requested that they be provided copies of permit applications for artificial reefs, and that a permittee be required to notify the Coast Guard District Commander when reef construction begins and when it is completed so timely information can be included in notices to mariners. The district engineer may elect to consult with the Coast Guard, when appropriate, during the pre-application phase of the permit process. At any rate, the Coast Guard will receive public notices of permit applications, and may make recommendations to ensure navigational safety on a case-by-case basis. Appropriate conditions can be added to permits to provide for such safety.

Section 325.1(e): Several commenters expressed concern with language changes requiring only additional information "essential to complete an evaluation" rather than the former requirement for information to "assist in evaluation of the application." They felt this change would reduce the data base on which decisions would be made. They indicated further that without necessary additional information, district engineers would not be able to make a reasonable decision, the public's ability to provide meaningful comments would be limited, and resource agencies would have to spend more time contacting the applicant and gathering information. They felt this could increase delays rather than limiting them. Several commenters asked that the regulations be altered to specifically require submission of information necessary for a 404(b)(1) evaluation. Similar concerns were expressed with the change stating that detailed engineering plans and specifications would not be required for a permit application. Commenters advised that without adequate plans or the ability to routinely require supplemental information it may be impossible to insure compliance with applicable water quality criteria or make reasonable permit decisions. Other commenters wanted further restrictions placed on the district engineer's ability to request additional information. Suggestions included altering the regulations to specify the type, need for, and level of detail which could be requested, and requiring the district engineer to prepare an analysis of costs and benefits of such information. Some commenters objected to requirements for providing information on project alternatives and on the source and composition of dredged or fill material.

This paragraph has been changed as proposed. The intent of this change was to assure that information necessary to make a decision would be obtained, while requests for non-essential information and delays associated with such requests would be limited.

Section 325.2(a)(6): The new requirement to document district engineer decisions contrary to state and local decisions was adopted essentially as proposed. The reference to state or local decisions in the middle of this paragraph incorrectly did not reference § 320.4(j)(4) in addition to § 320.4(j)(2). The adopted paragraph references state and local decisions in both of these paragraphs.

Section 325.2(b)(1)(ii): The May 12, 1983, proposed regulations sought to speed up the process by reducing the standard 60 day comment/waiver period to 30 days for state water quality certifications. Commenters on this paragraph offered a complete spectrum of views from strong support for the proposed changes to strong opposition to the proposal. Comments within this spectrum included opinions that: states must have 60 days; certification time should be the same as allowed by EPA (i.e. 6 months); the proposal is illegal; it conflicts with some state water quality certification regulations and procedures; and it would reduce state and public input to the decision-making process. Most states objected to this reduction with many citing established water quality certification procedures required by statute and/or regulations which require notice to the public (normally 30 days) and which allow requests for public hearings which cannot be completed within the 30-day period. We have, therefore, retained the 60 day period in the July 22, 1982, regulations. Some Corps districts have developed formal or informal agreements with the states, which identify procedures and time limits for submittal of water quality certifications and waivers. Where these are in effect, problems associated with certifications are minimized.

Many commenters objected to the May 12, 1983, proposal to delete from the July 22, 1982, regulations the statement, "The request for certification must be made in accordance with the regulations of the certifying agency." Deleting this statement will not delete the requirement that valid requests for certification must be made in accordance with State laws. However, we have found that, on a case-by-case basis in some states, the state certifying agency and the district engineer have found it beneficial to have some flexibility to determine what constitutes a valid request. Furthermore, we believe that the state has the responsibility to determine if it has received a valid request. If this statement were retained in the Corps regulation, it would require the Corps to determine if a request has been submitted in accordance with state law. To avoid this problem, we have decided to eliminate this statement.

Section 325.2(d)(2): Numerous commenters expressed concern with comment periods of less than 30 days. They were concerned that, in order to expedite processing times, 15 day

notices would become the norm. These commenters stated that 15 days was insufficient to prepare substantive comments and would not allow the public adequate participation in the permit process as mandated by Section 101 of the CWA. State agencies noted that, with internal and external mail requiring as much as a week each for the Corps and the state, 15 days would not provide any time for consideration of a project. Several commenters noted that such expedited review times might actually be counter-productive, as Federal and state agencies might routinely oppose projects and request permit denial so that they would then have sufficient time to review a project and to work with an applicant to resolve conflicts. We recognize that 15 days is a very short comment period considering internal agency processing and mail time. We expect that comment periods as short as 15 days would be used only for minor projects where experience has shown there would be little or no controversy. Some districts have been routinely using comment periods of less than 30 days (20 and 25 days) while others have used such procedures in only a limited number of special cases. In adopting this provision, we have modified the May 12, 1983, proposal to require the district engineer to consider the nature of the proposal, mail time, the need to obtain comments from remote areas, comments on similar proposals, and the need for site visits before designating public notice periods of less than 30 days. Additionally, after considering the length of the original comment period as well as those items noted above, the district engineer may extend the comment period an additional 30 days if warranted. We believe this provides the desired flexibility with the necessary restraints on when to use comment periods of less than 30 days.

Sections 325.2(e)(1) and 325.5(b)(2): Commenters supporting the use of letters of permission (LOP) for minor section 404 activities stated that applicants will realize significant time savings for minor requests while there will be no loss in environmental protection. Objectors believe that the Corps is seeking administrative expediency at the cost of environmental protection. Issues raised by commenters include: the legality of the 404 LOP procedure without providing for notice and opportunity for public hearing (Section 404(a) of the CWA); the legality of issuing a permit which would become effective upon the receipt or waiver of 401 certification and/or a consistency certification under the CZMA; the need to be more definitive as to the criteria for making a decision as to the categories of activities eligible for authorization under the LOP; and the lack of coordination with Federal and state resource agencies. A few commenters were concerned that the notice in the May 12, 1983, Proposed Rules was insufficient because it did not give the scope and location of the work to be covered. The commenting states also indicated that the notice was insufficient for water quality certification and coastal zone consistency determination purposes. Other commenters were concerned that, while LOP's would be coordinated with Federal and state fish and wildlife agencies, other resource agencies such as EPA should also review Section 404 LOP's. Based on the comments on the proposed 404 LOP procedures, we have decided not to adopt the 404 LOP procedures as proposed. We are not changing § 325.5(b)(2), LOP format, nor are we changing the section 10 LOP provisions. Rather, we have revised § 325.2(e)(1) to describe a separate section 404 LOP process. Unlike the section 10 LOP process, the section 404 process involves the identification of categories of discharges and a generic public notice. This LOP process is a type of abbreviated permit process which could and has been developed under the July 22, 1982, interim final regulations. These procedures will avoid unnecessary paperwork and delays for many minor section 404 projects in accordance with the intent of Section 101(f) of the Clean Water Act

Section 325.7(b): We have added a provision that, when considering a modification to a permit, the district engineer will consult with resource agencies when considering a change to terms, conditions, or features in which that agency has expressed a significant interest.

Section 325.9: One commenter generally supported this section on the district engineer's authority to determine jurisdiction but indicated that § 325.9(c) should not be adopted because it reflects the provisions of a Memorandum of Understanding (MOU) with EPA and would not be applicable if the MOU is revised or deleted. We have determined that this paragraph is not now needed and have decided not to adopt it.

Appendix A—Permit Form and Special Conditions

A. Permit Form

Project Description: A comment was received stating that intended use should be specified for all permitted work and not just for the fills involved. A comment was also received suggesting that we be more specific on what discharges are covered by permit authorizations. We agree with these points and have made appropriate changes to the instructional material relating to project descriptions.

General Conditions

General Condition 1: Several commenters stated that the specified three month lead time on the requesting of permit extensions was too long. We agree with these commenters and have, therefore, reduced this lead time from three to one month.

General Condition 2: One commenter recommended that the wording of this condition, relating to the maintenance of authorized work, be modified to indicate that restoration may be required if the permittee fails to comply with the condition. We agree and have modified the condition accordingly. Another commenter stated that it would not be reasonable to enforce this condition when a permitted underground facility is abandoned. We generally agree with this statement. However, we believe the procedures governing the enforcement of permit conditions are flexible enough to allow a reasonable approach in such situations.

General Condition 3: One commenter indicated that this condition should be modified to require the permittee to halt work that could damage discovered historic resources and to protect those resources from inadvertent damage. That commenter also indicated that under certain circumstances it would not be necessary to notify the Corps or to halt work. This notification requirement has been in effect since 1982, and the continuation of this requirement provides for the Corps to be notified in a timely manner. With this notification, the Corps can react quickly to determine the appropriate course of action. We believe this approach has proven to be satisfactory. Therefore, this condition is being adopted as proposed.

Proposed General Condition 4: In our proposal, we specifically requested comments on this condition, which would require recording the permit on the property deed. More than half the comments received were on this proposal. All but one of the commenters who addressed this condition were critical of it to a greater or lesser degree. Institutional interest observed that this condition would only add to their costs, since once lands were purchased they were seldom sold. Institutional and industrial interests observed that permits often relate to easements and

not to fee simple ownership and that compliance with the proposed condition, in such situations, would not be possible or meaningful in some locations. One commenter stated that a recordation condition should not be necessary, provided permittees complied with proposed General Condition 5, which requires owners to notify the Corps when property is transferred. To strengthen the property transfer condition, we have modified the statement preceding the transferee's signature to specify that the requirement to comply with the terms and conditions of the permit moves with the property. One commenter stated that a general condition requiring recordation where possible would be unfair, since it would not be uniformly applicable to all permittees. Further coordination with our field offices indicates that compliance with and use of the proposed condition probably occurs only in a few locations. This coordination also indicates that for some jurisdictions, where recordation is possible, the cost of recordation may be so great that it exceeds the benefits. Given that recordation may not be practical or appropriate for all Corps permits, we have deleted this general condition from the permit form and renumbered the remaining general conditions accordingly. On the other hand, the recordation requirement is appropriate and useful for many types of structures needing Corps permits, to provide fundamental fairness toward future purchasers of real property and to facilitate enforcement of permit conditions against future purchasers. For example, if the Corps were to issue a permit for a pier, that permit would require the owner to maintain the pier in good condition and in conformance with the terms and conditions of the permit. If the builder of the pier were to allow the pier to deteriorate, he could easily transfer the pier and associated property with no notice to the purchaser of the legal obligation to repair and maintain the pier, unless the permit were recorded along with the title documents relating to the associated property. This failure to give notice to prospective purchasers would be unfair, and would increase the Federal Government's difficulty in enforcing permit conditions against future purchasers. Because of this important notice function, we have added a recordation condition under B. Special Conditions, for use wherever recordation is found to be reasonably practicable and appropriate.

General Condition 4 (Proposed General Condition 5): One commenter suggested that this condition, relating to the transference of the permit with the property, be modified to provide for notice and approval from the Corps before the permit is transferred. The reason given for this suggestion was that the Corps may have special knowledge of the particular transferee's history and capabilities and may wish to modify the terms and conditions of the permit accordingly. The suggested change would require the issuing office to conduct a review and prepare decision documentation every time property is transferred and there is a Corps permit involved. We believe that such a review in every case involving the transfer of a permit would constitute an inefficient use of available resources. Under the procedures contained in 33 CFR 325.7, a permit is subject to suspension, modification, or revocation at any time the Corps determines such action is warranted. We believe this is a better approach, and have, therefore, retained the proposed wording of this condition.

General Condition 5 (Proposed General Condition 6): One commenter recommended that this proposed condition, which relates to compliance with the provisions of the water quality certification, be changed to provide for the modification of the Corps permit if EPA promulgates a revised Section 307 standard or prohibition which applies to the permitted activity. We agree that permits must be modified when circumstances warrant. Procedures governing modifications are contained in 33 CFR 325.7, and we advise permittees of these procedures in item 5 (Reevaluation of Permit Decision) under the "Further Information" heading. Therefore, since we believe this potential requirement for permit modifications is adequately covered under the "Further Information" heading, we have retained the proposed wording of this condition.

General Condition 6 (Proposed General Condition 7): One commenter noted that compliance inspections should be conducted during normal working hours. As a general rule, this observation seems reasonable. However, since we believe that compliance inspections will be scheduled during normal working hours when possible, we have not made any changes to the proposed wording of this condition.

Further Information

Limits of Federal Liability: One commenter suggested that the Government could, under certain circumstances, be held liable for damages caused by activities authorized by the permit and suggested that Item 3, which limits the Government's liability, be deleted in its entirety. While it is true that some courts have found the United States liable for damages sustained by the owners of permitted structures or by individuals injured in some way by those structures, it has never been the intent of the Corps to assume either type of liability or to insure that no interference or damage to a permitted structure will occur after it has been built. In permitting structures within navigable waters, the Corps does not assume any duty to guarantee the safety of that structure from damages caused by the permittee's work or by other authorized activities in the water, such as channel maintenance dredging. This is viewed as an acceptable limitation on the privilege of constructing a private structure for private benefit in a public waterway, particularly since insurance is readily available to protect the permittee from any damage his structure may sustain. Accordingly, the language in Item 3 has been further clarified to preclude any inference that the Government assumes any liability for interference with or damage to a permitted structure as a result of work undertaken by or on behalf of the United States in the public interest.

Reevaluation of Permit Decision: One commenter recommended that reevaluations be limited to the three circumstances listed. Although we believe that the vast majority of the reevaluations required will qualify under one of the three listed circumstances, we cannot exclude the possibility of non-qualifying, unique situations where the public's good may require a reevaluation of a permit decision. Therefore, we have retained the wording which states that reevaluations will not necessarily be limited to the circumstances listed. Another commenter recommended that we add to this item that we have the authority to issue administrative orders to require compliance with the terms and conditions of permits and to initiate legal actions where appropriate. The procedures governing these actions are contained in 33 CFR 326.4 and 326.5 and reference was made to these procedures in the proposed wording. However, we agree that it would be helpful to modify the proposed wording to provide permittees with a better understanding of our enforcement options; we have modified the text accordingly.

B. Special Conditions

One commenter suggested that Special Condition 5, which requires permittees authorized to perform certain types of work to provide advance notifications to the National Ocean

Service and the Corps before beginning work, be changed to allow verbal notifications followed by written confirmations. We have determined that this suggestion, if adopted, would greatly increase the chance of errors in notice documents published by the Government and would not be in the best interest of mariners. Two weeks advance notice is a reasonable period of time both for construction scheduling and for Government notification to mariners. Therefore, we have not adopted this suggestion.

One commenter suggested that a special condition be added, for use when appropriate, to require the permittee to carry out a historic preservation plan attached to the permit. The wording of special conditions are normally determined on a case-by-case basis. Only those that are used often and are subject to standardized wording are listed in Appendix A (B. Special Conditions). While we agree that special conditions of this nature may be required, we do not believe they lend themselves sufficiently to standardized wording to warrant adding a specific special condition to Appendix A.

Three comments were received which related to General Condition (n) on the previous permit form. This condition required the permittee to notify the issuing office of the date when the work authorized would start and of any prolonged suspensions before the work was complete. Two of the commenters recommended that this provision be retained as a general condition, and one commenter recommended that it be specified as a special condition. Our research indicates that this condition, as a general condition applicable to all permitted activities, has been virtually unenforceable in most areas and of limited use as a permit monitoring tool. We agree that special conditions requiring permittees to notify the Corps, in advance, of the dates permitted activities will start, are appropriate in certain situations. Two of these situations are covered by Special Condition 3 (maintenance dredging) and Special Condition 5 (charting of activities by National Ocean Service). Since we believe our field offices are in the best position to identify any other situations in which similar special conditions would be appropriate, we have not adopted these recommendations.

As discussed under Proposed General Condition 4 above, we have added a sixth special recordation condition for use where recordation is found to be reasonably practicable.

General: In addition to several editorial changes, we have added definitions for the word "you" and its derivatives and the term "this office" at the beginning of the permit form. We have substituted the term "this office" for references to the district engineer throughout the form.

Part 326—Enforcement

General: Three commenters objected to what they perceived as a lack of specific requirements and recommended that the word "should" be changed to "shall" throughout Part 326. Another commenter stated that the proposed regulations were too specific and recommended that a significant amount of the procedures in this Part be deleted and addressed in internal guidance. The word "should," where used, allows district engineers to base their enforcement actions on an assessment of what is the best approach on a case-by-case basis. The word "shall" would require district engineers to implement specified actions even though such actions may be obviously inappropriate in relation to a particular case. We believe this flexibility is appropriate and have, therefore, retained the word "should" in most of the places where it occurred in the proposed regulations. However, the word "will" is used at various places in this Part where flexibility is not appropriate. We believe that the proposed language achieves a proper balance between the providing of necessary guidance and flexibility.

Finally, one commenter suggested that Part 326 be rewritten to include only two requirements: orders for immediate restoration of filled wetlands and referrals for legal action if these orders are not complied with. When Congress established the Corps regulatory authorities, it allowed for the issuance of permits. To ignore the issuance of permits as one means of resolving violations would be inappropriate.

Section 326.1: As a result of further internal coordination, we have determined that it would be appropriate to make it clear that nothing in this Part establishes a non-discretionary duty on the part of a district engineer. Further, nothing in this Part should be considered as a basis for a private right of action against a district engineer. Therefore, we have modified this paragraph accordingly.

Section 326.2: One commenter recommended that this statement of general enforcement policy be expanded to provide priority guidance on enforcement actions. Two other commenters recommended strengthening of this paragraph, with one recommending that it cite the firm and fair enforcement of the law to prohibit and deter damage, to require restoration, and to punish violators as the purpose of the Corps enforcement program. In that we refer in this paragraph to unauthorized activities, we are reflecting the fact that these activities are unauthorized and subject to enforcement actions pursuant to the legal authorities cited at the beginning of this Part. Further, the other recommended changes would simply duplicate the discussions of enforcement methods and procedures already contained in §§ 326.3, 326.4, and 326.5. However, we have added a statement to this provision to reflect the fact that EPA has independent enforcement authorities under the Clean Water Act, and thus, district engineers should normally coordinate with EPA.

Section 326.3(b): One commenter recommended that this paragraph be amended to require the establishment of numbered file systems for violations. Most Corps districts already assign control numbers to enforcement actions, and since this is an administrative function, we have determined that it would be inappropriate to include this requirement in a Federal regulation designed to provide enforcement policy.

Section 326.3(c)(2): One commenter suggested rewording of this paragraph to make it clear that a violation involving a completed activity may or may not be resolved through the issuance of a Corps permit. The reference in the proposed wording to not initiating "any additional work before obtaining required Department of the Army authorizations" apparently led to the commenter misunderstanding this paragraph. The intent of this wording related to warning a violator not to initiate work on other projects before obtaining required Corps permits. Since the violator is in the process of being made aware of the legal requirements for obtaining Corps permits, we have determined that this warning is unnecessary and have, therefore, deleted it.

Section 326.3(c)(3): One commenter recommended that this paragraph be amended to indicate that the information requested will also be used for determining whether legal action is appropriate in addition to determining what initial corrective measures may be required. We agree that the information obtained from violators may provide a basis for enforcement decisions other than those relating to interim corrective measures. Therefore, we have revised this provision to provide for notifying violators of potential enforcement consequences and for the more generalized use of the information provided by violators in the

identification of appropriate enforcement measures.

Section 326.3(c)(4): One commenter recommended that this provision be reworded to indicate that the limitations on unauthorized work of an emergency nature are to be established in conjunction with Federal and state resource agencies. We believe it is understandable that actions of this type will be completed on an expedited basis with the procedures in § 326.3(c–d) being followed concurrently. Since § 326.3(d) already provides for interagency consultations, in appropriate cases, we do not believe it is necessary to duplicate that guidance in this provision.

Section 326.3(d)(1): One commenter recommended that "initial corrective measures" be defined as measures "which substantially elminate all current and future detrimental impacts resulting from the unauthorized work." This commenter also recommended that the procedures in 33 CFR 320.4 and 40 CFR Part 230 be referenced for use in determining what "initial corrective measures" are required. Essentially, this commenter is recommending that all violators be denied a Corps authorization and required to undertake full corrective measures in the initial stage of an enforcement action. This would not be a reasonable or practical approach, since it would eliminate public participation and would result in the removal of work that may have been permitted under normal circumstances. Another commenter objected to the statement that further enforcement actions "should normally" be unnecessary if the initial corrective measures substantially eliminate all current and future detrimental impacts. This commenter sees this provision as barring legal action in appropriate cases such as those involving willful, flagrant, or repeated violations. This is not the case. To say that such corrective measures "should normally" resolve a violation does not mean that they will "always" resolve a violation. Another commenter stated that consultations with the Fish and Wildlife Service and the National Marine Fisheries Service should be made mandatory in this paragraph pursuant to the Fish and Wildlife Coordination Act. The reason given was that this provision would result in the issuance of permits which would require such consultations. This paragraph deals with initial corrective measures and not with the issuance of permits. These agencies will be given an opportunity to comment in response to a public notice before any decision is made on an after-the-fact permit application. In view of the above discussion, we have retained the proposed wording of this paragraph.

Section 326.3(d)(2): One commenter recommended that this paragraph be deleted on the basis that it provided the district engineer with too much discretion and questioned the cross-reference to § 326.3(3). This paragraph was intended to provide guidance to district engineers in situations involving prior initiations of litigation or denials of essential authorizations or certifications by other Federal, state or local agencies. We believe district engineers should have the discretionary authority to determine what is a reasonable and practical course of action for the Corps under these circumstances. However, we have revised this paragraph to clarify its intent and to correct the cross-reference.

Section 326.3(d)(3): As a result of further review within the Corps, we have determined that the provision proposed as § 326.3(e)(1)(i), which states that it is not necessary to issue a Corps permit for initial corrective measures, should be moved to § 326.3(d) to more appropriately reflect the sequence of enforcement procedures. Therefore, we have modified this provision and established it as new § 326.3(d)(3).

Section 326.3(e): One commenter objected to the after-the-fact permit process, and observed that the process was generally seen as a mechanism to avoid compliance with the law. Exceptions to the processing of after-the-fact permit applications are contained in § 326.3(e)(i–iv). However, in most cases, the public participation associated with the processing of an application is necessary before a violation can be appropriately resolved.

Section 326.3(e)(1): One commenter recommended that this paragraph be amended to specify the criteria for legal action and to require that public notices associated with after-the-fact permit applications clearly identify that a violation is involved. The criteria for legal actions are given in § 326.5(a), and permit decisions are based on whether an activity complies with the section 404(b)(1) Guidelines, where applicable, and on whether it is or is not found to be contrary to the public interest. Permit decisions are not based on whether a permit application is before or after-the-fact. We have, therefore, retained the proposed wording of this paragraph.

Proposed Section 326.3(e)(1)(i): We have deleted this provision here and have moved a modified version of it to new § 326.3(d)(3); see discussion under § 326.3(d)(3).

Section 326.3(e)(1)(i)—Proposed as 326.3(e)(1)(ii): This provision indicates that the processing of an after-the-fact permit application will not be necessary "when" detrimental impacts have been eliminated by restoration. One commenter recommended that district engineers be required to consult with EPA before determining that restoration has been completed that eliminates current and future detrimental impacts. We have addresse this comment by modifying § 326.2 and § 326.3(g) to provide for such coordination when the district engineer is aware of an enforcement action being considered by EPA under its independent enforcement authorities. Another commenter observed that the word "when" appeared to be in error and recommended substituting the word "unless." This would indicate that the Corps should process an after-the-fact permit application only after restoration had taken place and there is no work requiring a permit. This obviously would not be reasonable. In view of the above discussion, we have retained the proposed wording of this provision.

Section 326.3(e)(1)(iii)—Proposed as 326.3(e)(1)(iv): One commenter recommended that a provision be added to this paragraph to prohibit the acceptance of an application for a Corps permit where an activity is not in compliance with other Federal, state, or local authorizations or certifications. In essence, this amounts to requiring district engineers to take steps to enforce the terms and conditions of another agency's authorization or certification. We believe this is the issuing agency's responsibility and not the responsibility of the Corps. Of course, where that other agency has denied a requisite authorization, the Corps would not accept an application for processing.

Section 326.3(e)(1)(iv)—Proposed as 326.3(e)(1)(v): Two commenters recommended rewording of this paragraph to prohibit the acceptance or processing of any after-the-fact permit application when the Corps is aware of litigation or other enforcement actions that have been initiated by other Federal, state or local agencies. We believe the Corps should, in appropriate situations, be able to take positions on cases that are in conflict with the viewpoints of other agencies. Therefore, we have retained the wording of this paragraph essentially as proposed. However, since EPA has independent enforcement authorities, we have provided for coordination with EPA in §§ 326.2 and 326.3(g).

Section 326.3(g): One commenter indicated that this paragraph should delineate EPA's responsibility over

recognizing and reporting unpermitted discharges. This paragraph deals only with cases where EPA is considering an enforcement action. The reporting of violations is covered under § 326.3(a). Another commenter recommended that this paragraph be reworded to ensure that Corps actions under Part 326 are not in conflict with EPA enforcement actions. Another commenter, a state agency, suggested that this provision be expanded to require similar consultations with state agencies that have initiated enforcement actions. The reason we have provided for consultations with EPA in this paragraph is due to the fact that both the Corps and EPA have overlapping authorities pursuant to the Clean Water Act. This is not the case with state agencies. Nevertheless, we believe district engineers will wish to consult with state agencies in appropriate circumstances. In any event, as we stated in our discussion relating to the wording of § 326.3(e)(iv), we believe the Corps should have the right to take a position that may conflict with another agency's viewpoint. However, we have revised this provision to emphasize that district engineers should coordinate with EPA when they are aware of enforcement actions being considered by EPA under its independent enforcement authorities.

Section 326.4(a–b): As a result of further internal coordination, we have determined that § 326.4(a) should make it clear that district engineers have the discretionary authority to determine when the inspection of permitted activities is appropriate. We have modified § 326.4(a) accordingly. In addition, we have added a new § 326.4(b) to further discuss inspection limitations.

Section 326.4(d)—Proposed as 326.4(c): One commenter, a state agency, objected to the provisions in this paragraph for attempting to obtain voluntary compliance before issuing a formal compliance order. The rationale given was that the absence of a formal order would make coordination between the Corps and the state difficult. Another state agency recommended consultations with state agencies and with EPA. The proposed, non-compliance procedures do not prohibit early coordination with other regulatory agencies, when appropriate, and presumably, if the permittee quickly brings his work into compliance, such coordination should not be necessary.

One commenter objected to allowing a district engineer to issue a compliance order and to not making the use of Corps suspension/revocation procedures or legal actions mandatory. Another commenter recommended that suspension/ revocation procedures or legal actions be made mandatory if a violator fails to comply with a compliance order. The issuance of a compliance order is provided for in section 404(s) of the Clean Water Act, and in most cases, we believe that the methods available for obtaining voluntary compliance should be used before discretionary consideration is given to using the Corps suspension/ revocation procedures or initiating legal action.

Another commenter objected to the term "significantly serious to require an enforcement action" on the basis that all violations are worthy of some enforcement action. Minor deviations from the terms and conditions of a Corps permit may not always warrant an enforcement action. For example, would a dock authorized to be constructed with a length of 50 feet but inadvertently constructed with a length of 51 feet constitute a violation warranting an enforcement action? We agree there may be extenuating circumstances, such as the additional length of the dock being just enough to impact the water access of a neighbor. However, this is a judgment that is best made by the district engineer involved.

One Commenter objected to the term "mutually agreeable solution" on the basis that such a solution could invalidate the prior results of coordination with resource agencies. Since this term refers to bringing the permitted activity into compliance or the resolution of the violation with a permit modification using the modification procedures in 33 CFR 325.7(b), such resolutions would not invalidate prior coordination. In view of the above discussion, we have retained the proposed wording of this paragraph.

Section 326.5(a): One commenter requested that the words "willful" and "repeated" be deleted from this paragraph, the rationale being, apparently, that most violators are not repeat or willful offenders and that the Corps should take the one opportunity it has to bring legal action against these one-time violators. We do not agree with this approach as being either reasonable or practical. Another commenter recommended adding violations that result in substantial impacts to the list of violations that should be considered appropriate for legal action. We agree with this recommendation and have modified the wording of this provision accordingly.

Section 326.5(c): One commenter recommended rewording of this paragraph to require that copies be provided to EPA of Corps referrals to local U.S. Attorneys. We believe it would be more appropriate to address matters relating to the detailed aspects of interagency coordination in interagency agreements. Therefore, we have retained the proposed wording of this paragraph.

Section 326.5(d)(2): As a result of further internal coordination, we have determined that litigation cases involving isolated water no longer need to be referred to the Washington level on a routine basis. Therefore, we have deleted this provision.

Section 326.5(e): One commenter recommended that the word "may" be replaced with the words "encouraged to" in the provision relating to sending litigation reports to the Office of the Chief of Engineers when the district engineer determines that an enforcement case warrants special attention and the local U.S. Attorney has declined to take legal action. We agree with this recommendation and have made the change.

Another commenter suggested that wording be aided to this paragraph to address circumstances in which permits are not required. The fact that a legal option may not be available does not mean that a permit is not required. If the district engineer chooses to close the case record, the activity in question will still be unauthorized and therefore illegal. Such unauthorized activities will be taken into account if the responsible parties become involved in future violations. One commenter suggested that Corps attorneys initiate legal actions as an alternative to actions by local U.S. Attorneys. However, the Corps does not have the authority under existing Federal laws to initiate legal actions on its own.

Another commenter recommended that this paragraph be modified to provide for joint Federal/state prosecution of violators. Since this involves discretionary decisions on the part of the Department of Justice, it would not be appropriate to include a provision of this nature in the Corps enforcement regulations.

Part 328—Definition of Waters of the United States

This part is being added in order to clarify the scope of the Section 404 permit program. This part was added in direct response to many concerns expressed by both the public and the Presidential Task Force on Regulatory Relief. We have not made changes to existing definitions; however, we have provided clarification by simply setting

them apart in a separate and distinct Part 328 of the regulation.

The format for Part 328 has been changed slightly from the proposed regulation in order to improve clarity and reduce duplication. The content of the proposed § 328.2 "General Definitions" has been partially combined with § 328.3 "Definitions." The remainder has been reestablished as § 328.5, "Changes in Limits of Waters of the United States." Section 328.2 has been established as "General Scope." The proposed §§ 328.4 and 328.5 have been combined into § 328.4 and renamed "Limits of Jurisdiction."

A number of commenters appeared to have misinterpreted the intent of this part. Many thought we were trying to reduce the scope of jurisdiction while others believed we were trying to expand the scope of jurisdiction. Neither is the case. The purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted.

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

The term "navigable waters of the United States" has not been added to this section since it is defined in Part 329.

A number of comments were received concerning the proposed change to the definition of the terms "adjacent" and the proposed definitions for the terms "inundation", "saturated", "prevalence", and "typically adapted." A number of commenters believed that these terms may better define the scope of jurisdiction of the section 404 program, but such definitions should more rightfully be within the province of the Environmental Protection Agency in order to remain consistent with the opinion of Benjamin Civiletti, Attorney General (September 5, 1979). These definitions would require the prior approval of the Environmental Protection Agency, which has not been forthcoming. Therefore, these new proposed definitions will not be adopted at this time.

To respond to requests for clarification, we have added a definition for "tidal waters." The definition is consistent with the way the Corps has traditionally interpreted the term.

Section 328.4: Limits of Jurisdiction. Section 328.4(c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water mark provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.

Section 328.5: Changes in Limits of Waters of the United States. This section was changed to reflect both natural and man-made changes to the limits of waters of the United States. This change was made for clarification and resulted from consultation with the Environmental Protection Agency.

Section 328.6: Supplemental Clarification. Most commenters favored the Corps plans to give special consideration to unique areas such as Arctic Tundra that do not easily fit the generic" wetlands definition. Several commenters indicated that the Corps should clarify its intended use of this section, and one questioned the need to "describe" unique areas in the **Federal Register.** A number of commenters indicated that criteria should be specified for determining wetland types to be included as unique areas. Some commenters stated that close coordination between the Corps and the Environmental Protection Agency will be necessary when selecting unique areas and developing procedures for making wetland determinations in such areas, since the Environmental Protection Agency has the final authority to determine the scope of "Waters of the United States."

While we believe that supplemental clarificaion of unique areas will be a positive step in clarifying the scope of jurisdiction under the section 404 permit program, we have determined that such supplemental clarification can be done under existing regulations of the Environmental Protection Agency and the Corps and therefore have deleted this section.

Part 329—Definition of Navigable Waters of the United States

We are currently planning to propose a complete revision of Part 329 in the near future, to simplify and clarify the procedures involved, while retaining the essential aspects of the relevant policy. In the interim, we are making the two minor changes discussed below.

Section 329.11: This section has been modified to clarify that the lateral extent of jurisdiction in rivers and lakes extends to the edge of all such waterbodies as it does in bays and estuaries (§ 329.12(b)).

Section 329.12(a): This section has been corrected to reflect that the territorial seas, for the purpose of Rivers and Harbors Act of 1899 jurisdiction, extend 3 geographic miles everywhere and are measured from the baseline.

Part 330—Nationwide Permits

We are reissuing the 26 nationwide permits at § 330.5(a) as modified and conditioned. The nationwide permits will be in effect for 5 years beginning with the effective date of this regulation, unless sooner revised or revoked.

Section 330.1: This section was restructured and updated in order to improve its readability and technical accuracy. The definition concerning the division engineer's discretionary authority was deleted from this section since similar language appears in § 330.2. "Definitions." The discussion concerning the applicability of nationwide permits as they relate to

other Federal, state, and local authorizations was deleted from this section and relocated to § 330.5(d) "Further Information."

Section 330.2: The definition of the term "headwaters" was deleted from Part 323 and relocated to § 330.2(b), since the definition is used as part of the nationwide permit program. The definition of the term "natural lake" which was proposed at § 330.2(c) has been deleted. Changes to the "headwaters"/"isolated waters" nationwide permit which is found at § 330.5(a)(26) have obviated the need for this definition.

Section 330.5: In order to better inform the public of the statutory authority under which each nationwide permit has been issued, we have added the authority by parenthetical expression at the end of each nationwide permit.

We had proposed nationwide permits for activities funded or authorized by another Federal agency or department and for activities adjacent to Corps of Engineers civil works projects. Most commenters discussed the two proposed nationwide permits together. The most frequent comments questioned whether they would comply with section 404(e) of the CWA. They believed these nationwide permits could authorize a wide variety of Federal projects that would not be similar in nature and projects which could have significant adverse environmental inpacts on aquatic resources. Numerous commenters stated that the Corps would be delegating its 404(b)(1) compliance responsibilities to other agencies and that there is a natural tendency of such agencies to be self-serving. Many commenters, including some states, objected that the public and other agencies would not have an opportunity to review some large individual projects. Many commenters encouraged the adoption of these nationwide permits; in most cases they based their opinion upon reduction in duplication and the expediting of project authorization. Based on the comments received we have decided that clarification of activities that could be covered by nationwide permits would be necessary to insure proper understanding and field application. Because of the complexity of doing this and an evaluation of the comments received, we have decided not to adopt these two nationwide permits.

Section 330.5(a)(3): This nationwide permit for repair, rehabilitation, or replacement of existing structures or fill has been clarified to show that beach restoration is not authorized by this nationwide permit.

Section 330.5(a)(6): This nationwide permit for survey activities was clarified to show that it does not authorize the drilling of exploration-type bore holes for oil and gas exploration.

Section 330.5(a)(7): This nationwide permit for outfall structures was clarified by adding language concerning minor excavation, filling and other work which is routinely associated with the installation of intake and outfall structures.

Section 330.5(a)(18): This nationwide permit for discharges up to 10 cubic yards was clarified by indicating that it does not authorize discharges for the purpose of stream diversion. The footnote was deleted because it was redundant with the terms of the nationwide permit itself.

Section 330.5(a)(19): This nationwide permit for dredging up to 10 cubic yards was clarified by indicating that it does not authorize the connection of canals or other artificial waterways to navigable waters of the United States.

Section 330.5(a)(22): This nationwide permit for the removal of obstructions to navigation was clarified by indicating that it does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Section 330.5(b)(3): This condition for the protection of endangered species was modified to set forth more clearly options available to the district engineer to satisfy section 7 of the Endangered Species Act when it has been determined that an activity may adversely affect any listed endangered species or its critical habitat.

Section 330.5(b)(7): This condition for the protection of wild and scenic rivers was modified to define more clearly components of the National Wild and Scenic River System by showing that it includes any Congressionally designated "study river."

Section 330.5(b)(9): This condition for the protection of historic properties was added in response to numerous comments which expressed concern for an apparent lack of consideration which was being given historic properties. This condition outlines the procedures to be followed by both the permittee and the district engineer to provide for modification, suspension, or revocation of a nationwide permit or contact with the Advisory Council on Historic Preservation if an activity authorized by a nationwide permit may adversely affect an historic property.

Section 330.5(b)(10): This condition was added as a result of comments which expressed concern that activities performed under the nationwide permits could impair reserved tribal rights.

Section 330.5(b) (11) and (12): These conditions were adopted as proposed. They provide notification to the public that, within certain states, authorization for the activity may have been denied without prejudice as a result of state 401 water quality certification denial or nonconcurrence with Coastal Zone Management consistency. These conditions trigger the provisions of §§ 330.9 and 330.10.

Section 330.5(b)(13): This condition was added to alert the public that regional conditions may have been added by the division engineer in accordance with § 330.8(a).

Section 330.5(c): The Grandfathering provision included in the October 5, 1984, final regulations expires on April 5, 1986, before the effective date of these regulations and is, therefore, no longer needed and has been deleted. A new paragraph has been added to provide the public further information on nationwide permits as they relate to such things as compliance with conditions, other required authorizations, property rights, Federal projects, and revised or modified water quality standards.

Section 330.5(d): This paragraph has been added to clarify that the Chief of Engineers has the authority to modify, suspend, or revoke any nationwide permit.

Some states indicated in their comments that there might be other ways to reduce burdens on the public within their state other than the nationwide permits. One state suggested that it might be appropriate to revoke all the nationwide permits in favor of regional permits subject to interagency review. The authority exists for the Chief of Engineers to revoke some or all of the nationwide permits within a state. There are also existing provisions in the regulations for district engineers and the states to develop a permit system designed around specific state authorities. These existing provisions include regional general permits, programmatic general permits, transfer of the 404 program (see 33 CFR 323.5), joint processing, permit consolidation, preapplication consultation and special area management planning. Before adopting a permit system designed around specific state authorities, a public notice providing an opportunity for a public hearing would be issued outlining the proposed permit system within the state and the proposal to revoke the nationwide permits. If such a system is developed, the Chief of Engineers will consider revoking all or most of the nationwide permits within a state.

Section 330.8(a): The concept of case-by-case regional conditioning authority received overwhelming support. This new paragraph allows the division engineer through discretionary authority to add activity specific conditions to nationwide permits on a case-by-case basis. The district engineer may do the same when there is mutual agreement with the permittee or when conditions are necessary based on conditions of a state 401 certification.

Section 330.8(c): This paragraph was modified to clarify that, although the division engineer has used discretionary authority to require individual permits, he may subsequently allow the activity to be authorized by nationwide permit if the impediment to using the nationwide permit, which triggered the discretionary authority, has been removed.

Section 330.8(c)(2): This paragraph has been modified to allow division engineers the discretionary authority to require individual permits for categories of activities or specific geographic areas. This authority was previously exercised by the Chief of Engineers. However, the Chief of Engineers is retaining this authority on a statewide or nationwide basis.

Section 330.9: Many commenters objected to the issuance of nationwide permits when a state denies 401 certification. Their objections were based on the Clean Water Act requirement that "No license or permit shall be granted until the certification . . . has been obtained or has been waived." Commenters expressed strong concerns about the validity of such permits, and stated that issuance would constitute a de facto transfer of the administration of this portion of the 404 permit program to the objecting states. An attendant concern was that, if states were unable to respond within the time specified by the Corps, a waiver would be presumed, and the nationwide permit would become effective, whether or not this would have been the intent of the state. Some commenters suggested that states would be forced to deny certifications because of inadequate time to ensure that proposed activities would not violate water quality standards. Most commenters opposed district engineers having discretionary authority over conditions to the 401 certification. One commenter believes this authority conflicts with states' rights. Another suggested that the proposed action could prod states into adopting their own wetland laws and regulatory programs. Several commenters supported the proposal, stating that it was a means of preserving the utility of the general permit program.

Section 330.9 has been modified to provide that, if a state denies a required 401 certification for a particular nationwide permit, then authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. We did not adopt the 30 day waiver period but rather will rely on the language at § 325.2(b)(1) which defines a reasonable period of time. This section was also modified to notify the public that the district engineer will include conditions of the 401 water quality certification as special conditions of the nationwide permit.

Section 330.9(b): This subsection has been added to notify the public of the certification requirements of the various nationwide permits.

Section 330.10: A number of coastal states commented that consistency determination or waiver thereof must have been obtained prior to the promulgation of the nationwide permits. Some commenters asserted that such a requirement is not a statutory prerequisite to permit issuance. Others contend that assuming a waiver of certification preempts the individual state's authority and thwarts Congressional intent that the permit process involves oversight by the state as well as Federal agencies.

Section 330.10 has been modified to state that, in certain instances where a state has not concurred that a particular nationwide permit is consistent with its coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has either concurred in that determination or waived its right to do so.

Section 330.11: This subsection was added to clarify existing procedures to establish a time limit in which a permittee may rely on confirmation from the district engineer that an activity is covered by a nationwide permit, and to specify procedures to modify, suspend, or revoke the permittee's right to proceed under the nationwide permit after the district engineer notified the permittee that the activity may proceed.

Section 330.12: This subsection was modified to provide a twelve month transition period for projects which may be affected by future changes in nationwide permits. After considering equity established in reliance on the nationwide permit and that the public will in all likelihood receive ample notice of proposed changes, we believe that this transition period is both reasonable and equitable. In addition, if necessary on a case-by-case basis we can, even though there is a grandfather provision, exercise discretionary authority pursuant to § 330.8 or modify, suspend or revoke individual authorization pursuant to 33 CFR 325.7.

State Certification of Nationwide Permits

Most states have issued or waived 401 certification and/or Coastal Zone Management consistency concurrence for one or more of the twenty six nationwide permits. Many states have issued a conditional certification and some have denied certification/consistency concurrence. Final action is still pending in some of the states but is imminent. The primary mechanisn for keeping the public informed of the status and/or changes in state certifications or Coastal Zone Management consistency concurrence will be public notices issued by the district engineers within the affected states. The district engineers will be issuing public notices concurrent with the publication of these regulations. Subsequent notices will be issued as changes occur.

Listed below are those states which, as of the date of this printing, have either denied or conditionally issued 401 certification and/or coastal zone management consistency concurrence for one or more of the nationwide permits. For more current and detailed information you should consult with the appropriate district engineer.

Alaska, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, West Virginia and Wisconsin.

Determinations under Executive Order 12291 and the Regulatory Flexibility Act. The Department of the Army has determined that the revisions to these regulations do not contain a major proposal requiring the preparation of a regulatory analysis under E.O. 12291. The Department of the Army certifies, pursuant to section 605(b) of the Regulatory Flexibility Act of 1980, that these regulations will not have a significant economic impact on a substantial number of entities.

Note 1.—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

33 CFR Part 320

Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

33 CFR Part 321

Dams, Intergovernmental relations, Navigation, Waterways.

33 CFR Part 322

Continental shelf, Electric power, Navigation, Water pollution control, Waterways.

33 CFR Part 323

Navigation, Water pollution control, Waterways.

33 CFR Part 324

Water pollution control.

33 CFR Part 325

Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.

33 CFR Part 326

Investigations, Intergovernmental relations, Law enforcement, Navigation, Water pollution control, Waterways.

33 CFR Part 327

Administrative practice and procedure, Navigation, Water pollution control, Waterways.

33 CFR Part 328

Navigation, Water pollution control, Waterways.

33 CFR Part 329

Waterways.

33 CFR Part 330

Navigation, Water pollution control, Waterways.

Dated: November 4, 1986.

Robert K. Dawson,

Assistant Secretary of the Army (Civil Works).

Accordingly, the Department of the Army is revising 33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 329, and 330 and adding Part 328 to read as follows:

PART 320—GENERAL REGULATORY POLICIES

Sec.
320.1 Purpose and scope.
320.2 Authorities to issue permits.
320.3 Related laws.
320.4 General policies for evaluating permit applications.

Authority: 33 U.S.C. 401 *et seq.;* 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 320.1 Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.* (1) The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890. Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources.

(2) The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers. If a district or division engineer makes a final decision on a permit application in accordance with the procedures and authorities contained in these regulations (33 CFR Parts 320–330), there is no administrative appeal of that decision.

(3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program described in 33 CFR Parts 325 and 330 is the primary method of eliminating unnecessary federal control over activities which do not justify individual control or which are adequately regulated by another agency.

(4) The Corps is neither a proponent nor opponent of any permit proposal. However, the Corps believes that applicants are due a timely decision. Reducing unnecessary paperwork and delays is a continuing Corps goal.

(5) The Corps believes that state and federal regulatory programs should complement rather than duplicate one another. The Corps uses general permits, joint processing procedures, interagency review, coordination, and authority transfers (where authorized by law) to reduce duplication.

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

(b) *Types of activities regulated.* This Part and the Parts that follow (33 CFR Parts 321–330) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army (DA) permits for controlling certain activities in waters of the United States or the oceans. This part identifies the various federal statutes which require that DA permits be issued before these activities can be lawfully undertaken; and related Federal laws and the general policies applicable to the review of those activities. Parts 321–324 and 330 address special policies and procedures applicable to the following specific classes of activities:

(1) Dams or dikes in navigable waters of the United States (Part 321);

(2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (Part 322);

(3) Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (Part 322);

(4) Construction of artificial islands, installations, and other devices on the outer continental shelf (Part 322);

(5) Discharges of dredged or fill material into waters of the United States (Part 323);

(6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters (Part 324); and

(7) Nationwide general permits for certain categories of activities (Part 330).

(c) *Forms of authorization.* DA permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of individual applications and general permits that authorize a category or categories of activities in specific geographical regions or nationwide. The term "general permit" as used in these regulations (33 CFR Parts 320–330) refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits which are issued by the Chief of Engineers through publication in the **Federal Register** and are applicable throughout the nation. The nationwide permits are found in 33 CFR Part 330. If an activity is covered by a general permit, an application for a DA permit

does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a DA permit. In certain cases pre-notification may be required before initiating construction. (See 33 CFR 330.7)

(d) *General instructions.* General policies for evaluating permit applications are found in this part. Special policies that relate to particular activities are found in Parts 321 through 324. The procedures for processing individual permits and general permits are contained in 33 CFR Part 325. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. "Navigable waters of the United States" are defined in 33 CFR Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899. "Waters of the United States" are defined in 33 CFR Part 328. These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the Rivers and Harbors Act, approved March 3, 1899 (33 U.S.C. 401) (hereinafter referred to as section 9), prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that state if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit (See 33 CFR Part 321.) Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (49 U.S.C. 1155g(6)(A)). A DA permit pursuant to section 404 of the Clean Water Act is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways. (See 33 CFR Part 323.)

(b) Section 10 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 403) (hereinafter referred to as section 10), prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. The authority of the Secretary of the Army to prevent obstructions to navigation in navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, by section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)). (See 33 CFR Part 322.)

(c) Section 11 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 404), authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads, or other works may be extended or deposits made without approval of the Secretary of the Army. Effective May 27, 1970, permits for work shoreward of those lines must be obtained in accordance with section 10 and, if applicable, section 404 of the Clean Water Act (see § 320.4(o) of this Part).

(d) Section 13 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 407), provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency (EPA), and the states under sections 402 and 405 of the Clean Water Act, (33 U.S.C. 1342 and 1345). (See 40 CFR Parts 124 and 125.)

(e) Section 14 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 408), provides that the Secretary of the Army, on the recommendation of the Chief of Engineers, may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(f) Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. (See 33 CFR Part 323.) The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army and published in 40 CFR Part 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers shall consider the economic impact on navigation and anchorage of such a prohibition in reaching his decision. Furthermore, the Administrator can deny, prohibit, restrict or withdraw the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearing and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. (See 40 CFR Part 230).

(g) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for the purpose of disposal in the ocean where it is determined that the disposal will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The selection of disposal sites will be in accordance with criteria developed by the Administrator of the EPA in consultation with the Secretary of the Army and published in 40 CFR Parts 220–229. However, similar to the EPA Administrator's limiting authority cited in paragraph (f) of this section, the Administrator can prevent the issuance of a permit under this authority if he

finds that the disposal of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries, or recreational areas. (See 33 CFR Part 324).

§ 320.3 Related laws.

(a) Section 401 of the Clean Water Act (33 U.S.C. 1341) requires any applicant for a federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or would originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or would originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(b) Section 307(c) of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1456(c)), requires federal agencies conducting activities, including development projects, directly affecting a state's coastal zone, to comply to the maximum extent practicable with an approved state coastal zone management program. Indian tribes doing work on federal lands will be treated as a federal agency for the purpose of the Coastal Zone Management Act. The Act also requires any non-federal applicant for a federal license or permit to conduct an activity affecting land or water uses in the state's coastal zone to furnish a certification that the proposed activity will comply with the state's coastal zone management program. Generally, no permit will be issued until the state has concurred with the non-federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the state's coastal zone management program. (See 15 CFR Part 930.)

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (16 U.S.C. 1432), authorizes the Secretary of Commerce, after consultation with other interested federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters, of the Great Lakes and their connecting waters, or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations * * *". (See Appendix B of 33 CFR Part 325.)

(e) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a, *et seq.*), the Migratory Marine Game-Fish Act (16 U.S.C. 760c–760g), the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c) and other acts express the will of Congress to protect the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4, any federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, and with the head of the appropriate state agency exercising administration over the wildlife resources of the affected state.

(f) The Federal Power Act of 1920 (16 U.S.C. 791a *et seq.*), as amended, authorizes the Federal Energy Regulatory Agency (FERC) to issue licenses for the construction and the operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a hydro-power project. However, where such structures will affect the navigable capacity of any navigable water of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a DA recommendation to FERC for the inclusion of appropriate provisions in the FERC license rather than the issuance of a separate DA permit under 33 U.S.C. 401 *et seq.* As to any other activities in navigable waters not constituting construction and the operation and maintenance of physical structures licensed by FERC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 *et seq.* remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of disposal in ocean waters, section 404 or section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for such listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 *et seq.*), which amends the Act of June 27, 1960. By this Act, whenever a federal construction project or federally licensed project, activity, or program alters any terrain such that significant historical or archeological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project.

(h) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.*) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 U.S.C. 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires DA authorization, the property report is required by Housing and Urban Development regulation to state whether

or not a permit for the development has been applied for, issued, or denied by the Corps of Engineers under section 10 or section 404. The property report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

(i) The Endangered Species Act (16 U.S.C. 1531 *et seq.*) declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act requires that federal agencies, in consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, use their authorities in furtherance of its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized, funded, or carried out by the Agency is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary of the Interior or Commerce, as appropriate, to be critical. (See 50 CFR Part 17 and 50 CFR Part 402.)

(j) The Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*) prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for section 10, section 404 and section 103 permits which may also be required pursuant to the authorities listed in section 320.2 and the policies specified in section 320.4 of this Part.

(k) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*) expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain restricted circumstances to waive the requirements of the Act.

(l) Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278 *et seq.*) provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.

(m) The Ocean Thermal Energy Conversion Act of 1980, (42 U.S.C. section 9101 *et seq.*) establishes a licensing regime administered by the Administrator of NOAA for the ownership, construction, location, and operation of ocean thermal energy conversion (OTEC) facilities and plantships. An application for an OTEC license filed with the Administrator constitutes an application for all federal authorizations required for ownership, construction, location, and operation of an OTEC facility or plantship, except for certain activities within the jurisdiction of the Coast Guard. This includes applications for section 10, section 404, section 103 and other DA authorizations which may be required.

(n) Section 402 of the Clean Water Act authorizes EPA to issue permits under procedures established to implement the National Pollutant Discharge Elimination System (NPDES) program. The administration of this program can be, and in most cases has been, delegated to individual states. Section 402(b)(6) states that no NPDES permit will be issued if the Chief of Engineers, acting for the Secretary of the Army and after consulting with the U.S. Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

(o) The National Fishing Enhancement Act of 1984 (Pub. L. 98–623) provides for the development of a National Artificial Reef Plan to promote and facilitate responsible and effective efforts to establish artificial reefs. The Act establishes procedures to be followed by the Corps in issuing DA permits for artificial reefs. The Act also establishes the liability of the permittee and the United States. The Act further creates a civil penalty for violation of any provision of a permit issued for an artificial reef.

§ 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for DA permits. Additional policies specifically applicable to certain types of activities are identified in 33 CFR Parts 321–324.

(a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work:

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

(3) The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. However, full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise.

(b) *Effect on wetlands.* (1) Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. For projects to be undertaken or partially or entirely funded by a federal, state, or local agency, additional requirements on wetlands considerations are stated in Executive Order 11990, dated 24 May 1977.

(2) Wetlands considered to perform functions important to the public interest include:

(i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;

(vii) Wetlands which serve significant water purification functions; and

(viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

(3) Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area. In addition, the district engineer may undertake, where appropriate, reviews of particular wetland areas in consultation with the Regional Director of the U. S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate state agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted which involves the alteration of wetlands identified as important by paragraph (b)(2) of this section or because of provisions of paragraph (b)(3), of this section unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR Part 230. 10(a) (1), (2), (3)).

(5) In addition to the policies expressed in this subpart, the Congressional policy expressed in the Estuary Protection Act, Pub. L. 90–454, and state regulatory laws or programs for classification and protection of wetlands will be considered.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this section) district engineers will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. The Army will give full consideration to the views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits.

(d) *Water quality.* Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity. The evaluation should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.

(e) *Historic, cultural, scenic, and recreational values.* Applications for DA permits may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties and National Landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar federal controls or policies. Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

(f) *Effects on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law. Generally, the coast line or base line is the line of ordinary low water on

the mainland; however, there are exceptions where there are islands or lowtide elevations offshore (the Submerged Lands Act, 43 U.S.C. 1301(a) and *United States* v. *California*, 381 U.S.C. 139 (1965), 382 U.S. 448 (1966)). Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, DC 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the administrative record of the application. After completion of standard processing procedures, the record will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

(g) *Consideration of property ownership.* Authorization of work or structures by DA does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) An inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.

(2) Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, adversely affect public health and safety, adversely impact floodplain or wetland values, or otherwise appears contrary to the public interest, the district engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources.

(3) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

(4) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized federal project, the applicant should be apprised in writing of the fact and of the possibility that a federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the Rivers and Harbors Act of 1899 or by section 404 of the Clean Water Act which may be caused by, or result from, future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes, and no claims or right to compensation will accrue from any such damage.

(5) Proposed activities in the area of a federal project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

(6) A DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application. The district engineer will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps public interest decision.

(h) *Activities affecting coastal zones.* Applications for DA permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate state agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security. Federal agency and Indian tribe applicants for DA permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved state coastal zone management programs.

(i) *Activities in marine sanctuaries.* Applications for DA authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

(j) *Other Federal, state, or local requirements.* (1) Processing of an application for a DA permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the DA permit will normally not be delayed pending action by another Federal, state or local agency (See 33 CFR 325.2 (d)(4)). However, where the required Federal, state and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application, the district engineer will, after considering the likelihood of subsequent approval of the other authorization and/or certification and the time and effort remaining to complete processing the Army permit application, either immediately deny the Army permit without prejudice or continue processing the application to a conclusion. If the district engineer continues processing the application, he will conclude by either denying the permit as contrary to the public interest, or denying it without prejudice indicating that except for the other Federal, state or local denial the Army permit could, under appropriate conditions, be issued. Denial without prejudice means that there is no prejudice to the right of the applicant to reinstate processing of the Army permit

application if subsequent approval is received from the appropriate Federal, state and/or local agency on a previously denied authorization and/or certification. Even if official certification and/or authorization is not required by state or federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(2) The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

(3) A proposed activity may result in conflicting comments from several agencies within the same state. Where a state has not designated a single responsible coordinating agency, district engineers will ask the Governor to express his views or to designate one state agency to represent the official state position in the particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320–324, and the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarly, a permit will generally be issued for Federal and Federally-authorized activities; another federal agency's determination to proceed is entitled to substantial consideration in the Corps' public interest review.

(5) Where general permits to avoid duplication are not practical, district engineers shall develop joint procedures with those local, state, and other Federal agencies having ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for DA permits may be processed jointly with the state or other federal applications to an independent conclusion and decision by the district engineer and the appropriate Federal or state agency. (See 33 CFR 325.2(e).)

(6) The district engineer shall develop operating procedures for establishing official communications with Indian Tribes within the district. The procedures shall provide for appointment of a tribal representative who will receive all pertinent public notices, and respond to such notices with the official tribal position on the proposed activity. This procedure shall apply only to those tribes which accept this option. Any adopted operating procedures shall be distributed by public notice to inform the tribes of this option.

(k) *Safety of impoundment structures.* To insure that all impoundment structures are designed for safety, non-Federal applicants may be required to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons and, in appropriate cases, that the design has been independently reviewed (and modified as the review would indicate) by similarly qualified persons.

(l) Floodplain management. (1) Floodplains possess significant natural values and carry out numerous functions important to the public interest. These include:

(i) Water resources values (natural moderation of floods, water quality maintenance, and groundwater recharge);

(ii) Living resource values (fish, wildlife, and plant resources);

(iii) Cultural resource values (open space, natural beauty, scientific study, outdoor education, and recreation); and

(iv) Cultivated resource values (agriculture, aquaculture, and forestry).

(2) Although a particular alteration to a floodplain may constitute a minor change, the cumulative impact of such changes may result in a significant degradation of floodplain values and functions and in increased potential for harm to upstream and downstream activities. In accordance with the requirements of Executive Order 11988, district engineers, as part of their public interest review, should avoid to the extent practicable, long and short term significant adverse impacts associated with the occupancy and modification of floodplains, as well as the direct and indirect support of floodplain development whenever there is a practicable alternative. For those activities which in the public interest must occur in or impact upon floodplains, the district engineer shall ensure, to the maximum extent practicable, that the impacts of potential flooding on human health, safety, and welfare are minimized, the risks of flood losses are minimized, and, whenever practicable the natural and beneficial values served by floodplains are restored and preserved.

(3) In accordance with Executive Order 11988, the district engineer should avoid authorizing floodplain developments whenever practicable alternatives exist outside the floodplain. If there are no such practicable alternatives, the district engineer shall consider, as a means of mitigation, alternatives within the floodplain which will lessen any significant adverse impact to the floodplain.

(m) *Water supply and conservation.* Water is an essential resource, basic to human survival, economic growth, and the natural environment. Water conservation requires the efficient use of water resources in all actions which involve the significant use of water or that significantly affect the availability of water for alternative uses including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements. Actions affecting water quantities are subject to Congressional policy as stated in section 101(g) of the Clean Water Act which provides that the authority of states to allocate water quantities shall not be superseded, abrogated, or otherwise impaired.

(n) *Energy conservation and development.* Energy conservation and development are major national objectives. District engineers will give high priority to the processing of permit actions involving energy projects.

(o) *Navigation.* (1) Section 11 of the Rivers and Harbors Act of 1899 authorized establishment of harbor lines shoreward of which no individual permits were required. Because harbor lines were established on the basis of navigation impacts only, the Corps of Engineers published a regulation on 27 May 1970 (33 CFR 209.150) which declared that permits would thereafter be required for activities shoreward of the harbor lines. Review of applications

would be based on a full public interest evaluation and harbor lines would serve as guidance for assessing navigation impacts. Accordingly, activities constructed shoreward of harbor lines prior to 27 May 1970 do not require specific authorization.

(2) The policy of considering harbor lines as guidance for assessing impacts on navigation continues.

(3) Protection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government.

(4) District engineers should protect navigational and anchorage interests in connection with the NPDES program by recommending to EPA or to the state, if the program has been delegated, that a permit be denied unless appropriate conditions can be included to avoid any substantial impairment of navigation and anchorage.

(p) *Environmental benefits.* Some activities that require Department of the Army permits result in beneficial effects to the quality of the environment. The district engineer will weigh these benefits as well as environmental detriments along with other factors of the public interest.

(q) *Economics.* When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values. Many projects also contribute to the National Economic Development (NED), (i.e., the increase in the net value of the national output of goods and services).

(r) *Mitigation.*[1] (1) Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses will be avoided to the extent practicable. Compensation may occur on-site or at an off-site location. Mitigation requirements generally fall into three categories.

(i) Project modifications to minimize adverse project impacts should be discussed with the applicant at pre-application meetings and during application processing. As a result of these discussions and as the district engineer's evaluation proceeds, the district engineer may require minor project modifications. Minor project modifications are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant's purpose and need. Such modifications can include reductions in scope and size; changes in construction methods, materials or timing; and operation and maintenance practices or other similar modifications that reflect a sensitivity to environmental quality within the context of the work proposed. For example, erosion control features could be required on a fill project to reduce sedimentation impacts or a pier could be reoriented to minimize navigational problems even though those projects may satisfy all legal requirements (paragraph (r)(1)(ii) of this section) and the public interest review test (paragraph (r)(1)(iii) of this section) without such modifications.

(ii) Further mitigation measures may be required to satisfy legal requirements. For Section 404 applications, mitigation shall be required to ensure that the project complies with the 404(b)(1) Guidelines. Some mitigation measures are enumerated at 40 CFR 230.70 through 40 CFR 230.77 (Subpart H of the 404(b)(1) Guidelines).

(iii) Mitigation measures in addition to those under paragraphs (r)(1) (i) and (ii) of this section may be required as a result of the public interest review process. (See 33 CFR 325.4(a).) Mitigation should be developed and incorporated within the public interest review process to the extent that the mitigation is found by the district engineer to be reasonable and justified. Only those measures required to ensure that the project is not contrary to the public interest may be required under this subparagraph.

(2) All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. District engineers will require all forms of mitigation, including compensatory mitigation, only as provided in paragraphs (r)(1) (i) through (iii) of this section. Additional mitigation may be added at the applicants' request.

[1] This is a general statement of mitigation policy which applies to all Corps of Engineers regulatory authorities covered by these regulations (33 CFR Parts 320–330). It is not a substitute for the mitigation requirements necessary to ensure that a permit action under section 404 of the Clean Water Act complies with the section 404(b)(1) Guidelines. There is currently an interagency Working Group formed to develop guidance on implementing mitigation requirements of the Guidelines.

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.

321.1 General.
321.2 Definitions.
321.3 Special policies and procedures.

Authority: 33 U.S.C. 401.

§ 321.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401). See 33 CFR 320.2(a). Dams and dikes in navigable waters of the United States also require DA permits under section 404 of the Clean Water Act, as amended (33 U.S.C. 1344). Applicants for DA permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of section 404.

§ 321.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "dike or dam" means, for the purposes of section 9, any impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce. The term does not include a weir. Weirs are regulated pursuant to section 10 of the Rivers and Harbors Act of 1899. (See 33 CFR Part 322.)

§ 321.3 Special policies and procedures.

The following additional special policies and procedures shall be applicable to the evaluation of permit applications under this regulation:

(a) The Assistant Secretary of the Army (Civil Works) will decide whether DA authorization for a dam or dike in an interstate navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the district engineer when forwarding the report to the Assistant Secretary of the Army (Civil Works), through the Chief of Engineers.

(b) District engineers are authorized to decide whether DA authorization for a dam or dike in an intrastate navigable water of the United States will be issued (see 33 CFR 325.8).

(c) Processing a DA application under section 9 will not be completed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate state legislature has been obtained if the navigable water of the United States is an intrastate waterbody (i.e., the navigable portion of the navigable water of the United States is solely within the boundaries of one state). The district engineer, upon receipt of such an application, will notify the applicant that the consent of Congress or the state legislature must be obtained before a permit can be issued.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.
322.1 General.
322.2 Definitions.
322.3 Activities requiring permits.
322.4 Activities not requiring permits.
322.5 Special policies.

Authority: 33 U.S.C. 403.

§ 322.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) (hereinafter referred to as section 10). See 33 CFR 320.2(b). Certain structures or work in or affecting navigable waters of the United States are also regulated under other authorities of the DA. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344; see 33 CFR Part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A DA permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 322.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 329. Generally, they are those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.

(b) The term "structure" shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(d) The term "letter of permission" means a type of individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.2(e).

(e) The term "individual permit" means a DA authorization that is issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR Part 325, and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320.

(f) The term "general permit" means a DA authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

(g) The term "artificial reef" means a structure which is constructed or placed in the navigable waters of the United States or in the waters overlying the outer continental shelf for the purpose of enhancing fishery resources and commercial and recreational fishing opportunities. The term does not include activities or structures such as wing deflectors, bank stabilization, grade stabilization structures, or low flow key ways, all of which may be useful to enhance fisheries resources.

§ 322.3 Activities requiring permits.

(a) *General.* DA permits are required under section 10 for structures and/or work in or affecting navigable waters of the United States except as otherwise provided in § 322.4 below. Certain activities specified in 33 CFR Part 330 are permitted by that regulation ("nationwide general permits"). Other activities may be authorized by district or division engineers on a regional basis ("regional general permits"). If an activity is not exempted by section 322.4 of this part or authorized by a general permit, an individual section 10 permit will be required for the proposed activity. Structures or work are in navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) of this section, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity. For purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

(b) *Outer continental shelf.* DA permits are required for the construction

of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf, pursuant to section 4(f) of the Outer Continental Shelf Lands Act as amended. (See 33 CFR 320.2(b).)

(c) *Activities of Federal agencies.* (1) Except as specifically provided in this paragraph, activities of the type described in paragraphs (a) and (b) of this section, done by or on behalf of any Federal agency are subject to the authorization procedures of these regulations. Work or structures in or affecting navigable waters of the United States that are part of the civil works activities of the Corps of Engineers, unless covered by a nationwide or regional general permit issued pursuant to these regulations, are subject to the procedures of separate regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under this regulation. Division and district engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(2) Congress has delegated to the Secretary of the Army in section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States, upon recommendation of the Chief of Engineers. The general legislation by which Federal agencies are enpowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of section 10. If an agency asserts that it has Congressional authorization meeting the test of section 10 or would otherwise be exempt from the provisions of section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(3) The policy provisions set out in 33 CFR 320.4(j) relating to state or local certifications and/or authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy, e.g., section 313 and section 401 of the Clean Water Act.

§ 322.4 Activities not requiring permits.

(a) Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR 320.4(o)) do not require section 10 permits; however, if those activities involve the discharge of dredged or fill material into waters of the United States after October 18, 1972, a section 404 permit is required. (See 33 CFR Part 323.)

(b) Pursuant to section 154 of the Water Resource Development Act of 1976 (Pub. L. 94–587), Department of the Army permits are not required under section 10 to construct wharves and piers in any waterbody, located entirely within one state, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce.

§ 322.5 Special policies.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 10 permits. The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* DA permits are required for structures or work in or affecting navigable waters of the United States. However, certain structures or work specified in 33 CFR Part 330 are permitted by that regulation. If a structure or work is not permitted by that regulation, an individual or regional section 10 permit will be required.

(b) *Artificial Reefs.* (1) When considering an application for an artificial reef, as defined in 33 CFR 322.2(g), the district engineer will review the applicant's provisions for siting, constructing, monitoring, operating, maintaining, and managing the proposed artificial reef and shall determine if those provisions are consistent with the following standards:

(i) The enhancement of fishery resources to the maximum extent practicable;

(ii) The facilitation of access and utilization by United States recreational and commercial fishermen;

(iii) The minimization of conflicts among competing uses of the navigable waters or waters overlying the outer continental shelf and of the resources in such waters;

(iv) The minimization of environmental risks and risks to personal health and property;

(v) Generally accepted principles of international law; and

(vi) the prevention of any unreasonable obstructions to navigation. If the district engineer decides that the applicant's provisions are not consistent with these standards, he shall deny the permit. If the district engineer decides that the provisions are consistent with these standards, and if he decides to issue the permit after the public interest review, he shall make the provisions part of the permit.

(2) In addition, the district engineer will consider the National Artificial Reef Plan developed pursuant to section 204 of the National Fishing Enhancement Act of 1984, and if he decides to issue the permit, will notify the Secretary of Commerce of any need to deviate from that plan.

(3) The district engineer will comply with all coordination provisions required by a written agreement between the DOD and the Federal agencies relative to artificial reefs. In addition, if the district engineer decides that further consultation beyond the normal public commenting process is required to evaluate fully the proposed artificial reef, he may initiate such consultation with any Federal agency, state or local government, or other interested party.

(4) The district engineer will issue a permit for the proposed artificial reef only if the applicant demonstrates, to the district engineer's satisfaction, that the title to the artificial reef construction material is unambiguous, that responsibility for maintenance of the reef is clearly established, and that he has the financial ability to assume liability for all damages that may arise with respect to the proposed artificial reef. A demonstration of financial responsibility might include evidence of insurance, sponsorship, or available assets.

(i) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall not be liable for damages caused by activities required to be undertaken under any terms and conditions of the permit, if the permittee is in compliance with such terms and conditions.

(ii) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall be liable, to the extent determined under applicable law, for damages to which paragraph (i) does not apply.

(iii) Any person who has transferred title to artificial reef construction materials to a person to whom a permit is issued in accordance with these regulations shall not be liable for damages arising from the use of such materials in an artificial reef, if such materials meet applicable requirements

of the plan published under section 204 of the National Artificial Reef Plan, and are not otherwise defective at the time title is transferred.

(c) *Non-Federal dredging for navigation.* (1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging access channels to docks and berthing facilities or deepening such channels to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, state, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with these regulations. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will be accorded to the fullest extent possible to both Federal and non-Federal operations. Permits for non-Federal dredging operations will normally contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(2) A permit for the dredging of a channel, slip, or other such project for navigation may also authorize the periodic maintenance dredging of the project. Authorization procedures and limitations for maintenance dredging shall be as prescribed in 33 CFR 325.6(e). The permit will require the permittee to give advance notice to the district engineer each time maintenance dredging is to be performed. Where the maintenance dredging involves the discharge of dredged material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* (1) In the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District engineers will inform applicants of the hazards involved and encourage safety in location, design, and operation. District engineers will encourage cooperative or group use facilities in lieu of individual proprietary use facilities.

(2) Floating structures for small recreational boats or other recreational purposes in lakes controlled by the Corps of Engineers under a resource manager are normally subject to permit authorities cited in § 322.3, of this section, when those waters are regarded as navigable waters of the United States. However, such structures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in 36 CFR 327.19 if the land surrounding those lakes is under complete Federal ownership. District engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation in the vicinity of the lake resource manager's office.

(e) *Aids to navigation.* The placing of fixed and floating aids to navigation in a navigable water of the United States is within the purview of Section 10 of the Rivers and Harbors Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of its control of marking, lighting and standardization of such navigation aids. A Section 10 nationwide permit has been issued for such aids provided they are approved by, and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR 330.5(a)(1)). Electrical service cables to such aids are not included in the nationwide permit (an individual or regional Section 10 permit will be required).

(f) *Outer continental shelf.* Artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, are subject to the standard permit procedures of this regulation. Where the islands, installations and other devices are to be constructed on lands which are under mineral lease from the Mineral Management Service, Department of the Interior, that agency, in cooperation with other federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artificial waterways connected to navigable waters of the United States.* A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, of this Part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of these regulations. For all other canals, the exercise of regulatory authority is restricted to those activities which affect the course, location, condition, or capacity of the navigable waters of the United States. The district engineer will consider, for applications for canal work, a proposed plan of the entire development and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal.

(h) *Facilities at the borders of the United States.* (1) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(2) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural

gas to or from a foreign country, must be made to the Secretary of Energy. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(e), 15 U.S.C. 717(b), as amended by Executive Order 12038, February 3, 1978, and 18 CFR Parts 32 and 153).

(3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.766).

(4) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; facilities for the exportation or importation of water or sewage to or from a foreign country; and monorails, aerial cable cars, aerial tramways, and similar facilities for the transportation of persons and/or things, to or from a foreign country. (Executive Order 11423, August 16, 1968).

(5) A DA permit under section 10 of the Rivers and Harbors Act of 1899 is also required for all of the above facilities which affect the navigable waters of the United States, but in each case in which a permit has been issued as provided above, the district engineer, in evaluating the general public interest, may consider the basic existence and operation of the facility to have been primarily examined and permitted as provided by the Executive Orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in waters of the United States or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate DA authorizations under section 404 of the Clean Water Act or under section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, are also required. (See 33 CFR Parts 323 and 324.)

(i) *Power transmission lines.* (1) Permits under section 10 of the Rivers and Harbors Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Department of Energy under the Federal Power Act of 1920. If an application is received for a permit for lines which are part of such a water power project, the applicant will be instructed to submit the application to the Department of Energy. If the lines are not part of such a water power project, the application will be processed in accordance with the procedures of these regulations.

(2) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length or span, and type of supports as outlined in the National Electrical Safety Code.

Nominal system voltage, kV	Minimum additional clearance (feet) above clearance required for bridges
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750-765	45

(3) Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings are usually required to be a minimum of ten feet above clearances required for bridges. Greater clearances will be required if the public interest so indicates.

(4) Corps of Engineer regulation ER 1110-2-4401 prescribes minimum vertical clearances for power and communication lines over Corps lake projects. In instances where both this regulation and ER 1110-2-4401 apply, the greater minimum clearance is required.

(j) *Seaplane operations.* (1) Structures in navigable waters of the United States associated with seaplane operations require DA permits, but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(2) The FAA must be notified by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, district engineer, and other interested parties as to the effects of the proposal on the use of airspace. The district engineer will, therefore, refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due consideration to its recommendations when evaluating the general public interest.

(3) If the seaplane base would serve air carriers licensed by the Department of Transportation, the applicant must receive an airport operating certificate from the FAA. That certificate reflects a determination and conditions relating to the installation, operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the district engineer may, in evaluating the general public interest, consider such matters to have been primarily evaluated by the FAA.

(4) For regulations pertaining to seaplane landings at Corps of Engineers projects, see 36 CFR 327.4.

(k) *Foreign trade zones.* The Foreign Trade Zones Act (48 Stat. 998-1003, 19 U.S.C. 81a to 81u, as anended) authorizes the establishnent of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published at Title 15 of the Code of Federal Regulations, Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the district engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of these regulations. Evaluation by a district engineer of a permit application may give recognition to the consideration by the Board of the general econonic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

(l) *Shipping safety fairways and anchorage areas.* DA permits are required for structures located within shipping safety fairways and anchorage areas established by the U.S. Coast Guard.

(1) The Department of the Army will grant no permits for the erection of structures in areas designated as fairways, except that district engineers may permit temporary anchors and attendant cables or chains for floating or semisubmersible drilling rigs to be placed within a fairway provided the following conditions are met:

(i) The installation of anchors to stabilize semisubmersible drilling rigs within fairways must be temporary and shall be allowed to remain only 120 days. This period may be extended by the district engineer provided reasonable cause for such extension can

be shown and the extension is otherwise justified.

(ii) Drilling rigs must be at least 500 feet from any fairway boundary or whatever distance necessary to insure that minimnum clearance over an anchor line within a fairway will be 125 feet.

(iii) No anchor buoys or floats or related rigging will be allowed on the surface of the water or to a depth of 125 feet from the surface, within the fairway.

(iv) Drilling rigs may not be placed closer than 2 nautical miles of any other drilling rig situated along a fairway boundary, and not closer than 3 nautical miles to any drilling rig located on the opposite side of the fairway.

(v) The permittee must notify the district engineer, Bureau of Land Management, Mineral Management Service, U.S. Coast Guard, National Oceanic and Atmospheric Administration and the U.S. Navy Hydrographic Office of the approximate dates (commencenent and completion) the anchors will be in place to insure maximum notification to mariners.

(vi) Navigation aids or danger markings must be installed as required by the U.S. Coast Guard.

(2) District engineers may grant permits for the erection of structures within an area designated as an anchorage area, but the number of structures will be limited by spacing, as follows: The center of a structure to be erected shall be not less than two (2) nautical miles from the center of any existing structure. In a drilling or production complex, associated structures shall be as close together as practicable having due consideration for the safety factors involved. A complex of associated structures, when connected by walkways, shall be considered one structure for the purpose of spacing. A vessel fixed in place by moorings and used in conjunction with the associated structures of a drilling or production complex, shall be considered an attendant vessel and its extent shall include its moorings. When a drilling or production complex includes an attendant vessel and the complex extends more than five hundred (500) yards from the center or the complex, a structure to be erected shall be not closer than two (2) nautical miles from the near outer limit of the complex. An underwater completion installation in and anchorage area shall be considered a structure and shall be marked with a lighted buoy as approved by the United States Coast Guard.

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.

323.1 General.
323.2 Definitions.
323.3 Discharges requiring permits.
323.4 Discharges not requiring permits.
323.5 Program transfer to states.
323.6 Special policies and procedures.

Authority: 33 U.S.C. 1344.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for DA permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) (hereinafter referred to as section 404). (See 33 CFR 320.2(g).) Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401; see 33 CFR Part 321) and certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A DA permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this part, the following terms are defined:

(a) The term "waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 328.

(b) The term "lake" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

(c) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(d) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). The term does not include *de minimis,* incidental soil movement occurring during normal dredging operations.

(e) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.

(f) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities,

intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms).

(g) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this part and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(h) The term "general permit" means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

§ 323.3 Discharges requiring permits.

(a) *General.* Except as provided in § 323.4 of this Part, DA permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in 33 CFR Part 330 are permitted by that regulation ("nationwide permits"). Other discharges may be authorized by district or division engineers on a regional basis ("regional permits"). If a discharge of dredged or fill material is not exempted by § 323.4 of this Part or permitted by 33 CFR Part 330, an individual or regional section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

(b) *Activities of Federal agencies.* Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, other than the Corps of Engineers (see 33 CFR Part 209.145), are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulations. Division and district engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in expediting the processing of their applications.

§ 323.4 Discharges not requiring permits.

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii) (A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(*1*) Minor Drainage means:

(*i*) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidential to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(*ii*) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(*iii*) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species. (The provisions of paragraphs (a)(1)(iii)(C)(*1*) (*ii*) and (*iii*) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.)

(*iv*) The discharges of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

(*2*) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition,

minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a state has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4) (B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the state's approved program description pursuant to the requirements of 40 CFR Part 233.22(i), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1)–(6) of this section contains any toxic pollutant listed under section 307 of the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)–(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States nay be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a

permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

(d) Federal projects which qualify under the criteria contained in section 404(r) of the CWA are exempt from section 404 permit requirements, but may be subject to other state or Federal requirements.

§ 323.5 Program transfer to states.

Section 404(h) of the CWA allows the Administrator of the Environmental Protection Agency (EPA) to transfer administration of the section 404 permit program for discharges into certain waters of the United States to qualified states. (The program cannot be transferred for those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to the high tide line, including wetlands adjacent thereto). See 40 CFR Parts 233 and 124 for procedural regulations for transferring Section 404 programs to states. Once a state's 404 program is approved and in effect, the Corps of Engineers will suspend processing of section 404 applications in the applicable waters and will transfer pending applications to the state agency responsible for administering the program. District engineers will assist EPA and the states in any way practicable to effect transfer and will develop appropriate procedures to ensure orderly and expeditious transfer.

§ 323.6 Special policies and procedures.

(a) The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 404 permits. The district engineer will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b)(1) of the CWA. (see 40 CFR Part 230.) Subject to consideration of any economic impact on navigation and anchorage pursuant to section 404(b)(2), a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines. If the district engineer determines that the proposed discharge would comply with the 404(b)(1) guidelines, he will grant the permit unless issuance would be contrary to the public interest.

(b) The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing pursuant to 40 CFR 231.3(a)(1) that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site in accordance with section 404(c) of the Clean Water Act. However the Corps will continue to complete the administrative processing of the application while the section 404(c) procedures are underway including completion of final coordination with EPA under 33 CFR Part 325.

PART 324—PERMITS FOR OCEAN DUMPING OF DREDGED MATERIAL

Sec.

324.1 General.
324.2 Definitions.
324.3 Activities requiring permits.
324.4 Special procedures.

Authority: 33 U.S.C. 1413.

§ 324.1 General.

This regulation prescribes in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize the transportation of dredged material by vessel or other vehicle for the purpose of dumping it in ocean waters at dumping sites designated under 40 CFR Part 228 pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require DA permits under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) for the dredging in navigable waters of the United States. Applicants for DA permits under this Part should also refer to 33 CFR Part 322 to satisfy the requirements of Section 10.

§ 324.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(b) The term "dredged material" means any material excavated or dredged from navigable waters of the United States.

(c) The term "transport" or "transportation" refers to the conveyance and related handling of dredged material by a vessel or other vehicle.

§ 324.3 Activities requiring permits.

(a) *General.* DA permits are required for the transportation of dredged material for the purpose of dumping it in ocean waters.

(b) *Activities of Federal agencies.* (1) The transportation of dredged material for the purpose of disposal in ocean waters done by or on behalf of any Federal agency other than the activities of the Corps of Engineers is subject to the procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under these regulations. Division and district engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expeditious processing of their applications. The activities of the Corps of Engineers that involve the transportation of dredged material for disposal in ocean waters are regulated by 33 CFR 209.145.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to state or local authorizations do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are responsible for conformance with such laws and policies. (See EO 12088, October 18, 1978.) Federal agencies are not required to obtain and provide certification of compliance with effluent limitations and water quality standards from state or interstate water pollution control agencies in connection with activities involving the transport of dredged material for dumping into ocean waters beyond the territorial sea.

§ 324.4 Special procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 103 permits. The following additional procedures shall also be applicable under this regulation.

(a) *Public notice.* For all applications for section 103 permits, the district engineer will issue a public notice which shall contain the information specified in 33 CFR 325.3.

(b) *Evaluation.* Applications for permits for the transportation of dredged material for the purpose of dumping it in ocean waters will be evaluated to determine whether the proposed dumping will unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems or economic potentialities. District engineers will apply the criteria established by the Administrator of EPA pursuant to section 102 of the Marine Protection, Research and Sanctuaries Act of 1972 in making this evaluation. (See 40 CFR Parts 220–229) Where ocean dumping is determined to be necessary, the district engineer will, to the extent feasible, specify disposal sites using the recommendations of the Administrator pursuant to section 102(c) of the Act.

(c) *EPA review.* When the Regional Administrator, EPA, in accordance with 40 CFR 225.2(b), advises the district engineer, in writing, that the proposed dumping will comply with the criteria, the district engineer will complete his evaluation of the application under this part and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the district engineer, in writing, that the proposed dumping does not comply with the criteria, the district engineer will proceed as follows:

(1) The district engineer will determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the district engineer will evaluate them in accordance with 33 CFR Parts 320, 322, 323, and 325 and this Part, as appropriate.

(2) If the district engineer determines that there is no economically feasible alternative method or site available, and the proposed project is otherwise found to be not contrary to the public interest, he will so advise the Regional Administrator setting forth his reasons for such determination. If the Regional Administrator has not removed his objection within 15 days, the district engineer will submit a report of his determination to the Chief of Engineers for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain the analysis of whether there are other economically feasible methods or sites available to dispose of the dredged material.

(d) *Chief of Engineers review.* The Chief of Engineers shall evaluate the permit application and make a decision to deny the permit or recommend its issuance. If the decision of the Chief of Engineers is that ocean dumping at the proposed disposal site is required because of the unavailability of economically feasible alternatives, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with 40 CFR 225.4.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec.
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Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 USC 1413.

§ 325.1 Applications for permits.

(a) *General.* The processing procedures of this Part apply to any Department of the Army (DA) permit. Special procedures and additional information are contained in 33 CFR Parts 320 through 324, 327 and Part 330. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing applications for DA permits.

(b) *Pre-application consultation for major applications.* The district staff element having responsibility for administering, processing, and enforcing federal laws and regulations relating to the Corps of Engineers regulatory program shall be available to advise potential applicants of studies or other information foreseeably required for later federal action. The district engineer will establish local procedures and policies including appropriate publicity programs which will allow potential applicants to contact the district engineer or the regulatory staff element to request pre-application consultation. Upon receipt of such request, the district engineer will assure the conduct of an orderly process which may involve other staff elements and affected agencies (Federal, state, or local) and the public. This early process should be brief but thorough so that the potential applicant may begin to assess the viability of some of the more obvious potential alternatives in the application. The district engineer will endeavor, at this stage, to provide the potential applicant with all helpful information necessary in pursuing the application, including factors which the Corps must consider in its permit decision making process. Whenever the district engineer becomes aware of planning for work which may require a DA permit and which may involve the preparation of an environmental document, he shall contact the principals involved to advise them of the requirement for the permit(s) and the attendant public interest review including the development of an environmental document. Whenever a potential applicant indicates the intent to submit an application for work which may require the preparation of an environmental document, a single point of contact shall be designated within the district's regulatory staff to effectively coordinate the regulatory process, including the National Environmental Policy Act (NEPA) procedures and all attendant reviews, meetings, hearings, and other actions, including the scoping process if appropriate, leading to a decision by the district engineer. Effort devoted to this process should be commensurate with the likelihood of a permit application actually being submitted to the Corps. The regulatory staff coordinator shall maintain an open relationship with each potential applicant or his consultants so as to assure that the potential applicant is fully aware of the substance (both quantitative and qualitative) of the data required by the district engineer for use in preparing an environmental assessment or an environmental impact statement (EIS) in accordance with 33 CFR Part 230, Appendix B.

(c) *Application form.* Applicants for all individual DA permits must use the standard application form (ENG Form 4345, OMB Approval No. OMB 49–R0420). Local variations of the application form for purposes of facilitating coordination with federal, state and local agencies may be used. The appropriate form may be obtained from the district office having

jurisdiction over the waters in which the activity is proposed to be located. Certain activities have been authorized by general permits and do not require submission of an application form but may require a separate notification.

(d) *Content of application.* (1) The application must include a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice (detailed engineering plans and specifications are not required); the location, purpose and need for the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and a list of authorizations required by other federal, interstate, state, or local agencies for the work, including all approvals received or denials already made. See § 325.3 for information required to be in public notices. District and division engineers are not authorized to develop additional information forms but may request specific information on a case-by-case basis. (See § 325.1(e)).

(2) All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application. District engineers should reject, as incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina will include dredging required for access as well as any fill associated with construction of the marina.

(3) If the activity would involve dredging in navigable waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.

(4) If the activity would include the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters the application must include the source of the material; the purpose of the discharge, a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. Certification under section 401 of the Clean Water Act is required for such discharges into waters of the United States.

(5) If the activity would include the construction of a filled area or pile or float-supported platform the project description must include the use of, and specific structures to be erected on, the fill or platform.

(6) If the activity would involve the construction of an impoundment structure, the applicant may be required to demonstrate that the structure complies with established state dam safety criteria or that the structure has been designed by qualified persons and, in appropriate cases, independently reviewed (and modified as the review would indicate) by similiarly qualified persons. No specific design criteria are to be prescribed nor is an independent detailed engineering review to be made by the district engineer.

(7) *Signature on application.* The application must be signed by the person who desires to undertake the proposed activity (i.e. the applicant) or by a duly authorized agent. When the applicant is represented by an agent, that information will be included in the space provided on the application or by a separate written statement. The signature of the applicant or the agent will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application, except where the lands are under the control of the Corps of Engineers, in which cases the district engineer will coordinate the transfer of the real estate and the permit action. An application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area and each owner submits a statement designating the same agent.

(8) If the activity would involve the construction or placement of an artificial reef, as defined in 33 CFR 322.2(g), in the navigable waters of the United States or in the waters overlying the outer continental shelf, the application must include provisions for siting, constructing, monitoring, and managing the artificial reef.

(9) *Complete application.* An application will be determined to be complete when sufficient information is received to issue a public notice (See 33 CFR 325.1(d) and 325.3(a).) The issuance of a public notice will not be delayed to obtain information necessary to evaluate an application.

(e) *Additional information.* In addition to the information indicated in paragraph (d) of this section, the applicant will be required to furnish only such additional information as the district engineer deems essential to make a public interest determination including, where applicable, a determination of compliance with the section 404(b)(1) guidelines or ocean dumping criteria. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(f) *Fees.* Fees are required for permits under section 404 of the Clean Water Act, section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and sections 9 and 10 of the Rivers and Harbors Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. No fee will be charged if the applicant withdraws the application at any time prior to issuance of the permit or if the permit is denied. Collection of the fee will be deferred until the proposed activity has been determined to be not contrary to the public interest. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require publication of a public notice will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions, general permits or letters of permission. Agencies or instrumentalities of federal, state or local governments will not be required to pay any fee in connection with permits.

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received the district engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness, and if the application is incomplete, request from the applicant within 15 days of receipt of the application any additional information necessary for further processing.

(2) Within 15 days of receipt of an application the district engineer will either determine that the application is complete (see 33 CFR 325.1(d)(9) and issue a public notice as described in § 325.3 of this Part, unless specifically exempted by other provisions of this

regulation or that it is incomplete and notify the applicant of the information necessary for a complete application. The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

(3) The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer (see § 325.2(d)(5)). At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application. The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to mediate differences, or to gather information to aid in the decision process. The district engineer should not delay processing of the application unless the applicant requests a reasonable delay, normally not to exceed 30 days, to provide additional information or comments.

(4) The district engineer will follow Appendix B of 33 CFR Part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.

(5) The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR Part 327.

(6) After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a statement of findings (SOF) or, where an EIS has been prepared, a record of decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the district engineer. The SOF or ROD shall be dated, signed, and included in the record prior to final action on the application. Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD. If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j) (2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance. If a permit is warranted, the district engineer will determine the special conditions, if any, and duration which should be incorporated into the permit. In accordance with the authorities specified in Section 325.8 of this Part, the district engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final EIS or environmental assessment, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in a format prescribed by the Chief of Engineers. District and division engineers will notify the applicant and interested federal and state agencies that the application has been forwarded to higher headquarters. The district or division engineer may, at his option, disclose his recommendation to the news media and other interested parties, with the caution that it is only a recommendation and not a final decision. Such disclosure is encouraged in permit cases which have become controversial and have been the subject of stories in the media or have generated strong public interest. In those cases where the application is forwarded for decision in the format prescribed by the Chief of Engineers, the report will serve as the SOF or ROD. District engineers will generally combine the SOF, environmental assessment, and findings of no significant impact (FONSI), 404(b)(1) guideline analysis, and/or the criteria for dumping of dredged material in ocean waters into a single document.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit and a standard individual permit form will be used, the issuing official will forward the permit to the applicant for signature accepting the conditions of the permit. The permit is not valid until signed by the issuing official. Letters of permission require only the signature of the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of the permit or signature of the issuing official on the authorizing document.

(8) The district engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. It will also note that relevant environmental documents and the SOF's or ROD's are available upon written request and, where applicable, upon the payment of administrative fees. This list will be distributed to all persons who may have an interest in any of the public notices listed.

(9) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(i) If the activity involves the construction of artificial islands, installations or other devices on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, DC 20390 Attention, Code NS12, and to the Charting and Geodetic Services, N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852.

(ii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Defense Mapping Agency, Hydrographic Center and National Ocean Service as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(iii) If the activity involves the erection of an aerial transmission line, submerged cable, or submerged pipeline

across a navigable water of the United States, to the Charting and Geodetic Services N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852.

(iv) If the activity is listed in paragraphs (a)(9) (i), (ii), or (iii) of this section, or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(b) *Procedures for particular types of permit situations.*—(1) *Section 401 Water Quality Certification.* If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.

(i) The public notice for such activity, which will contain a statement on certification requirements (see § 325.3(a)(8)), will serve as the notification to the Administrator of the Environmental Protection Agency (EPA) pursuant to section 401(a)(2) of the Clean Water Act. If EPA determines that the proposed discharge may affect the quality of the waters of any state other than the state in which the discharge will originate, it will so notify such other state, the district engineer, and the applicant. If such notice or a request for supplemental information is not received within 30 days of issuance of the public notice, the district engineer will assume EPA has made a negative determination with respect to section 401(a)(2). If EPA determines another state's waters may be affected, such state has 60 days from receipt of EPA's notice to determine if the proposed discharge will affect the quality of its waters so as to violate any water quality requirement in such state, to notify EPA and the district engineer in writing of its objection to permit issuance, and to request a public hearing. If such occurs, the district engineer will hold a public hearing in the objecting state. Except as stated below, the hearing will be conducted in accordance with 33 CFR Part 327. The issues to be considered at the public hearing will be limited to water quality impacts. EPA will submit its evaluation and recommendations at the hearing with respect to the state's objection to permit issuance. Based upon the recommendations of the objecting state, EPA, and any additional evidence presented at the hearing, the district engineer will condition the permit, if issued, in such a manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot, in the district engineer's opinion, insure such compliance, he will deny the permit.

(ii) No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date, and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly, if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

(2) *Coastal Zone Management Consistency.* If the proposed activity is to be undertaken in a state operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone Management (CZM) Act (see 33 CFR 320.3(b)), the district engineer shall proceed as follows:

(i) If the applicant is a federal agency, and the application involves a federal activity in or affecting the coastal zone, the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of federal activities. The federal agency applicant shall be responsible for complying with the CZM Act's directive for ensuring that federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved CZM Programs. (See 15 CFR Part 930.) If the state coastal zone agency objects to the proposed federal activity on the basis of its inconsistency with the state's approved CZM Program, the district engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the CZM Act for resolving such disagreements.

(ii) If the applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved state CZM Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the CZM Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.

(iii) If the applicant is requesting a permit for work on Indian reservation lands which are in the coastal zone, the district engineer shall treat the application in the same manner as prescribed for a Federal applicant in paragraph (b)(2)(i) of this section. However, if the applicant is requesting a permit on non-trust Indian lands, and the state CZM agency has decided to assert jurisdiction over such lands, the district engineer shall treat the application in the same manner as prescribed for a non-Federal applicant in paragraph (b)(2)(ii) of this section.

(3) *Historic Properties.* If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with Corps National Historic Preservation Act implementing regulations.

(4) *Activities Associated with Federal Projects.* If the proposed activity would consist of the dredging of an access channel and/or berthing facility associated with an authorized federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the federal project to the maximum extent feasible. Separate notice, hearing, and environmental documentation will not be required for activities so included and coordinated, and the public notice issued by the district engineer for these federal and associated non-federal activities will be the notice of intent to issue permits for those included non-federal dredging activities. The decision whether to issue or deny such a permit will be consistent with the decision on the federal project unless special considerations applicable to the proposed activity are identified. (See § 322.5(c).)

(5) *Endangered Species.* Applications will be reviewed for the potential impact on threatened or endangered species pursuant to section 7 of the Endangered Species Act as amended. The district engineer will include a statement in the public notice of his current knowledge of endangered species based on his initial review of the application (see 33 CFR 325.2(a)(2)). If the district engineer determines that the proposed activity would not affect listed species or their critical habitat, he will include a statement to this effect in the public notice. If he finds the proposed activity may affect an endangered or threatened species or their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service. Public notices forwarded to the U.S. Fish and Wildlife Service or National Marine Fisheries Service will serve as the request for information on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity, pursuant to section 7(c) of the Act. References, definitions, and consultation procedures are found in 50 CFR Part 402.

(c) [Reserved]

(d) *Timing of processing of applications.* The district engineer will be guided by the following time limits for the indicated steps in the evaluation process:

(1) The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with paragraph 325.1.(d) of this Part.

(2) The comment period on the public notice should be for a reasonable period of time within which interested parties may express their views concerning the permit. The comment period should not be more than 30 days nor less than 15 days from the date of the notice. Before designating comment periods less than 30 days, the district engineer will consider: (i) Whether the proposal is routine or noncontroversial, (ii) mail time and need for comments from remote areas, (iii) comments from similar proposals, and (iv) the need for a site visit. After considering the length of the original comment period, paragraphs (a)(2) (i) through (iv) of this section, and other pertinent factors, the district engineer may extend the comment period up to an additional 30 days if warranted.

(3) District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless (i) precluded as a matter of law or procedures required by law (see below), (ii) the case must be referred to higher authority (see § 325.8 of this Part), (iii) the comment period is extended, (iv) a timely submittal of information or comments is not received from the applicant, (v) the processing is suspended at the request of the applicant, or (vi) information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period. Once the cause for preventing the decision from being made within the normal 60-day period has been satisfied or eliminated, the 60-day clock will start running again from where it was suspended. For example, if the comment period is extended by 30 days, the district engineer will, absent other restraints, decide on the application within 90 days of receipt of a complete application. Certain laws (e.g., the Clean Water Act, the CZM Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and Sanctuaries Act) require procedures such as state or other federal agency certifications, public hearings, environmental impact statements, consultation, special studies, and testing which may prevent district engineers from being able to decide certain applications within 60 days.

(4) Once the district engineer has sufficient information to make his public interest determination, he should decide the permit application even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by federal law, a prerequisite to making a decision on the DA permit application. Permits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the DA permit. In unusual cases the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization. In such cases, he may advise the other agency of his position on the DA permit while deferring his final decision.

(5) The applicant will be given a reasonable time, not to exceed 30 days, to respond to requests of the district engineer. The district engineer may make such requests by certified letter and clearly inform the applicant that if he does not respond with the requested information or a justification why additional time is necessary, then his application will be considered withdrawn or a final decision will be made, whichever is appropriate. If additional time is requested, the district engineer will either grant the time, make a final decision, or consider the application as withdrawn.

(6) The time requirements in these regulations are in terms of calendar days rather than in terms of working days.

(e) *Alternative procedures.* Division and district engineers are authorized to use alternative procedures as follows:

(1) *Letters of permission.* Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the publishing of an individual public notice. The letter of permission will not be used to authorize the transportation of dredged material for the purpose of dumping it in ocean waters. Letters of permission may be used:

(i) In those cases subject to section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.

(ii) In those cases subject to section 404 of the Clean Water Act after:

(A) The district engineer, through consultation with Federal and state fish and wildlife agencies, the Regional

Administrator, Environmental Protection Agency, the state water quality certifying agency, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures;

(B) The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and

(C) A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.

(2) *Regional permits.* Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review. A regional permit may be revoked by the issuing authority if it is determined that it is contrary to the public interest provided the procedures of § 325.7 of this Part are followed. Following revocation, applications for future activities in areas covered by the regional permit shall be processed as applications for individual permits. No regional permit shall be issued for a period of more than five years.

(3) *Joint procedures.* Division and district engineers are authorized and encouraged to develop joint procedures with states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. Such procedures may be substituted for the procedures in paragraphs (a)(1) through (a)(5) of this section provided that the substantive requirements of those sections are maintained. Division and district engineers are also encouraged to develop management techniques such as joint agency review meetings to expedite the decision-making process. However, in doing so, the applicant's rights to a full public interest review and independent decision by the district or division engineer must be strictly observed.

(4) *Emergency procedures.* Division engineers are authorized to approve special processing procedures in emergency situations. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable.

§ 325.3 Public notice.

(a) *General.* The public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment. The notice should include the following items of information:

(1) Applicable statutory authority or authorities;

(2) The name and address of the applicant;

(3) The name or title, address and telephone number of the Corps employee from whom additional information concerning the application may be obtained;

(4) The location of the proposed activity;

(5) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills or pile or float-supported platforms, and a description of the type, composition, and quantity of materials to be discharged or disposed of in the ocean;

(6) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

(7) If the proposed activity would occur in the territorial seas or ocean waters, a description of the activity's relationship to the baseline from which the territorial sea is measured;

(8) A list of other government authorizations obtained or requested by the applicant, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;

(9) If appropriate, a statement that the activity is a categorical exclusion for purposes of NEPA (see paragraph 7 of Appendix B to 33 CFR Part 230);

(10) A statement of the district engineer's current knowledge on historic properties;

(11) A statement of the district engineer's current knowledge on endangered species (see § 325.2(b)(5));

(12) A statement(s) on evaluation factors (see § 325.3(c));

(13) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest;

(14) The comment period based on § 325.2(d)(2);

(15) A statement that any person may request, in writing, within the comment period specified in the notice, that a public hearing be held to consider the application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing;

(16) For non-federal applications in states with an approved CZM Plan, a statement on compliance with the approved Plan; and

(17) In addition, for section 103 (ocean dumping) activities:

(i) The specific location of the proposed disposal site and its physical boundaries;

(ii) A statement as to whether the proposed disposal site has been designated for use by the Administrator, EPA, pursuant to section 102(c) of the Act;

(iii) If the proposed disposal site has not been designated by the Administrator, EPA, a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible;

(iv) A brief description of known dredged material discharges at the proposed disposal site;

(v) Existence and documented effects of other authorized disposals that have been made in the disposal area (e.g.,

heavy metal background reading and organic carbon content);

(vi) An estimate of the length of time during which disposal would continue at the proposed site; and

(vii) Information on the characteristics and composition of the dredged material.

(b) *Public notice for general permits.* District engineers will publish a public notice for all proposed regional general permits and for significant modifications to, or reissuance of, existing regional permits within their area of jurisdiction. Public notices for statewide regional permits may be issued jointly by the affected Corps districts. The notice will include all applicable information necessary to provide a clear understanding of the proposal. In addition, the notice will state the availability of information at the district office which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance of general permits. District engineers will publish a public notice for nationwide permits in accordance with 33 CFR 330.4.

(c) *Evaluation factors.* A paragraph describing the various evaluation factors on which decisions are based shall be included in every public notice.

(1) Except as provided in paragraph (c)(3) of this section, the following will be included:

"The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."

(2) If the activity would involve the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters, the public notice shall also indicate that the evaluation of the inpact of the activity on the public interest will include application of the guidelines promulgated by the Administrator, EPA, (40 CFR Part 230) or of the criteria established under authority of section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 229), as appropriate. (See 33 CFR Parts 323 and 324).

(3) In cases involving construction of artificial islands, installations and other devices on outer continental shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(d) *Distribution of public notices.* (1) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, to appropriate Indian Tribes or tribal representatives, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, to appropriate state and areawide clearing houses as prescribed by OMB Circular A-95, to local news media and to any other interested party. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the state agency responsible for fish and wildlife resources, the State Historic Preservation Officer, and the District Commander, U.S. Coast Guard.

(2) In addition to the general distribution of public notices cited above, notices will be sent to other addressees in appropriate cases as follows:

(i) If the activity would involve structures or dredging along the shores of the seas or Great Lakes, to the Coastal Engineering Research Center, Washington, DC 20016.

(ii) If the activity would involve construction of fixed structures or artificial islands on the outer continental shelf or in the territorial seas, to the Assistant Secretary of Defense (Manpower, Installations, and Logistics (ASD(MI&L)), Washington, DC 20310; the Director, Defense Mapping Agency (Hydrographic Center) Washington, DC 20390, Attention, Code NS12; and the Charting and Geodetic Services, N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852, and to affected military installations and activities.

(iii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(iv) If the activity involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations, to the Regional Director of the Federal Aviation Administration.

(v) If the activity would be in connection with a foreign-trade zone, to the Executive Secretary, Foreign-Trade Zones Board, Department of Commerce, Washington, DC 20230 and to the appropriate District Director of Customs as Resident Representative, Foreign-Trade Zones Board.

(3) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the proposed project. A copy of the public notice with the list of the addresses to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the district engineer may request its comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constitutent or himself, the district engineer will inform the member of Congress of the final decision.

(4) District engineers will update public notice mailing lists at least once every two years.

§ 325.4. Conditioning of permits.

(a) District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

(1) Legal requirements which may be satisfied by means of Corps permit conditions include compliance with the 404(b)(1) guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state section 401 water quality certifications.

(2) Where appropriate, the district engineer may take into account the existence of controls imposed under other federal, state, or local programs which would achieve the objective of the desired condition, or the existence of an enforceable agreement between the applicant and another party concerned with the resource in question, in determining whether a proposal complies with the 404(b)(1) guidelines, ocean dumping criteria, and other applicable statutes, and is not contrary to the public interest. In such cases, the Department of the Army permit will be conditioned to state that material changes in, or a failure to implement and enforce such program or agreement, will be grounds for modifying, suspending, or revoking the permit.

(3) Such conditions may be accomplished on-site, or may be accomplished off-site for mitigation of significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment.

(b) District engineers are authorized to add special conditions, exclusive of paragraph (a) of this section, at the applicant's request or to clarify the permit application.

(c) If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit.

(d) *Bonds.* If the district engineer has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

§ 325.5 Forms of permits.

(a) *General discussion.* (1) DA permits under this regulation will be in the form of individual permits or general permits. The basic format shall be ENG Form 1721, DA Permit (Appendix A).

(2) The general conditions included in ENG Form 1721 are normally applicable to all permits; however, some conditions may not apply to certain permits and may be deleted by the issuing officer. Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest in accordance with Section 325.4 of this Part.

(b) *Individual permits*—(1) *Standard permits.* A standard permit is one which has been processed through the public interest review procedures, including public notice and receipt of comments, described throughout this Part. The standard individual permit shall be issued using ENG Form 1721.

(2) *Letters of permission.* A letter of permission will be issued where procedures of paragraph 325.2(e)(1) have been followed. It will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority, any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the relevant general conditions from ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

(c) *General permits*—(1) *Regional permits.* Regional permits are a type of general permit. They may be issued by a division or district engineer after compliance with the other procedures of this regulation. If the public interest so requires, the issuing authority may condition the regional permit to require a case-by-case reporting and acknowledgment system. However, no separate applications or other authorization documents will be required.

(2) *Nationwide permits.* Nationwide permits are a type of general permit and represent DA authorizations that have been issued by the regulation (33 CFR Part 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit.

(3) *Programmatic permits.* Programmatic permits are a type of general permit founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program.

(d) *Section 9 permits.* Permits for structures in interstate navigable waters of the United States under section 9 of the Rivers and Harbors Act of 1899 will be drafted at DA level.

§ 325.6 Duration of permits.

(a) *General.* DA permits may authorize both the work and the resulting use. Permits continue in effect until they automatically expire or are modified, suspended, or revoked.

(b) *Structures.* Permits for the existence of a structure or other activity of a permanent nature are usually for an indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the permit will be of limited duration with a definite expiration date.

(c) *Works.* Permits for construction work, discharge of dredged or fill material, or other activity and any construction period for a structure with a permit of indefinite duration under paragraph (b) of this section will specify time limits for completing the work or activity. The permit may also specify a date by which the work must be started, normally within one year from the date of issuance. The date will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. Permits issued for the transport of dredged material for the purpose of disposing of it in ocean waters will specify a completion date for the disposal not to exceed three years from the date of permit issuance.

(d) *Extensions of time.* An authorization or construction period will automatically expire if the permittee fails to request and receive an extension of time. Extensions of time may be granted by the district engineer. The permittee must request the extension and explain the basis of the request, which will be granted unless the district engineer determines that an extension would be contrary to the public interest. Requests for extensions will be processed in accordance with the regular procedures of § 325.2 of this Part, including issuance of a public notice, except that such processing is not required where the district engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued.

(e) *Maintenance dredging.* If the authorized work includes periodic maintenance dredging, an expiration date for the authorization of that maintenance dredging will be included in the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after evaluation of the proposed method of dredging and disposal of the dredged material in accordance with the requirements of 33 CFR Parts 320 to 325. In such cases, the district engineer shall require notification of the maintenance dredging prior to actual performance to insure continued compliance with the requirements of this regulation and 33 CFR Parts 320 to 324. If the permittee desires to continue maintenance

dredging beyond the expiration date, he must request a new permit. The permittee should be advised to apply for the new permit six months prior to the time he wishes to do the maintenance work.

§ 325.7 Modification, suspension, or revocation of permits.

(a) *General.* The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this Part, and not as modifications under this section.

(b) *Modification.* Upon request by the permittee or, as a result of reevaluation of the circumstances and conditions of a permit, the district engineer may determine that the public interest requires a modification of the terms or conditions of the permit. In such cases, the district engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give the permittee written notice of the modification, which will then become effective on such date as the district engineer may establish. In the event a mutual agreement cannot be reached by the district engineer and the permittee, the district engineer will proceed in accordance with paragraph (c) of this section if immediate suspension is warranted. In cases where immediate suspension is not warranted but the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a meeting with the district engineer and/or a public hearing. The modification will become effective on the date set by the district engineer which shall be at least ten days after receipt of the notice by the permittee unless a hearing or meeting is requested within that period. If the permittee fails or refuses to comply with the modification, the district engineer will proceed in accordance with 33 CFR Part 326. The district engineer shall consult with resource agencies before modifying any permit terms or conditions, that would result in greater impacts, for a project about which that agency expressed a significant interest in the term, condition, or feature being modified prior to permit issuance.

(c) *Suspension.* The district engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop those activities previously authorized by the suspended permit. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may within 10 days of receipt of notice of the suspension, request a meeting with the district engineer and/or a public hearing to present information in this matter. If a hearing is requested, the procedures prescribed in 33 CFR Part 327 will be followed. After the completion of the meeting or hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested), the district engineer will take action to reinstate, modify, or revoke the permit.

(d) *Revocation.* Following completion of the suspension procedures in paragraph (c) of this section, if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it. The permittee will be advised in writing of the final decision.

(e) *Regional permits.* The issuing official may, by following the procedures of this section, revoke regional permits for individual activities, categories of activities, or geographic areas. Where groups of permittees are involved, such as for categories of activities or geographic areas, the informal discussions provided in paragraph (b) of this section may be waived and any written notification nay be made through the general public notice procedures of this regulation. If a regional permit is revoked, any permittee may then apply for an individual permit which shall be processed in accordance with these regulations.

§ 325.8 Authority to issue or deny permits.

(a) *General.* Except as otherwise provided in this regulation, the Secretary of the Army, subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny permits for dams or dikes in intrastate waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899; for construction or other work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899; for the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act; or for the transportation of dredged material for the purpose of disposing of it into ocean waters pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. The authority to issue or deny permits in interstate navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(b) *District engineer's authority.* District engineers are authorized to issue or deny permits in accordance with these regulations pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899; section 404 of the Clean Water Act; and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, in all cases not required to be referred to higher authority (see below). It is essential to the legality of a permit that it contain the name of the district engineer as the issuing officer. However, the permit need not be signed by the district engineer in person but may be signed for and in behalf of him by whomever he designates. In cases where permits are denied for reasons other than navigation or failure to obtain required local, state, or other federal approvals or certifications, the Statement of Findings must conclusively justify a denial decision. District

engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state, or other federal permits for the proposed activity have been denied or where he determines that the activity will clearly interfere with navigation except in all cases required to be referred to higher authority (see below). District engineers are also authorized to add, modify, or delete special conditions in permits in accordance with § 325.4 of this Part, except for those conditions which may have been imposed by higher authority, and to modify, suspend and revoke permits according to the procedures of § 325.7 of this Part. District engineers will refer the following applications to the division engineer for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed;

(3) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(4) When higher authority requests the application be forwarded for decision; or

(5) When the district engineer is precluded by law or procedures required by law from taking final action on the application (e.g. section 9 of the Rivers and Harbors Act of 1899, or territorial sea baseline changes).

(c) *Division engineer's authority.* Division engineers will review and evaluate all permit applications referred by district engineers. Division engineers may authorize the issuance or denial of permits pursuant to section 10 of the Rivers and Harbors Act of 1899; section 404 of the Clean Water Act; and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the inclusion of conditions in accordance with § 325.4 of this Part in all cases not required to be referred to the Chief of Engineers. Division engineers will refer the following applications to the Chief of Engineers for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(3) When higher authority requests the application be forwarded for decision; or

(4) When the division engineer is precluded by law or procedures required by law from taking final action on the application.

§ 325.9 Authority to determine jurisdiction.

District engineers are authorized to determine the area defined by the terms "navigable waters of the United States" and "waters of the United States" except:

(a) When a determination of navigability is made pursuant to 33 CFR 329.14 (division engineers have this authority); or

(b) When EPA makes a section 404 jurisdiction determination under its authority.

§ 325.10 Publicity.

The district engineer will establish and maintain a program to assure that potential applicants for permits are informed of the requirements of this regulation and of the steps required to obtain permits for activities in waters of the United States or ocean waters. Whenever the district engineer becomes aware of plans being developed by either private or public entities which might require permits for implementation, he should advise the potential applicant in writing of the statutory requirements and the provisions of this regulation. Whenever the district engineer is aware of changes in Corps of Engineers regulatory jurisdiction, he will issue appropriate public notices.

Appendix A—Permit Form and Special Conditions

A. Permit Form

Department of the Army Permit

Permittee _____

Permit No. _____

Issuing Office _____

Note.—The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

Project Description: (Describe the permitted activity and its intended use with references to any attached plans or drawings that are considered to be a part of the project description. Include a description of the types and quantities of dredged or fill materials to be discharged in jurisdictional waters.)

Project Location: (Where appropriate, provide the names of and the locations on the waters where the permitted activity and any off-site disposals will take place. Also, using name, distance, and direction, locate the permitted activity in reference to a nearby landmark such as a town or city.)

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on _____. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions: (Add special conditions as required in this space with reference to a continuation sheet if necessary.)

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

( ) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

( ) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(Permittee)

(Date)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

(District Engineer)

(Date)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(Transferee)

(Date)

B. Special Conditions. No special conditions will be preprinted on the permit form. The following and other special conditions should be added, as appropriate, in the space provided after the general conditions or on a referenced continuation sheet:

1. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.

2. You must have a copy of this permit available on the vessel used for the authorized transportation and disposal of dredged material.

3. You must advise this office in writing, at least two weeks before you start maintenance dredging activities under the authority of this permit.

4. You must install and maintain, at your expense, any safety lights and signals prescribed by the United States Coast Guard (USCG), through regulations or otherwise, on your authorized facilities. The USCG may be reached at the following address and telephone number:

5. The condition below will be used when a Corps permit authorizes an artificial reef, an aerial transmission line, a submerged cable or pipeline, or a structure on the outer continental shelf.

National Ocean Service (NOS) has been notified of this authorization. You must notify NOS and this office in writing, at least two weeks before you begin work and upon completion of the activity authorized by this permit. Your notification of completion must include a drawing which certifies the location and configuration of the completed activity (a certified permit drawing may be used). Notifications to NOS will be sent to the following address: The Director, National Ocean Service (N/CG 222), Rockville, Maryland 20852.

6. The following condition should be used for every permit where legal recordation of the permit would be reasonably practicable and recordation could put a subsequent purchaser or owner of property on notice of permit conditions.

You must take the actions required to record this permit with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title to or interest in real property.

Appendix B—[Reserved] (For Future NEPA Regulation)

Appendix C—[Reserved] (For Historic Properties Regulation)

PART 326—ENFORCEMENT

Sec.

326.1 Purpose.
326.2 Policy.
326.3 Unauthorized activities.
326.4 Supervision of authorized activities.
326.5 Legal action.

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 326.1 Purpose.

This Part prescribes enforcement policies (§ 326.2) and procedures applicable to activities performed without required Department of the Army permits (§ 326.3) and to activities not in compliance with the terms and conditions of issued Department of the Army permits (§ 326.4). Procedures for initiating legal actions are prescribed in § 326.5. Nothing contained in this Part shall establish a non-discretionary duty on the part of district engineers nor shall deviation from these precedures give rise to a private right of action against a district engineer.

§ 326.2 Policy.

Enforcement, as part of the overall regulatory program of the Corps, is based on a policy of regulating the waters of the United States by discouraging activities that have not been properly authorized and by requiring corrective measures, where appropriate, to ensure those waters are not misused and to maintain the integrity of the program. There are several methods discussed in the remainder of this part which can be used either singly or in combination to implement this policy, while making the most effective use of the enforcement resources available. As EPA has independent enforcement authority under the Clean Water Act for unauthorized discharges, the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved.

§ 326.3 Unauthorized activities.

(a) *Surveillance.* To detect unauthorized activities requiring permits, district engineers should make the best use of all available resources.

Corps employees; members of the public; and representatives of state, local, and other Federal agencies should be encouraged to report suspected violations. Additionally, district engineers should consider developing joint surveillance procedures with Federal, state, or local agencies having similar regulatory responsibilities, special expertise, or interest.

(b) *Initial investigation.* District engineers should take steps to investigate suspected violations in a timely manner. The scheduling of investigations will reflect the nature and location of the suspected violations, the anticipated impacts, and the most effective use of inspection resources available to the district engineer. These investigations should confirm whether a violation exists, and if so, will identify the extent of the violation and the parties responsible.

(c) *Formal notifications to parties responsible for violations.* Once the district engineer has determined that a violation exists, he should take appropriate steps to notify the responsible parties.

(1) If the violation involves a project that is not complete, the district engineer's notification should be in the form of a cease and desist order prohibiting any further work pending resolution of the violation in accordance with the procedures contained in this part. See paragraph (c)(4) of this section for exception to this procedure.

(2) If the violation involves a completed project, a cease and desist order should not be necessary. However, the district engineer should still notify the responsible parties of the violation.

(3) All notifications, pursuant to paragraphs (c) (1) and (2) of this section, should identify the relevant statutory authorities, indicate potential enforcement consequences, and direct the responsible parties to submit any additional information that the district engineer may need at that time to determine what course of action he should pursue in resolving the violation; further information may be requested, as needed, in the future.

(4) In situations which would, if a violation were not involved, qualify for emergency procedures pursuant to 33 CFR Part 325.2(e)(4), the district engineer may decide it would not be appropriate to direct that the unauthorized work be stopped. Therefore, in such situations, the district engineer may, at his discretion, allow the work to continue, subject to appropriate limitations and conditions as he may prescribe, while the violation is being resolved in accordance with the procedures contained in this part.

(5) When an unauthorized activity requiring a permit has been undertaken by American Indians (including Alaskan natives, Eskimos, and Aleuts, but not including Native Hawaiians) on reservation lands or in pursuit of specific treaty rights, the district engineer should use appropriate means to coordinate proposed directives and orders with the Assistant Chief Counsel for Indian Affairs (DAEN–CCI).

(6) When an unauthorized activity requiring a permit has been undertaken by an official acting on behalf of a foreign government, the district engineer should use appropriate means to coordinate proposed directives and orders with the Office, Chief of Engineers, ATTN: DAEN–CCK.

(d) *Initial corrective measures.* (1) The district engineer should, in appropriate cases, depending upon the nature of the impacts associated with the unauthorized, completed work, solicit the views of the Environmental Protection Agency; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service, and other Federal, state, and local agencies to facilitate his decision on what initial corrective measures are required. If the district engineer determines as a result of his investigation, coordination, and preliminary evaluation that initial corrective measures are required, he should issue an appropriate order to the parties responsible for the violation. In determining what initial corrective measures are required, the district engineer should consider whether serious jeopardy to life, property, or important public resources (see 33 CFR Part 320.4) may be reasonably anticipated to occur during the period required for the ultimate resolution of the violation. In his order, the district engineer will specify the initial corrective measures required and the time limits for completing this work. In unusual cases where initial corrective measures substantially eliminate all current and future detrimental impacts resulting from the unauthorized work, further enforcement actions should normally be unnecessary. For all other cases, the district engineer's order should normally specify that compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.

(2) An order requiring initial corrective measures that resolve the violation may also be issued by the district engineer in situations where the acceptance or processing of an after-the-fact permit application is prohibited or considered not appropriate pursuant to § 326.3(e)(1) (iii)–(iv) below. However, such orders will be issued only when the district engineer has reached an independent determination that such measures are necessary and appropriate.

(3) It will not be necessary to issue a Corps permit in connection with initial corrective measures undertaken at the direction of the district engineer.

(e) *After-the-fact permit applications.* (1) Following the completion of any required initial corrective measures, the district engineer will accept an after-the-fact permit application unless he determines that one of the exceptions listed in subparagraphs i–iv below is applicable. Applications for after-the-fact permits will be processed in accordance with the applicable procedures in 33 CFR Parts 320–325. Situations where no permit application will be processed or where the acceptance of a permit application must be deferred are as follows:

(i) No permit application will be processed when restoration of the waters of the United States has been completed that eliminates current and future detrimental impacts to the satisfaction of the district engineer.

(ii) No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate (§ 326.5(a)) until such legal action has been completed.

(iii) No permit application will be accepted where a Federal, state, or local authorization or certification, required by Federal law, has already been denied.

(iv) No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.

(2) Upon completion of his review in accordance with 33 CFR Parts 320–325, the district engineer will determine if a permit should be issued, with special conditions if appropriate, or denied. In reaching a decision to issue, he must determine that the work involved is not contrary to the public interest, and if section 404 is applicable, that the work also complies with the Environmental Protection Agency's section 404(b)(1) guidelines. If he determines that a denial is warranted, his notification of denial should prescribe any final corrective

actions required. His notification should also establish a reasonable period of time for the applicant to complete such actions unless he determines that further information is required before the corrective measures can be specified. If further information is required, the final corrective measures may be specified at a later date. If an applicant refuses to undertake prescribed corrective actions ordered subsequent to permit denial or refuses to accept a conditioned permit, the district engineer may initiate legal action in accordance with § 326.5.

(f) *Combining steps.* The procedural steps in this section are in the normal sequence. However, these regulations do not prohibit the streamlining of the enforcement process through the combining of steps.

(g) *Coordination with EPA.* In all cases where the district engineer is aware that EPA is considering enforcement action, he should coordinate with EPA to attempt to avoid conflict or duplication. Such coordination applies to interim protective measures and after-the-fact permitting, as well as to appropriate legal enforcement actions.

§ 326.4 Supervision of authorized activities.

(a) *Inspections.* District engineers will, at their discretion, take reasonable measures to inspect permitted activities, as required, to ensure that these activities comply with specified terms and conditions. To supplement inspections by their enforcement personnel, district engineers should encourage their other personnel; members of the public; and interested state, local, and other Federal agency representatives to report suspected violations of Corps permits. To facilitate inspections, district engineers will, in appropriate cases, require that copies of ENG Form 4336 be posted conspicuously at the sites of authorized activities and will make available to all interested persons information on the terms and conditions of issued permits. The U.S. Coast Guard will inspect permitted ocean dumping activities pursuant to section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

(b) *Inspection limitations.* Section 326.4 does not establish a non-discretionary duty to inspect permitted activities for safety, sound engineering practices, or interference with other permitted or unpermitted structures or uses in the area. Further, the regulations implementing the Corps regulatory program do not establish a non-discretionary duty to inspect permitted activities for any other purpose.

(c) *Inspection expenses.* The expenses incurred in connection with the inspection of permitted activities will normally be paid by the Federal Government unless daily supervision or other unusual expenses are involved. In such unusual cases, the district engineer may condition permits to require permittees to pay inspection expenses pursuant to the authority contained in Section 9701 of Pub L. 97-258 (33 U.S.C. 9701). The collection and disposition of inspection expense funds obtained from applicants will be administered in accordance with the relevant Corps regulations governing such funds.

(d) *Non-compliance.* If a district engineer determines that a permittee has violated the terms or conditions of the permit and that the violation is sufficiently serious to require an enforcement action, then he should, unless at his discretion he deems it inappropriate: (1) First contact the permittee; (2) request corrected plans reflecting actual work, if needed; and (3) attempt to resolve the violation. Resolution of the violation may take the form of the permitted project being voluntarily brought into compliance or of a permit modification (33 CFR 325.7(b)). If a mutually agreeable solution cannot be reached, a written order requiring compliance should normally be issued and delivered by personal service. Issuance of an order is not, however, a prerequisite to legal action. If an order is issued, it will specify a time period of not more than 30 days for bringing the permitted project into compliance, and a copy will be sent to the appropriate state official pursuant to section 404(s)(2) of the Clean Water Act. If the permittee fails to comply with the order within the specified period of time, the district engineer may consider using the suspension/revocation procedures in 33 CFR 325.7(c) and/or he may recommend legal action in accordance with § 326.5.

§ 326.5 Legal action.

(a) *General.* For cases the district engineer determines to be appropriate, he will recommend criminal or civil actions to obtain penalties for violations, compliance with the orders and directives he has issued pursuant to §§ 326.3 and 326.4, or other relief as appropriate. Appropriate cases for criminal or civil action include, but are not limited to, violations which, in the district engineer's opinion, are willful, repeated, flagrant, or of substantial impact.

(b) *Preparation of case.* If the district engineer determines that legal action is appropriate, he will prepare a litigation report or such other documentation that he and the local U.S. Attorney have mutually agreed to, which contains an analysis of the information obtained during his investigation of the violation or during the processing of a permit application and a recommendation of appropriate legal action. The litigation report or alternative documentation will also recommend what, if any, restoration or mitigative measures are required and will provide the rationale for any such recommendation.

(c) *Referral to the local U.S. Attorney.* Except as provided in paragraph (d) of this section, district engineers are authorized to refer cases directly to the U.S. Attorney. Because of the unique legal system in the Trust Territories, all cases over which the Department of Justice has no authority will be referred to the Attorney General for the trust Territories. Information copies of all letters of referral shall be forwarded to the appropriate division counsel, the Office, Chief of Engineers, ATTN: DAEN-CCK, the Office of the Assistant Secretary of the Army (Civil Works), and the Chief of the Environmental Defense Section, Lands and Natural Resources Division, U.S. Department of Justice.

(d) *Referral to the Office, Chief of Engineers.* District engineers will forward litigation reports with recommendations through division offices to the Office, Chief of Engineers, ATTN: DAEN-CCK, for all cases that qualify under the following criteria:

(1) Significant precedential or controversial questions of law or fact;

(2) Requests for elevation to the Washington level by the Department of Justice;

(3) Violations of section 9 of the Rivers and Harbors Act of 1899;

(4) Violations of section 103 the Marine Protection, Research and Sanctuaries Act of 1972;

(5) All cases involving violations by American Indians (original of litigation report to DAEN-CCI with copy to DAEN-CCK) on reservation lands or in pursuit of specific treaty rights;

(6) All cases involving violations by officials acting on behalf of foreign governments; and

(7) Cases requiring action pursuant to paragraph (e) of this section.

(e) *Legal option not available.* In cases where the local U.S. Attorney declines to take legal action, it would be appropriate for the district engineer to close the enforcement case record unless he believes that the case warrants special attention. In that situation, he is encouraged to forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN-CCK, for

direct coordination through the Office of the Assistant Secretary of the Army (Civil Works) with the Department of Justice. Further, the case record should not be closed if the district engineer anticipates that further administrative enforcement actions, taken in accordance with the procedures prescribed in this part, will identify remedial measures which, if not complied with by the parties responsible for the violation, will result in appropriate legal action at a later date.

PART 327—PUBLIC HEARINGS

Sec.
327.1 Purpose.
327.2 Applicability.
327.3 Definitions.
327.4 General policies.
327.5 Presiding officer.
327.6 Legal adviser.
327.7 Representation.
327.8 Conduct of hearings.
327.9 Filing of transcript of the public hearing.
327.10 Authority of the presiding officer.
327.11 Public notice.

Authority: 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 327.1 Purpose.

This regulation prescribes the policy, practice and procedures to be followed by the U.S. Army Corps of Engineers in the conduct of public hearings conducted in the evaluation of a proposed DA permit action or Federal project as defined in § 327.3 of this Part including those held pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) and section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended (33 U.S.C. 1413).

§ 327.2 Applicability.

This regulation is applicable to all divisions and districts responsible for the conduct of public hearings.

§ 327.3 Definitions.

(a) Public hearing means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed DA permit action, or Federal project, and which affords the public an opportunity to present their views, opinions, and information on such permit actions or Federal projects.

(b) Permit action, as used herein means the evaluation of and decision on an application for a DA permit pursuant to sections 9 or 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, or section 103 of the MPRSA, as amended, or the modification, suspension or revocation of any DA permit (see 33 CFR 325.7).

(c) Federal project means a Corps of Engineers project (work or activity of any nature for any purpose which is to be performed by the Chief of Engineers pursuant to Congressional authorizations) involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters subject to section 404 of the Clean Water Act, or section 103 of the MPRSA.

§ 327.4 General policies.

(a) A public hearing will be held in connection with the consideration of a DA permit application or a Federal project whenever a public hearing is needed for making a decision on such permit application or Federal project. In addition, a public hearing may be held when it is proposed to modify or revoke a permit. (See 33 CFR 325.7).

(b) Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a DA permit application or on a Federal project, that a public hearing be held to consider the material matters at issue in the permit application or with respect to Federal project. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the district engineer may expeditiously attempt to resolve the issues informally. Otherwise, he shall promptly set a time and place for the public hearing, and give due notice thereof, as prescribed in § 327.11 of this Part. Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The district engineer will make such a determination in writing, and communicate his reasons therefor to all requesting parties. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(c) In case of doubt, a public hearing shall be held. HQDA has the discretionary power to require hearings in any case.

(d) In fixing the time and place for a hearing, the convenience and necessity of the interested public will be duly considered.

§ 327.5 Presiding officer.

(a) The district engineer, in whose district a matter arises, shall normally serve as the presiding officer. When the district engineer is unable to serve, he may designate the deputy district engineer or other qualified person as presiding officer. In cases of unusual interest, the Chief of Engineers or the division engineer may appoint such person as he deems appropriate to serve as the presiding officer.

(b) The presiding officer shall include in the administrative record of the permit action the request or requests for the hearing and any data or material submitted in justification thereof, materials submitted in opposition to or in support of the proposed action, the hearing transcript, and such other material as may be relevant or pertinent to the subject matter of the hearing. The administrative record shall be available for public inspection with the exception of material exempt from disclosure under the Freedom of Information Act.

§ 327.6 Legal adviser.

At each public hearing, the district counsel or his designee may serve as legal advisor to the presiding officer. In appropriate circumstances, the district engineer may waive the requirement for a legal advisor to be present.

§ 327.7 Representation.

At the public hearing, any person may appear on his own behalf, or may be represented by counsel, or by other representatives.

§ 327.8 Conduct of hearings.

(a) The presiding officer shall make an opening statement outlining the purpose of the hearing and prescribing the general procedures to be followed.

(b) Hearings shall be conducted by the presiding officer in an orderly but expeditious manner. Any person shall be permitted to submit oral or written statements concerning the subject matter of the hearing, to call witnesses who may present oral or written statements, and to present recommendations as to an appropriate decision. Any person may present written statements for the hearing record prior to the time the hearing record is closed to public submissions, and may present proposed findings and recommendations. The presiding officer shall afford participants a reasonable opportunity for rebuttal.

(c) The presiding officer shall have discretion to establish reasonable limits upon the time allowed for statements of witnesses, for arguments of parties or their counsel or representatives, and upon the number of rebuttals.

(d) Cross-examination of witnesses shall not be permitted.

(e) All public hearings shall be reported verbatim. Copies of the transcripts of proceedings may be

purchased by any person from the Corps of Engineers or the reporter of such hearing. A copy will be available for public inspection at the office of the appropriate district engineer.

(f) All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall, subject to exclusion by the presiding officer for reasons of redundancy, be received in evidence and shall constitute a part of the record.

(g) The presiding officer shall allow a period of not less than 10 days after the close of the public hearing for submission of written comments.

(h) In appropriate cases, the district engineer may participate in joint public hearings with other Federal or state agencies, provided the procedures of those hearings meet the requirements of this regulation. In those cases in which the other Federal or state agency allows a cross-examination in its public hearing, the district engineer may still participate in the joint public hearing but shall not require cross examination as a part of his participation.

§ 327.9 Filing of the transcript of the public hearing.

Where the presiding officer is the initial action authority, the transcript of the public hearing, together with all evidence introduced at the public hearing, shall be made a part of the administrative record of the permit action or Federal project. The initial action authority shall fully consider the matters discussed at the public hearing in arriving at his initial decision or recommendation and shall address, in his decision or recommendation, all substantial and valid issues presented at the hearing. Where a person other than the initial action authority serves as presiding officer, such person shall forward the transcript of the public hearing and all evidence received in connection therewith to the initial action authority together with a report summarizing the issues covered at the hearing. The report of the presiding officer and the transcript of the public hearing and evidence submitted thereat shall in such cases be fully considered by the initial action authority in making his decision or recommendation to higher authority as to such permit action or Federal project.

§ 327.10 Authority of the presiding officer.

Presiding officers shall have the following authority:

(a) To regulate the course of the hearing including the order of all sessions and the scheduling thereof, after any initial session, and the recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation. Such notice should normally provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and provided to newspapers of general circulation for publication. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

Sec.
328.1 Purpose.
328.2 General scope.
328.3 Definitions.
328.4 Limits of jurisdiction.
328.5 Changes in limits of waters of the United States.

Authority: 33 U.S.C. 1344.

§ 328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR Parts 320–330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).

§ 328.2 General scope.

Waters of the United States include those waters listed in § 328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and non-tidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)–(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term "high tide line" means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

§ 328.4 Limits of jurisdiction.

(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)

(b) *Tidal Waters of the United States.* The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) *Non-Tidal Waters of the United States.* The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

§ 328.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.

PART 329—DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Sec.

329.1 Purpose.
329.2 Applicability.
329.3 General policies.
329.4 General definitions.
329.5 General scope of determination.
329.6 Interstate or foreign commerce.
329.7 Intrastate or interstate nature of waterway.
329.8 Improved or natural conditions of the waterbody.
329.9 Time at which commerce exists or determination is made.
329.10 Existence of obstructions.
329.11 Geographic and jurisdictional limits of rivers and lakes.
329.12 Geographic and jurisdictional limits of oceanic and tidal waters.
329.13 Geographic limits: shifting boundaries.
329.14 Determination of navigability.
329.15 Inquiries regarding determinations.
329.16 Use and maintenance of lists of determinations.

Authority: 33 U.S.C. 401 *et seq.*

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Parts 323 and 328.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of commerce: type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this Part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.* (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area (see paragraph 329.12(b) of this Part).

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvement need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in paragraph 329.8(b) of this Part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" of commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) *Jurisdiction over entire bed.* Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

(a) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).

(1) *Baseline defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.

(2) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(b) *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic limits: shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

(a) *Effect on determinations.* Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(b) *Procedures of determination.* A determination whether a waterbody is a navigable water of the United States will be made by the division engineer, and will be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

(c) *Suggested format of report of findings:*

(1) Name of waterbody:

(2) Tributary to:

(3) Physical characteristics:

(i) Type: (river, bay, slough, estuary, etc.)

(ii) Length:

(iii) Approximate discharge volumes: Maximum, Minimum, Mean:

(iv) Fall per mile:

(v) Extent of tidal influence:

(vi) Range between ordinary high and ordinary low water:

(vii) Description of improvements to navigation not listed in paragraph (c)(5) of this section:

(4) Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:

(5) Authorized projects:

(i) Nature, condition and location of any improvements made under projects authorized by Congress:

(ii) Description of projects authorized but not constructed:

(iii) List of known survey documents or reports describing the waterbody:

(6) Past or present interstate commerce:

(i) General types, extent, and period in time:

(ii) Documentation if necessary:

(7) Potential use for interstate commerce, if applicable:

(i) If in natural condition:

(ii) If improved:

(8) Nature of jurisdiction known to have been exercised by Federal agencies if any:

(9) State or Federal court decisions relating to navigability of the waterbody, if any:

(10) Remarks:

(11) Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

(a) Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an energency determination, district engineers may act in reliance on a finding prepared as in Section 329.14 of this Part. The report of findings should then be forwarded to the division engineer on an expedited basis.

(b) Where determinations have been made by the division engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that _____ (River) (Bay) (Lake, etc.) is a navigable water of the United States from _____ to _____. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

(c) Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or (2) if not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

(a) Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

PART 330—NATIONWIDE PERMITS

Sec.

330.1 General.
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330.9 State water quality certification.
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330.11 Nationwide permit verification.
330.12 Expiration of nationwide permits.

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 330.1 General.

The purpose of this regulation is to describe the Department of the Army's (DA) nationwide permit program and to list all current nationwide permits which have been issued by publication herein. A nationwide permit is a form of general permit which may authorize activities throughout the nation. (Another type of general permit is a "regional permit" and is issued by division or district engineers on a regional basis in accordance with 33 CFR Part 325). Copies of regional conditions and modifications, if any, to the nationwide permits can be obtained from the appropriate district engineer. Nationwide permits are designed to allow certain activities to occur with little, if any, delay or paperwork. Nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Failure to comply with a condition does not necessarily mean the activity cannot be authorized but rather that the activity can only be authorized by an individual or regional permit. Several of the nationwide permits require notification to the district engineer prior to commencement of the authorized activity. The procedures for this notification are located at § 330.7 of this Part. Nationwide permits can be issued to satisfy the requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and/or section 103 of the Marine Protection, Research and Sanctuaries Act. The applicable authority is indicated at the end of each nationwide permit.

§ 330.2 Definitions.

(a) The definitions of 33 CFR Parts 321–329 are applicable to the terms used in this Part.

(b) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second. The district engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, district engineers may establish the "headwaters" as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

(c) Discretionary authority means the authority delegated to division engineers in § 330.8 of this part to override provisions of nationwide permits, to add regional conditions, or to require individual permit application.

§ 330.3 Activities occurring before certain dates.

The following activities were permitted by nationwide permits issued on July 19, 1977, and unless modified do not require further permitting:

(a) Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began July 25, 1975, and extended section 404 jurisdiction to all waters of the United

States. (These phase-in dates are: After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States.) (Section 404)

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation. (Section 10)

§ 330.4 Public notice.

(a) *Chief of Engineers.* Upon proposed issuance of new nationwide permits, modification to, or reissuance of, existing nationwide permits, the Chief of Engineers will publish a notice in the **Federal Register** seeking public comments and including the opportunity for a public hearing. This notice will state the availability of information at the Office of the Chief of Engineers and at all district offices which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance under general permit authority. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(b) *District engineers.* Concurrent with publication in the **Federal Register** of proposed, new, or reissued nationwide permits by the Chief of Engineers, district engineers will so notify the known interested public by an appropriate notice. The notice will include regional conditions, if any, developed by the division engineer.

§ 330.5 Nationwide permits.

(a) *Authorized activities.* The following activities are hereby permitted provided they meet the conditions listed in paragraph (b) of this section and, where required, comply with the notification procedures, of § 330.7.

(1) The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR Part 66, Subchapter C). (Section 10)

(2) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR Part 322.5(g)). (Section 10)

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (Section 10 and 404)

(4) Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, lobster traps, duck blinds, and clam and oyster digging. (Section 10)

(5) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures. (Section 10)

(6) Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling of exploration-type bore holes for oil and gas exploration is not authorized by this nationwide permit; the plugging of such holes is authorized. (Sections 10 and 404).

(7) Outfall structures and associated intake structures where the effluent from that outfall has been permitted under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the district or division engineer makes a determination that the individual and cumulative adverse environmental effects of the structure itself are minimal in accordance with § 330.7 (c)(2) and (d). Intake structures per se are not included—only those directly associated with an outfall structure are covered by this nationwide permit. This permit includes minor excavation, filling and other work associated with installation of the intake and outfall structures. (Sections 10 and 404)

(8) Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Mineral Management Service, provided those structures are not placed within the limits of any designated shipping safety fairway or traffic separation scheme (where such limits have not been designated or where changes are anticipated, district engineers will consider recommending the discretionary authority provided by 330.8 of this Part, and further subject to the provisions of the fairway regulations in 33 CFR 322.5(1) (Section 10).

(9) Structures placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (Section 10)

(10) Non-commercial, single-boat, mooring buoys. (Section 10)

(11) Temporary buoys and markers placed for recreational use such as water skiing and boat racing provided that the buoy or marker is removed within 30 days after its use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

(12) Discharge of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area). A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. (The utility line and outfall and intake structures will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322. See also paragraph (a)(7) of this section). (Section 404)

(13) Bank stabilization activities provided:

(i) The bank stabilization activity is less than 500 feet in length;

(ii) The activity is necessary for erosion prevention;

(iii) The activity is limited to less than an average of one cubic yard per running foot placed along the bank within waters of the United States;

(iv) No material is placed in excess of the minimum needed for erosion protection;

(v) No material is placed in any wetland area;

(vi) No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

(vii) Only clean material free of waste metal products, organic materials, unsightly debris, etc. is used; and

(viii) The activity is a single and complete project. (Sections 10 and 404)

(14) Minor road crossing fills including all attendant features, both temporary and permanent, that are part of a single and complete project for crossing of a non-tidal waterbody, provided that the crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and provided further that discharges into any wetlands adjacent to the waterbody do not extend beyond 100 feet on either side of the ordinary high water mark of that waterbody. A "minor road crossing fill" is defined as a crossing that involves the discharge of less than 200 cubic yards of fill material below the plane of ordinary high water. The crossing may require a permit from the US Coast Guard if located in navigable waters of the United States. Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). District engineers are authorized, where local circumstances indicate the need, to define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit. (Sections 10 and 404)

(15) Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharge has been authorized by the US Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional Section 404 permit. (Section 404)

(16) Return water from an upland, contained dredged material disposal area (see 33 CFR 323.2(d)) provided the state has issued a site specific or generic certification under section 401 of the Clean Water Act (see also 33 CFR 325.2(b)(1)). The dredging itself requires a Section 10 permit if located in navigable waters of the United States. The return water or runoff from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a section 404 permit. This nationwide permit satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. (Section 404)

(17) Fills associated with small hydropower projects at existing reservoirs where the project which includes the fill is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the FERC (see 18 CFR 4.61); and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal in accordance with § 330.7 (c)(2) and (d). (Section 404)

(18) Discharges of dredged or fill material into all waters of the United States other than wetlands that do not exceed ten cubic yards as part of a single and complete project provided the material is not placed for the purpose of stream diversion. (Sections 10 and 404)

(19) Dredging of no more than ten cubic yards from navigable waters of the United States as part of a single and complete project. This permit does not authorize the connection of canals or other artificial waterways to navigable waters of the United States (see Section 33 CFR 322.5(g)). (Section 10)

(20) Structures, work, and discharges for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, (40 CFR Part 300), provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action. (Sections 10 and 404)

(21) Structures, work, discharges associated with surface coal mining activities provided they were authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining or state (as the case may be) documentation prior to any decision on that application; and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal in accordance with §§ 330.7 (c) (2) and (3) and (d). (Sections 10 and 404)

(22) Minor work, fills, or temporary structures required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This permit does not authorize maintenance dredging, shoal removal, or river bank snagging. (Sections 10 and 404)

(23) Activities, work, and discharges undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another federal agency or department where that agency or department has determined, pursuant to the CEQ Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: DAEN-CWO-N) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exlcusions, the Chief of Engineers will solicit comments through publication in the **Federal Register**. (Sections 10 and 404)

(24) Any activity permitted by a state administering its own Section 404 permit program for the discharge of dredged or fill material authorized at 33 U.S.C. 1344(g)-(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this nationwide permit but many will be exempted by section 154 of Pub. L. 94-587. (See 33 CFR 322.3(a)(2)). (Section 10)

(25) Discharge of concrete into tightly sealed forms or cells where the concrete is used as a structural member which would not otherwise be subject to Clean Water Act jurisdiction. (Section 404)

(26) Discharges of dredged or fill material into the waters listed in paragraphs (a)(26) (i) and (ii) of this section except those which cause the loss or substantial adverse modification of 10 acres or more of such waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification to the district engineer is required in accordance with section 330.7 of this section. (Section 404).

(i) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of a surface tributary system to interstate waters or

navigable waters of the United States (i.e., isolated waters).

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That any discharge of dredged or fill material will not occur in the proximity of a public water supply intake.

(2) That any discharge of dredged or fill material will not occur in areas of concentrated shellfish production unless the discharge is directly related to a shellfish harvesting activity authorized by paragraph (a)(4) of this section.

(3) That the activity will not jeopardize a threatened or endangered species as identified under the Endangered Species Act (ESA), or destroy or adversely modify the critical habitat of such species. In the case of federal agencies, it is the agencies' responsibility to comply with the requirements of the ESA. If the activity may adversely affect any listed species or critical habitat, the district engineer must initiate Section 7 consultation in accordance with the ESA. In such cases, the district engineer may:

(i) Initiate section 7 consultation and then, upon completion, authorize the activity under the nationwide permit by adding, if appropriate, activity specific conditions, or

(ii) Prior to or concurrent with section 7 consultation he may recommend discretionary authority (See section 330.8) or use modification, suspension, or revocation procedures (See 33 CFR 325.7).

(4) That the activity shall not significantly disrupt the movement of those species of aquatic life indigenous to the waterbody (unless the primary purpose of the fill is to impound water);

(5) That any discharge of dredged or fill material shall consist of suitable material free from toxic pollutants (see section 307 of the Clean Water Act) in toxic amounts;

(6) That any structure or fill authorized shall be properly maintained.

(7) That the activity will not occur in a component of the National Wild and Scenic River System; nor in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status;

(8) That the activity shall not cause an unacceptable interference with navigation;

(9) That, if the activity may adversely affect historic properties which the National Park Service has listed on, or determined eligible for listing on, the National Register of Historic Places, the permittee will notify the district engineer. If the district engineer determines that such historic properties may be adversely affected, he will provide the Advisory Council on Historic Preservation an opportunity to comment on the effects on such historic properties or he will consider modification, suspension, or revocation in accordance with 33 CFR 325.7. Furthermore, that, if the permittee before or during prosecution of the work authorized, encounters a historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, he shall immediately notify the district engineer;

(10) That the construction or operation of the activity will not impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights;

(11) That in certain states, an individual state water quality certification must be obtained or waived (See § 330.9);

(12) That in certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (See § 330.10);

(13) That the activity will comply with regional conditions which may have been added by the division engineer (See § 330.8(a)); and

(14) That the management practices listed in § 330.6 of this part shall be followed to the maximum extent practicable.

(c) *Further information.* (1) District engineers are authorized to determine if an activity complies with the terms and conditions of a nationwide permit unless that decision must be made by the division engineer in accordance with § 330.7.

(2) Nationwide permits do not obviate the need to obtain other Federal, state or local authorizations required by law.

(3) Nationwide permits do not grant any property rights or exclusive privileges.

(4) Nationwide permits do not authorize any injury to the property or rights of others.

(5) Nationwide permits do not authorize interference with any existing or proposed Federal project.

(d) *Modification, Suspension or Revocation of Nationwide Permits.* The Chief of Engineers may modify, suspend, or revoke nationwide permits in accordance with the relevant procedures of 33 CFR 325.7. Such authority includes, but is not limited to: adding individual, regional, or nationwide conditions; revoking authorization for a category of activities or a category of waters by requiring individual or regional permits; or revoking an authorization on a case-by-case basis. This authority is not limited to concerns for the aquatic environment as is the discretionary authority in § 330.8.

§ 330.6 Management practices.

(a) In addition to the conditions specified in § 330.5 of this Part, the following management practices shall be followed, to the maximum extent practicable, in order to minimize the adverse effects of these discharges on the aquatic environment. Failure to comply with these practices may be cause for the district engineer to recommend, or the division engineer to take, discretionary authority to regulate the activity on an individual or regional basis pursuant to § 330.8 of this Part.

(1) Discharges of dredged or fill material into waters of the United States shall be avoided or minimized through the use of other practical alternatives.

(2) Discharges in spawning areas during spawning seasons shall be avoided.

(3) Discharges shall not restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

(4) If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized.

(5) Discharge in wetlands areas shall be avoided.

(6) Heavy equipment working in wetlands shall be placed on mats.

(7) Discharges into breeding areas for migratory waterfowl shall be avoided.

(8) All temporary fills shall be removed in their entirety.

§ 330.7 Notification procedures.

(a) The general permittee shall not begin discharges requiring pre-discharge notification pursuant to the nationwide permit at § 330.5(a)(26):

(1) Until notified by the district engineer that the work may proceed under the nationwide permit with any special conditions imposed by the district or division engineer; or

(2) If notified by the district or division engineer that an individual permit may be required; or

(3) Unless 20 days have passed from receipt of the notification by the district engineer and no notice has been

received from the district or division engineer.

(b) Notification pursuant to the nationwide permit at § 330.5(a)(26) must be in writing and include the information listed below. Notification is not an admission that the proposed work would result in more than minimal impacts to waters of the United States; it simply allows the district or division engineer to evaluate specific activities for compliance with general permit criteria.

(1) Name, address, and phone number of the general permittee;

(2) Location of the planned work;

(3) Brief description of the proposed work, its purpose, and the approximate size of the waters, including wetlands, which would be lost or substantially adversely modified as a result of the work; and

(4) Any specific information required by the nationwide permit and any other information that the permittee believes is appropriate.

(c) *District engineer review of notification.* Upon receipt of notification, the district engineer will promptly review the general permittee's notification to determine which of the following procedures should be followed:

(1) If the nationwide permit at § 330.5(a)(26) is involved and the district engineer determines either, (i) the proposed activity falls within a class of discharges or will occur in a category of waters which has been previously identified by the Regional Administrator, Environmental Protection Agency; the Regional Director, Fish and Wildlife Service; the Regional Director, National Marine Fisheries Service; or the heads of the appropriate state natural resource agencies as being of particular interest to those agencies; or (ii) the particular discharge has not been previously identified but he believes it may be of importance to those agencies, he will promptly forward the notification to the division engineer and the head and appropriate staff officials of those agencies to afford those agencies an adequate opportunity before such discharge occurs to consider such notification and express their views, if any, to the district engineer concerning whether individual permits should be required.

(2) If the nationwide permits at § 330.5(a) (7), (17), or (21) are involved and the Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service or the appropriate state natural resource or water quality agencies forward concerns to the district engineer, he will forward those concerns to the division engineer together with a statement of the factors pertinent to a determination of the environmental effects of the proposed discharges, including those set forth in the 404(b)(1) guidelines, and his views on the specific points raised by those agencies.

(3) If the nationwide permit at § 330.5(a)(21) is involved the district engineer will give notice to the Environmental Protection Agency and the appropriate state water quality agency. This notice will include as a minimum the information required by paragraph (b) of this section.

(d) *Division engineer review of notification.* The division engineer will review all notifications referred to him in accordance with paragraph (c)(1) or (c)(2) of this section. The division engineer will require an individual permit when he determines that an activity does not comply with the terms or conditions of a nationwide permit or does not meet the definition of a general permit (see 33 CFR 322.2(f) and 323.2(n)) including discharges under the nationwide permit at § 330.5(a)(26) which have more than minimal adverse environmental effects on the aquatic environment when viewed either cumulatively or separately. In reaching his decision, he will review factors pertinent to a determination of the environmental effects of the proposed discharge, including those set forth in the 404(b)(1) guidelines, and will give full consideration to the views, if any, of the federal and state natural resource agencies identified in paragraph (c) of this section. If the division engineer decides that an individual permit is not required, and a federal or appropriate state natural resource agency has indicated in writing that an activity may result in more than minimal adverse environmental impacts, he will prepare a written statement, available to the public on request, which sets forth his response to the specific points raised by the commenting agency. When the division engineer reaches his decision he will notify the district engineer, who will immediately notify the general permittee of the division engineer's decision.

§ 330.8 Discretionary authority.

Except as provided in paragraphs (c)(2) and (d) of this section, division engineers on their own initiative or upon recommendation of a district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis, for a category of activities, or in specific geographic areas. Discretionary authority will be based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to section 404(b)(1). (40 CFR Part 230)

(a) *Activity Specific conditions.* Division engineers are authorized to modify nationwide permits by adding individual conditions on a case-by-case basis applicable to certain activities within their division. Activity specific conditions may be added by the District Engineer in instances where there is mutual agreement between the district engineer and the permittee. Furthermore, district engineers will condition NWPs with conditions which have been imposed on a state section 401 water quality certification issued pursuant to § 330.9 of this Part.

(b) *Regional conditions.* Division engineers are authorized to modify nationwide permits by adding conditions on a generic basis applicable to certain activities or specific geographic areas within their divisions. In developing regional conditions, division and district engineers will follow standard permit processing procedures as prescribed in 33 CFR Part 325 applying the evaluation criteria of 33 CFR Part 320 and appropriate parts of 33 CFR Parts 321, 322, 323, and 324. Division and district engineers will take appropriate measures to inform the public of the additional conditions.

(c) *Individual permits*—(1) *Case-by-Case.* In nationwide permit cases where additional individual or regional conditioning may not be sufficient to address concerns for the aquatic environment or where there is not sufficient time to develop such conditions under paragraphs (a) or (b) of this section, the division engineer may suspend use of the nationwide permit and require an individual permit application on a case-by-case basis. The district engineer will evaluate the application and will either issue or deny a permit. However, if at any time the reason for taking discretionary authority is satisfied, then the division engineer may remove the suspension, reactivating authority under the nationwide permit. Where time is of the essence, the district engineer may telephonically recommend that the division engineer assert discretionary authority to require an individual permit application for a specific activity. If the division engineer concurs, he may orally authorize the district engineer to implement that authority. Oral authorization should be followed by written confirmation.

(2) *Category.* Additionally, after notice and opportunity for public hearing, division engineers may decide that individual permit applications

should be required for categories of activities, or in specific geographic areas. However, only the Chief of Engineers may modify, suspend, or revoke nationwide permits on a statewide or nationwide basis. The division engineer will announce the decision to persons affected by the action. The district engineer will then regulate the activity or activities by processing an application(s) for an individual permit(s) pursuant to 33 CFR Part 325.

(d) For the nationwide permit found at § 330.5(a)(26), after the applicable provisions of § 330.7(a) (1) and (3) have been satisfied, the permittee's right to proceed under the general permit may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 325.7.

(e) A copy of all modifications or revocations of activities covered by nationwide permits will be forwarded to the Office of the Chief of Engineers, ATTN: DAEN-CWO-N.

§ 330.9 State water quality certification.

(a) State water quality certification is required for nationwide permits which may result in any discharge into waters of the United States. If a state issues a water quality certification which includes special conditions, the district engineer will add these conditions as conditions of the nationwide permit in that state. However, if such conditions do not comply with the provisions of 33 CFR 325.4 or if a state denies a required 401 certification for a particular nationwide permit, authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. A district engineer will not process an individual permit application for an activity for which authorization has been denied without prejudice under the nationwide permit program. However, if the division engineer determines that it would otherwise be appropriate to exercise his discretionary authority, pursuant to § 330.8, to override the nationwide permit or permits in question, he may do so, and the district engineer may proceed with the processing of individual permit applications. In instances where a state has denied the 401 water quality certification for discharges under a particular nationwide permit, applicants must furnish the district engineer with an individual or generic 401 certification or a copy of the application to the state for the certification. If a state fails to act within a reasonable period of time (see § 325.2(b)(1)(ii)), a waiver will be presumed. Upon receipt of an individual or generic certification or a waiver of certification, the proposed work is authorized under the nationwide permit. If a state issues a conditioned individual certification, the district engineer will include those conditions that comply with 33 CFR 325.4 as special conditions of the nationwide permit (see 33 CFR Part 330.8(a)) and notify the applicant that the work is authorized under the nationwide permit provided all conditions are met.

(b) Certification requirements for nationwide permits fall into the following general categories:

(1) *No certification required.* Nationwide permits numbered 1, 2, 4, 5, 8, 9, 10, 11, and 19 do not involve activities which may result in a discharge and therefore 401 certification is not applicable.

(2) *Certification sometimes required.* Nationwide permits numbered 3, 6, 7, 13, 20, 21, 22, and 23 each involve various activities, some of which may result in a discharge and require certification, and others of which do not. State denial of certification for any specific nationwide permit in this category affects only those activities involving discharges. Those not involving discharges remain in effect.

(3) *Certification required.* Nationwide permits numbered 12, 14, 15, 16, 17, 18, 24, 25, and 26 involve activities which would result in discharges and therefore 401 certification is required.

(c) District engineers will take appropriate measures to inform the public of which waterbodies or regions within the state, and for which nationwide permits, an individual 401 water quality certification is required.

§ 330.10 Coastal zone management consistency determination.

In instances where a state has not concurred that a particular nationwide permit is consistent with an approved coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has concurred in it. If a state does not act on an applicant's consistency statement within six months after receipt by the state, consistency shall be presumed. District engineers will take appropriate measures to inform the public of which waterbodies or regions within the state, and for which nationwide permits, such individual consistency determination is required. District engineers will not process any permit application for an activity which has been denied without prejudice under the nationwide permit program. However, if the division engineer determines that it would otherwise be appropriate to exercise his discretionary authority, pursuant to § 330.8, to override the nationwide permit or permits in question, he may do so, and the district engineer may proceed with the processing of individual permit applications.

§ 330.11 Nationwide permit verification.

(a) General permittees may, and in some cases must, request from a district engineer confirmation that an activity complies with the terms and conditions of a nationwide permit. District engineers will respond promptly to such requests. The response will state that the verification is valid for a period of no more than two years or a lesser period of time if deemed appropriate. Section 330.12 takes precedence over this section, therefore, it is incumbent upon the permittee to remain informed of changes to nationwide permits.

(b) If the district engineer decides that an activity does not comply with the terms or conditions of a nationwide permit, he will so notify the person desiring to do the work and indicate that an individual permit is required (unless covered by a regional permit).

(c) If the district engineer decides that an activity does comply with the terms and conditions of a nationwide permit he will so notify the general permittee. In such cases, as with any activity which qualifies under a nationwide permit, the general permittee's right to proceed with the activities under the nationwide permit may be modified, suspended, or revoked only in accordance with the procedures of 33 CFR 325.7.

§ 330.12 Expiration of nationwide permits.

The Chief of Engineers will review nationwide permits on a continual basis, and will decide to either modify, reissue (extend) or revoke the permits at least every five years. If a nationwide permit is not modified or reissued within five years of publication in the **Federal Register**, it automatically expires and becomes null and void. Authorization of activities which have commenced or are under contract to commence in reliance upon a nationwide permit will remain in effect provided the activity is completed within twelve months of the date a nationwide permit has expired or was revoked unless discretionary permit authority has been exercised in

accordance with § 330.8 of this Part or modification, suspension, or revocation procedures are initiated in accordance with the relevent provisions of 33 CFR 325.7. Activities completed under the authorization of a nationwide permit which was in effect at the time the activity was completed continue to be authorized by that nationwide permit.

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Part III

Department of Labor

Pension and Welfare Benefits Administration

29 CFR Parts 2509, 2510, 2520, and 2550

Employee Benefit Plans: Definition of Plan Assets and Exemption and Alternative Method of Annual Reporting for Plans Investing in Certain Entities; Rule

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Parts 2509, 2510, and 2550

Final Regulation Relating to the Definition of Plan Assets

AGENCY: Department of Labor.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation that describes what constitute assets of a plan for purposes of certain provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA, or the Act) and the related prohibited transaction provisions of the Internal Revenue Code (the Code). This document also contains a redesignation of the rule relating to guaranteed governmental mortgage pool certificates that was originally codified at 29 CFR 2550.401b–1. There has been considerable uncertainty regarding what constitute "plan assets" for purposes of ERISA, and the regulation will provide guidance to plan fiduciaries, participants and beneficiaries of plans and other affected parties.

DATES: The final regulations will be effective March 13, 1987. In general, the final regulations will apply for purposes of identifying plan assets at any time after March 13, 1987. The final regulations also contain certain transitional provisions.

FOR FURTHER INFORMATION CONTACT: John S. Hunter, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 523–7901 or Shelby J. Hoover or Daniel J. Maguire, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, (202) 523–8658 or (202) 523–9595, respectively. For matters concerning Executive Order 12291, the Regulatory Flexibility Act or the Paperwork Reduction Act, contact Gary Hendricks, Office of Policy, Planning and Research, Pension and Welfare Benefits Administration, (202) 523–7933. These are not toll free numbers.

Background

I. History of the Regulation

On January 8, 1985, the Department of Labor (the Department) published a notice in the **Federal Register** containing a proposed regulation that would characterize the assets of certain entities in which plans invest as including plan assets, with the result that the managers of those entities would be considered "fiduciaries" subject to the fiduciary responsibility provisions of ERISA.[1] The notice gave an opportunity for interested persons to comment on the proposal.

On February 15, 1985, the Department published a notice in the **Federal Register** containing an amendment modifying the effective date provision of the proposed regulation.[2]

A public hearing on the proposal was held in Washington, DC, on May 6, 7 and 8, 1985 at which time more than 45 commentators made oral presentations. At the conclusion of the hearing, the record in the proceeding was held open until June 30, 1985, in order to permit the filing of additional submissions.[3]

The Department has received more than 700 letters of comment regarding the proposal. The final regulation has been substantially revised in response to the comments received and the testimony at the public hearing.

The following discussion summarizes the proposed regulation and the major issues raised by the commentators and explains the Department's reasons for adopting the final regulation that is published with this notice.

II. Overview of the "Plan Assets" Issue

The proposed plan assets regulation described the circumstances under which the assets of an entity in which a plan invests will be considered to include "plan assets" so that the manager of the entity would be subject to the fiduciary responsibility rules of ERISA. Under ERISA, persons who exercise discretionary authority or control over the assets of a plan or who provide investment advice for a fee with respect to such assets are "fiduciaries" subject to the fiduciary responsibility provisions of the Act.[4] Thus, identifying a plan's assets is a critical step in identifying plan fiduciaries. Moreover, the fiduciary responsibility provisions of ERISA include prohibited transaction provisions which restrict the manner in which fiduciaries may deal with the assets of a plan.[5] In general, a fiduciary may not use the assets of a plan to engage in transactions with "parties in interest" to the plan or plans for which he is acting.

In ERISA, the term "fiduciary" is defined broadly and in functional terms. Fiduciary status is determined with reference to a person's activities with respect to a plan; it does not depend upon any formal undertaking or agreement.[6] In the Department's view, there are many situations where a plan, although nominally investing its assets in a separate entity, is as a practical matter retaining the persons who manage the entity to provide investment management services for the plan. For example, some institutional managers—such as banks and insurance companies—have traditionally pooled the assets of several plans for purposes of collective investment, and plans typically participate in such a fund by acquiring investment units evidencing an interest in the fund. More recently, limited partnerships have been used as devices for the collective investment of plan assets.

Although ERISA does not explicitly define what constitute "plan assets", it does deal specifically with certain kinds of collective investment arrangements. Section 401(b)(1) of ERISA provides that, in the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of the plan will be deemed to include such security, but will not, solely by reason of the plan's acquisition of the security, be deemed to include any assets of the investment company.[7] Similarly, section 401(b)(2) of ERISA provides that when a plan acquires a "guaranteed benefit policy" from an insurance company, the assets of the plan include the policy, but do not include any of the underlying assets of the insurance company issuing the policy.

ERISA also includes provisions which indicate that the underlying assets of certain kinds of collective funds do

[1] Proposed regulation 29 CFR 2510.3–101 (50 FR 961). That document also gave notice of withdrawal of a previously proposed regulation (45 FR 38084, June 6, 1980) and the withdrawal of most of the provisions of another previously proposed regulation (44 FR 50363, August 28, 1979) both of which dealt with the definition of plan assets. The Department also noted that the regulation, if adopted, would contain a revision and clarification of Interpretive Bulletin 75–2 (29 CFR 2509.75–2).

[2] 50 FR 6362.

[3] Transcript of Hearing for May 8, 1985, at 110.

[4] See section 3(21) of ERISA.

[5] See section 406 of ERISA. The prohibited transaction provisions of ERISA are complemented by section 4975 of the Code which imposes an excise tax on disqualified persons who engage in prohibited transactions.

[6] See H.R. Rep. No. 1280, 93d Cong., 2d Sess., 323 (1974) (the Conference Report).

[7] The Conference Report indicates that this statutory exclusion was included in ERISA in view of the existence of regulation under the Investment Company Act and because interests in registered investment companies must be widely held. Conference Report at 296. Section 3(21)(B) of ERISA also indicates that neither a registered investment company, its investment adviser nor its principal underwriter is deemed to be a fiduciary by reason of a plan's investment in the investment company, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of such company, adviser or underwriter.

include "plan assets."[8] Thus, the Act contains special reporting and disclosure provisions where some or all of the assets of a plan are held in an insurance company separate account or a bank common or collective trust fund.[9] In addition, the legislative history accompanying ERISA clearly indicates that the assets of such traditional investment funds should be considered "plan assets" subject to the fiduciary responsibility rules of the Act.[10]

In the Department's view, it would be unreasonable to suppose that Congress intended that the protections of the fiduciary responsibility provisions of the Act which are applicable where a plan directly retains a manager of its investments would not be applicable where the manager is retained indirectly through investment by the plan in a collective investment fund. It would also appear to be inconsistent with the broad functional definition of "fiduciary" in ERISA if persons who provide services that would cause them to be fiduciaries if the services were provided directly to plans are able to circumvent the fiduciary responsibility rules of the Act by the interposition of a separate legal entity between themselves and the plans (for example, by providing services to a limited partnership in which plans invest). However, neither ERISA itself nor the legislative history of the Act provides a clear indication of the extent to which the fiduciary responsibility provisions of the Act are intended to apply when a plan invests in another entity which may be a vehicle for collective investment of plan funds. In developing a regulation to address this issue the Department has taken into account the public comments on the proposed regulation and the testimony at the public hearing, the express statutory provisions of ERISA, the relevant legislative history and the existing federal regulatory structure applicable to entities in which plans invest.

[8] In such case, a plan's assets would include its interest in the fund and an undivided interest in each of the underlying assets of the fund.

[9] Section 103(b)(3)(C) of the Act.

[10] "[I]nsurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts and the assets of these contracts are to be considered as plan assets . . ." Conference Report, at 296. "The conferees understand that it is common practice for banks, trust companies and insurance companies to maintain pooled investment funds for plans. . . . Banks, etc. that operate such pooled investment funds are, of course, plan fiduciaries." Conference Report, at 316.

III. Description of the Proposed Regulation

In order to determine when an investment is an arrangement for the indirect provision of investment management services, the proposed regulation established a "look-through" rule pursuant to which a plan would, in cases where the rule applies, be considered to have acquired an interest in the underlying assets of an entity in which it invests so that the assets of the entity would include "plan assets." To define the scope of the look-through rule, the proposed regulation also established a series of exceptions to the rule. The proposed regulation reflected a general policy determination that the fiduciary responsibility provisions of the Act should apply to an entity in which a plan invests only if: (1) The plan's investment is such that it has an opportunity to participate in the earnings of the entity; (2) the entity itself is an investment fund; and (3) there is some indication that interests in the entity are offered especially to plans. Although, as discussed below, the Department has made several modifications to the regulation in response to the comments received, this general policy approach is reflected in the final regulation.

The first exclusion in the proposed regulation was for plan investments that are not "equity interests". This exclusion reflected a determination that only those investments which provide a plan with an opportunity to share in the success or failure of the entity to which the investment relates are likely to be vehicles for the indirect provision of investment management services. Under the proposal, "equity interests" were defined generally as interests in an entity other than instruments which are treated as indebtedness under local law and which have no substantial equity features.

The second exclusion was for "publicly-offered" securities, that is securities that are registered under the federal securities acts and which are widely-held and freely transferable. The exclusion did not extend to securities that are offered primarily to tax exempt investors.

The third exclusion was for entities in which there was no "significant" plan investment. This exclusion was intended to deal with investments in entities in which there has been no special solicitation of plan investors. Under the proposal, plan investment was "significant" if ERISA plans and certain other kinds of benefit plans own more than 20 percent of any class of outstanding equity interests in an entity.

The fourth exclusion related to "operating companies"—companies that are primarily engaged in the production or sale of a product or service other than the investment of capital. The proposal also specifically described certain "real estate operating companies" and "venture capital operating companies" which were treated as operating companies.

The proposed regulation also provided that the assets of certain entities would always include "plan assets." These included bank collective trust funds, most insurance company separate accounts and entities that are wholly owned by plans. The proposal also provided that the assets of entities, other than insurance companies licensed to do business in a state, that are established for the purpose of providing benefits to participants of investing plans would include plan assets. This provision was intended to apply primarily to so-called "multiple employer trusts."

As proposed, the plan assets regulation would have been effective 90 days after it was published in final form. Under a transitional rule, however, the regulation would not apply to entities which accepted no new plan investments after June 30, 1986.

The Final Regulation

I. The Look-Through Rule for Plan Investments

A. Comments on the General Approach of the Regulation

Several persons who submitted comments on the proposed regulation suggested that the Department should not establish any look-through rule with respect to plan investments in other entities. These commentators indicated that, in their view, references in ERISA to the "assets" of a plan should in all cases be considered to refer to a plan's investment and not to the underlying assets of the entity in which it invests. Some of the commentators suggested that the Department does not have the authority to issue a regulation characterizing the assets of a separate legal entity in which a plan invests as "plan assets". Even assuming that the Department has this authority, the commentators stated, there is no sufficiently compelling policy reason for adopting a look-through rule. With respect to these points, the commentators pointed out that the Department recognized, in its Interpretive Bulletin 75–2, that the assets of an entity in which a plan invests

generally are not "plan assets".[11] According to the commentators, the Interpretive Bulletin is a correct and proper interpretation of ERISA, and the Department should not depart from that rule.

Other commentators suggested that even if the Department adopts a look-through rule, different standards should be applied in determining when that rule is applicable. Several of these commentators urged the Department to adopt a rule based solely upon the degree of plan investment in an entity. Under the rule suggested by the commentators, the assets of an entity in which a plan invests would include plan assets only if aggregate plan investment exceeds a specified percentage of total investment in the entity (such as 80 percent) or only if aggregate plan investment in the entity exceeds some lesser percentage (such as 50 percent) and one plan or group of related plans holds more than 10 percent of the aggregate outstanding investments in the entity. Finally, some commentators suggested that the look-through rule should apply only where a single plan or group of related plans owns more than a specified percentage of the outstanding equity interests in an entity.

B. The Final Regulation

As noted above, the final regulation adheres to the general approach of the proposed regulation although a number of specific changes have been made.

In the Department's view, the regulation is necessary for several reasons. First, in the absence of a regulation it would be relatively easy for an investment manager to avoid compliance with the fiduciary responsibility provisions of ERISA by indirectly providing investment management services to plans through a separate legal entity. This result would be inconsistent with the broad, functional definition of fiduciary in ERISA as well as Congress's intention that fiduciary status should be imposed on all persons conducting certain specified activities on behalf of plans rather than merely on those who expressly agree to be fiduciaries.

Second, since many collective investment arrangements—such as limited partnerships—allow realization of economies of scale, they are often especially suited for the purposes of smaller plans. Moreover, testimony at the public hearing on the proposed regulation indicated that the traditional forms of collective investment specifically addressed in ERISA—bank collective trust funds and insurance company separate accounts—are generally available only to larger plans. Thus, if other forms of collective investment that are suitable for small plans are not subject to the fiduciary responsibility rules of ERISA, the full protections of those rules would be available for larger plans, but would not be available for smaller plans.

Third, although the legislative history and the statute itself provide specific guidance regarding the application of the fiduciary responsibility rules to certain traditional forms of collective investment, they do not describe how those rules should apply to other forms of collective investment. Thus, if the Department does not adopt a regulation, uncertainty about the scope of the fiduciary responsibility rules will persist until such time as the issue is settled in litigation. This uncertainty would, in the Department's view, be detrimental to plans as well as to persons marketing investments to plans.

The Department also believes that the general approach of the proposed regulation, which takes into account the nature of the plan's investment, the nature of the entity to which the investment relates, and the nature of other investors, is the most appropriate way of distinguishing investments that are vehicles for the indirect provision of investment management services from those that are not. In this respect, the Department has concluded that, although the degree of plan investment in an entity is relevant to a determination whether the underlying assets of an entity include plan assets, that factor alone should not be dispositive.

Finally, the Department believes that it has authority under ERISA to promulgate the final regulation set forth here.[12]

II. Scope of the Regulation

A. The Proposed Regulation

The proposed regulation described what constitute "plan assets" with respect to a plan's investment in another entity for purposes of Subtitle A (definitional and coverage provisions) and Parts 1 and 4 (reporting and disclosure and fiduciary provisions) of Subtitle B of Title I of ERISA and for purposes of section 4975 of the Internal Revenue Code (excise tax provisions relating to prohibited transactions).[13] Since it applied to the prohibited transaction provisions of the Code as well as Title I of ERISA, the proposed regulations would have affected not only investments by plans that are subject to Title I (Title I plans), but also investments by plans that are not subject to Title I, but which are described in section 4975 of the Code.[14] These plans include primarily individual retirement accounts (IRAs) and certain plans which are qualified for favorable tax treatment under the Code that cover only self-employed individuals.

B. Comments Received

The Department received several comments which expressed concern about the effect that the proposed regulation might have on investment opportunities for IRAs. In addition, several commentators raised questions regarding the extent to which the regulation should apply to plans other than Title I plans. In this respect, some commentators and a witness at the public hearing on the proposal emphasized that investment decisions with respect to IRAs are generally made by the persons for whom the accounts are established and that these investments thus differ substantially from those typically made by employer-sponsored plans. Finally, one commentator urged the Department to clarify whether the reference to "plan" in paragraph (a)(2) of the proposal refers to "benefit plan investors" (which include certain plans that are not subject to either Title I of ERISA or section 4975 of the Code) or only to plans described either in Title I of ERISA or in section 4975(e)(1) of the Code.

C. The Final Regulation

The final regulation will apply to determinations of what constitute "plan

[11] 29 CFR 2509.75-2.

[12] The Department notes that not only does section 505 of ERISA contain a broad grant of rulemaking authority, but that in section 11018(d) of Pub. L. 99-272 Congress has expressly instructed the Department to issue a final regulation defining "plan assets" by December 31, 1986.

[13] Thus, as discussed in the preamble to the proposed regulation, the regulation is not relevant to "minimum standards" issues, such as matters relating to vesting and funding. With respect to the reporting and disclosure provisions of ERISA, the Department recognized that special difficulties are presented in reporting transactions involving collective investment funds whose assets include plan assets and therefore published a proposed alternative method of compliance for such entities (proposed regulation 29 CFR 2520.103-12 (50 FR 3362, January 24, 1985)). As discussed below, the Department is also publishing this regulation in final form in today's **Federal Register**.

[14] Section 102 of Reorganization Plan Number 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), transferred the authority of the Secretary of the Treasury to issue regulations under most provisions of section 4975 of the Code, including those provisions to which the definition of the term "plan assets" is relevant, to the Secretary of Labor.

assets" for all purposes under the definitional provisions of ERISA and parts 1 and 4 of Title I of ERISA and section 4975 of the Internal Revenue Code. Thus, it will apply to investments made by IRAs and other plans described in section 4975(e)(1) of the Code in addition to plans that are subject to the requirements of Title I of ERISA. The Department has determined that, even though there may be differences between IRAs and Title I plans that affect the kinds of investments made by such plans, there is a need for consistent application of the prohibited transaction rules of ERISA and the related excise tax provisions of the Code. In this respect, it appears clear that Congress intended that the prohibited transaction excise tax provisions would not only operate to discourage the direct or indirect use of the assets of an IRA for purposes unrelated to retirement needs, but that they also would apply to transactions involving persons who are fiduciaries by reason of providing investment management services to such accounts.[15] Although, as noted above, most of the Department of the Treasury's authority under section 4975 of the Code has been transferred to the Department, the Department has consulted with the Department of the Treasury regarding the scope of the final regulation.

III. Definition of Equity Interest

A. The Proposed Regulation

Under the proposed regulation, the assets of a plan would not have included an interest in the assets of an entity in which it invests unless the plan acquires an "equity interest" in the entity. Paragraph (b)(1) of the proposal stated that the term "equity interest" means any interest in an entity "other than an instrument that is treated as indebtedness under applicable local law and which has no substantial equity features." That paragraph also provided that a profits interest in a partnership, an undivided ownership interest in property and a beneficial interest in a trust would be treated as equity interests.

The preamble to the proposal indicated that, while the question whether a plan's interest is an "equity interest" is an inherently factual one, an instrument will not fail to be a debt instrument merely because it has certain equity features—such as additional variable interest and conversion rights—that are incidental to the primary fixed obligation. In addition, an example in the proposal indicated that a plan would not acquire an "equity interest" at the time that it purchases a convertible debenture if the conversion feature is incidental to the primary obligation to pay principal and interest. However, the example also indicated that the plan would acquire an "equity interest" at the time that it exercises its option to convert the debenture to stock of the issuing corporation.

B. Discussion of Comments and the Terms of the Final Regulation.

1. *Applicable Law.* Several commentators noted that the proposal did not specify which state's law would control with respect to a determination whether a plan has invested in a debt instrument. One commentator indicated that the law of the state in which the entity is formed should control. Some commentators suggested that the exclusion in the regulation should apply to any instrument that is treated as indebtedness under local law, regardless of the extent to which the instrument has equity features.

—The Final Regulation

The reference to local law in the definition of equity interest in the final regulation is the same as the reference in the proposal. In the Department's view, the reference to local law provides an initial frame of reference for determinations whether an interest is indebtedness. With respect to the question of which law applies for purposes of determining whether an instrument is treated as indebtedness under "applicable local law," the Department intends that such determinations should be made under the law governing questions regarding interpretation of the instrument.

2. *Substantial Equity Features.* Some commentators requested that the Department provide a more meaningful explanation of when certain equity features will be considered "incidental" to the primary fixed obligation for purposes of the definition of equity interest. Several commentators specifically requested additional guidance regarding how the "substantial equity features" element of the definition would apply to hybrid investments. One commentator suggested that the Department include a list of common equity features in the final regulation and provide in the regulation that the existence of any two of these features would constitute "substantial equity features". However, other commentators acknowledged that it is extremely difficult to characterize accurately an instrument that has both debt and equity features. Nonetheless, these commentators suggested that some certainty could be provided in this area if the Department established safe harbors under which certain hybrid instruments would not be considered "equity interests." Some commentators advocated a safe harbor based on the approach taken in the regulations proposed by the Department of the Treasury under section 385 of the Code, *i.e.*, that the instrument be characterized as debt or equity according to its predominant characteristic.[16] One commentator suggested an alternative safe harbor for hybrid instruments which are considered "indebtedness" under state law and which have an effective annual interest rate on the fixed obligation portion equal to at least 60 percent of the current "applicable federal rate" under section 1274(d) of the Code.[17] Another commentator proposed a safe harbor for hybrid instruments which contain certain characteristics typical of many securities offered by real estate firms. Finally, one commentator requested that the text of the regulation should state explicitly the principle established in the example discussed above, *i.e.*, that the mere presence of a conversion right which is incidental to the primary fixed obligation does not create an "equity interest" until such a right is exercised.

—The Final Regulation

The Department has decided not to modify the regulation to specify more precisely when equity features of a debt instrument become "substantial". As demonstrated by the comments on this issue, there are a vast number of different kinds of equity features, each of which provide investors with different opportunities to participate in the earnings of an entity. Thus, whether any particular investment has substantial equity features is an inherently factual question that must be

[15] Congress expressly made prohibited transactions with respect to certain plans that are not covered by Title I of ERISA subject to the excise tax imposed by section 4975. Moreover, section 4975 expressly distinguishes between prohibited transactions that benefit beneficiaries of IRAs and those that do not: Section 408(e)(2)(A) and section 408(e)(4) of the Code provide that an individual retirement account will lose its tax exempt status if any of the assets of the account are used to engage in a prohibited transaction for the benefit of an individual who has established an account or who is a beneficiary of the account, and section 4975(c)(3) of the Code provides for the abatement of the excise tax that would otherwise be imposed with respect to such a prohibited transaction. No similar abatement is provided for other kinds of prohibited transactions involving IRAs, however.

[16] Formerly 26 CFR 1.385-1—1.385-10 (adopted December 29, 1980 and withdrawn August 8, 1983).

[17] Section 1274 of the Code establishes rules for imputing a rate of interest to certain debt instruments; the "applicable Federal rate" is one element in making such a determination.

resolved on a case-by-case basis. In making such a determination, however, it would be appropriate, in the Department's view, to take into account whether the equity features of an instrument are such that a plan's investment in the instrument would be a practical vehicle for the indirect provision of investment management services. Nonetheless, as reflected in the definition of equity interest, the Department has concluded that the mere fact that a debt instrument has some equity features does not require characterization of the instrument as an equity interest.

3. *Timing.* A number of comments addressed the issue of when a determination should be made that a particular instrument is debt or equity. Several commentators expressed concern with the implication in the proposal that characterization of an instrument as debt or equity might change over time. One commentator advocated that a determination of the character of an instrument be made at the time of its initial issuance. Another commentator suggested that the characterization of an instrument at the time of issuance should control unless a significant change is made to the terms of the instrument itself. Other commentators suggested that a determination of whether an instrument creates a debt or equity interest should be made at the time of the plan's investment.

—The Final Regulation

The definition of equity interest in the final regulation in effect provides that characterization of an instrument as debt or equity is made continuously during a plan's holding of the instrument. Thus, for example, if a plan acquires an instrument which is debt at the time of acquisition, but due to changing market conditions the equity features become significant, the instrument would then be characterized as an "equity interest." This approach will provide for uniform treatment among plan investors, because the characterization given a particular class of securities will not be different for different plan investors depending solely on when the plans happened to make the investment, and will assure that plans' holdings of instruments that provide a significant opportunity to participate in the earnings of the issuer will be tested under the other rules in the regulation in order to determine whether the investments are vehicles for the indirect provision of investment management services.

IV. The "Publicly-Offered" Exception

A. The Proposed Regulation

As noted above, the look-through rule in the proposed regulation would not have applied in the case of a plan's investment in "publicly-offered" securities. Thus, the managers of an issuer of publicly-offered securities would not have been considered ERISA fiduciaries solely by reason of a plan's acquisition of such securities.

Paragraph (b)(2) of the proposed regulation defined "publicly-offered securities" as securities which are widely-held, freely transferable, and part of a class of securities registered pursuant to section 12(b) or 12(g) of the Securities Exchange Act of 1934, or sold to a plan from a public offering pursuant to an effective registration statement under the Securities Act of 1933 and the class of securities of which such security is a part is subsequently registered under the 1934 Securities Act. The proposal also indicated that a security would not be publicly-offered if it is part of an offering that is directed primarily to tax-exempt entities. The Department indicated in the preamble to the proposal that, although a determination whether a security is offered primarily to tax-exempt entities would be made on a case-by-case basis, a security would be considered to be offered primarily to such entities if it is subject to restrictions on transfer that result, or are likely to result, in the security being acquired primarily by tax-exempt entities, or if the disclosure materials relating to the offering indicate that the investment is intended primarily for such entities.

With respect to the "free transferability" requirement, the Department stated in the preamble to the proposal that the extent to which any particular restriction affects the free transferability of a security is a factual question to be resolved on a case-by-case basis.

B. Discussion of Comments and the Terms of the Final Regulation

1. *"Primarily to Tax Exempt Investors" Limitation.* The limitation to the publicly-offered exception that made the exception unavailable in the case of offerings primarily to tax-exempt investors was the single most controversial provision of the proposal, and a large number of commentators urged the Department to delete the limitation. These comments were made principally by sponsors of real estate limited partnerships designed especially for plan investors and by certain real estate investment trusts (REITs).

The commentators argued that public real estate partnerships are sufficiently different from traditional pooled investment funds in which plans participate that plan investments in such partnerships should not be considered the functional equivalent of retaining the general partner to provide investment management services. Moreover, the commentators described at some length the scope of regulation of public real estate partnerships under federal and state securities laws. These commentators contended that widely-held, freely transferable securities issued by public real estate partnerships are similar to equity securities issued by registered investment companies, the underlying assets of which are not treated as plan assets under ERISA.[18]

The commentators also argued that if the underlying assets of a publicly-offered real estate partnership are considered to include plan assets, and if managers of public real estate partnerships are treated as ERISA fiduciaries, it would be extremely difficult, if not impossible, for many partnerships with large numbers of plan investors to comply with the ERISA prohibited transaction rules. In this respect, the commentators noted that, due to the high minimum investment requirements for participation in bank and insurance company pooled real estate vehicles, REITS and public real estate partnerships are the primary means by which small and medium sized plans invest in real estate.

Most of the commentators urged the Department to delete the "primarily to tax-exempt investors" limitation entirely so that the publicly-offered exception would be available for securities offerings directed particularly to plans. Some commentators also suggested, however, that if a limitation to the publicly-offered exception were retained in the final regulation, it should apply only to offerings made primarily to Title I plans.

—The Final Regulation

The Department has deleted the primarily offered limitation from the publicly-offered exception in the final regulation. Thus, the assets of an entity whose securities are widely-held, freely transferable and registered under the federal securities acts would not include plan assets even where those securities are offered primarily, or even exclusively, to plans. Consequently, the managers of such entities would not be ERISA fiduciaries merely because there is plan investment in the entity.

[18] See section 3(21)(B) and 401(b)(1) of ERISA, discussed above.

The primary basis for the proposed publicly-offered exception was to prevent the regulation from operating to create inadvertent ERISA fiduciaries. The manager of a publicly-offered entity typically is not able to control plan investment in the entity and often is not readily able to determine whether a particular investor is, or is not, a plan. In these circumstances, the Department concluded that it would be inappropriate to impose fiduciary responsibility on the entity's managers—even where the entity is an investment fund—merely because plans happen to invest in the entity.[19]

The limitation to the publicly-offered exclusion in the 1985 proposal was based on the Department's conclusion that, where a securities offering in an investment fund is made especially to plans, the primary rationale for the publicly-offered exception would not be applicable because the issuer of securities that are offered primarily to plans cannot be said to have "inadvertently" assumed fiduciary responsibilities that might result from plan investment. Based on the comments received concerning the limitation, however, the Department has reexamined the role of the publicly-offered exception.

In deciding to delete the limitation, the Department has considered the existing federal regulatory structure relating to companies that invest and reinvest capital. In enacting the Investment Company Act of 1940, Congress created a system of *substantive* federal regulation for companies that invest in securities, but did not extend such regulation to companies that invest in property other than securities. Thus, although publicly-offered securities of companies which invest in property other than securities (such as real estate) are subject to the disclosure-oriented Securities Act of 1933 and Securities Exchange Act of 1934, these companies generally are not subject to substantive federal regulation of their business activities. Congress specifically recognized that the Investment Company Act would result in such differing regulatory treatment. In this respect, the legislative history of the Investment Company Act indicates that Congress found that investment funds consisting of securities are particularly susceptible to abuse because securities are typically highly liquid investments.[20] Moreover, the staff of the Securities and Exchange Commission has recognized this distinction several times in expressing opinions regarding the scope of the Investment Company Act.[21]

As discussed above, the Department has concluded that the plan assets regulation is essential in order to protect fundamental principles under the fiduciary responsibility provisions of ERISA and to implement Congress's intent in enacting ERISA. In formulating the final regulation, however, the Department has also taken into account Congressional decisions implementing other federal policies. In the Department's view, it would be inappropriate, in the absence of compelling reasons for doing so, to take a regulatory position here which would disrupt the Congressional balancing of policy interests that is reflected in the federal securities laws. Thus, the Department has balanced the apparent need to apply the fiduciary responsibility provisions of ERISA to the issuers of publicly-offered securities against the intrusion on other federal regulatory policies that would result from such application. In this respect, it appears that, although public offerings have been developed which take into account the particular investment needs of plans, there is no clear indication that plan investments in such offerings have on the whole operated to the detriment of the investing plans or their beneficiaries.[22]

Accordingly, the Department has determined that the benefits of extending the ERISA fiduciary responsibility rules to the managers of issuers of such securities are outweighed by the disruption of other federal regulatory policies which would result from such a rule.

The Department also believes that the "widely-held" and "freely transferable" requirements under the publicly-offered exception will provide plan investors two significant protections: (1) The ability to liquidate an unattractive investment; and (2) diminution of concentration of ownership in any one investor due to the large number of investors in the entity so that it will be less likely that the entity's managers will engage in transactions for the benefit of persons related to any particular investor.

The Department also notes that investing plan fiduciaries have a duty to carefully evaluate plan investments in publicly-offered securities that are issued by entities that are similar to investment funds. A plan fiduciary is obligated under ERISA to consider all relevant information in making investment decisions.[23] Thus, whether the underlying assets of an entity include "plan assets" is one factor that a plan fiduciary should consider in making a decision to invest in an entity.

2. The Widely-Held Requirement. Some commentators also suggested that the final regulation clarify the term "widely-held" as it is used in the publicly-offered exception. In general, these comments stated that the Department should include in the final regulation a statement made in the preamble to the 1979 plan assets proposal to the effect that interests in an entity ordinarily will be considered "widely-held" if they are held by 100 or more persons. Commentators on behalf of REITs particularly stressed this point, noting that under section 856 of the Internal Revenue Code a REIT must have 100 or more investors to qualify for favorable tax treatment. Other commentators suggested that the "widely-held" requirement be replaced by a limitation on the amount of the outstanding interests in an entity that could be held by any single investor (for example, 5 percent). According to the commentators, this test would assure that no plan investor would be able to exercise a controlling influence over the entity's management.

—The Final Regulation

In the final regulation, the Department has provided a more precise definition of the term "widely-held" as it is used in the publicly-offered exception. Under the final regulation, securities will be considered "widely-held" only if they are part of a class of securities purchased and held by 100 or more persons who are independent of the issuer and of one another.[24] This bright line test was chosen to provide as much clarity and certainty as possible. The requirement that the investors be independent of each other and the

[19] See the discussion of the similar publicly-offered exception in the Department's 1979 plan assets proposal (44 FR 50364–5, August 28, 1979).

[20] See H.R. Rep. No. 2639, 76th Cong., 3d Sess. 7 (1940).

[21] See, *e.g.*, Merrill, Lynch, Pierce, Fenner & Smith Inc., [1982] Fed. Sec. L. Rep. (CCH) ¶ 77,089 at 77,750 (October 5, 1981).

[22] In individual cases, a plan's investment in publicly-offered securities of companies which invest in property other than securities (which are thus not regulated by the Investment Company Act of 1940) might result in losses to the plan and in some cases such losses may be attributable to the misconduct of the manager of the entity to which the securities relate. The Department, however, has not identified the kind of pattern of abuse that would provide a sufficiently compelling reason for applying a look-through rule to plan investments in such securities. Of course, if such a pattern of abuse were to develop, the Department would need to reexamine its conclusions.

[23] See 29 CFR 2550.404a–1(b)(1).

[24] Securities will not, however, be considered to fail this test if subsequent to issuance, events beyond the issuer's control cause the securities to be held by fewer than 100 independent investors.

management of the entity to which the investment relates will assure that this aspect of the publicly-offered exception will not be subject to manipulation, for example, by the issuance of securities to affiliates of the issuer or to small groups of related investors.

3. The Free Transferability Requirement. A number of commentators also urged that the Department either eliminate the free transferability element of the publicly-offered exception or that it specifically indicate that customary restrictions on the transfer of limited partnership and REIT interests will not cause those interests to fail to meet the requirement. In general, the commentators suggested that the Department indicate that four categories of restrictions would be permissible. These included restrictions necessary to comply with: (1) Applicable federal or state securities laws; (2) federal or state tax law; (3) state partnership laws; or (4) reasonable administrative processing needs.

Public real estate partnerships and REITs also specifically requested that the Department make it clear that the existence of a right of first refusal will not cause a security to fail to be freely transferable. In the case of partnerships, the commentators noted, a right of first refusal (*i.e.*, a requirement that an issuer be provided an opportunity to acquire securities that an investor wishes to sell before they may be sold to another party) is a useful way of preventing the premature termination or liquidation of the partnership for tax purposes; the commentators also indicated that in the case of REITs, a right of first refusal helps assure that the REIT will not lose its qualification for favorable tax treatment under section 856 of the Code.

Some commentators also suggested that the final regulation should provide that the free transferability requirement is met if investors have the ability to freely assign the economic benefits of ownership of securities even though the original investor retains legal title to the securities.

The commentators also noted that REITs and public real estate partnerships frequently require prior approval by a general partner or other co-investors as a condition to transfer of a limited partnership interest. The commentators indicated that this kind of restriction, as well as suitability standards for potential transferees, aid REITs and limited partnerships in meeting requirements under state and federal tax and securities laws, and they urged the Department to make it clear that such requirements would not affect the free transferability of securities.

Some commentators also requested that the final regulation make it clear that reasonable administrative fees could be imposed with respect to the transfer of securities without affecting the free transferability of the securities.

—The Final Regulation

In general, the Department has concluded that a determination whether a security is considered freely transferable is a factual one to be made on the basis of the circumstances of each case. Nonetheless, because the comments demonstrate that many federal and state requirements exist which might be considered to affect the "free transferability" of a security, the Department has also determined that some additional clarification is necessary. In the opinion of the Department, the minimum amount which can be purchased by an investor is a characteristic of a securities offering which will frequently affect the ability of an investor to liquidate his investment. For example, where the amount of the minimum investment is relatively low, the securities which are the subject of the offering are more likely to be widely distributed and it is more likely that the securities can be easily liquidated. Conversely, where the amount of the minimum investment is relatively high, there are likely to be more limited opportunities to dispose of the securities.

Based on the information submitted by commentators, the Department has concluded that where a minimum investment in a public offering is $10,000 or less, the securities in question are likely to be widely distributed. Thus, although a determination whether securities offered in a public offering in which the minimum investment is $10,000 or less are freely transferable is ultimately a factual question under the final regulation, paragraph (b)(4) contains a list of eight types of permissible restrictions which ordinarily will not, alone or in combination, affect a finding that such securities are freely transferable. These permissible restrictions are derived from the special transitional rule for publicly-offered real estate companies in Public Law 99-272.[25] The enumerated restrictions include restrictions necessary to permit partnerships to comply with applicable federal and state laws, to assure favorable treatment under federal or state tax law, and to meet reasonable administrative processing needs. Thus, the final regulation in effect establishes a presumption that securities will be considered freely transferable, notwithstanding the existence of the enumerated restrictions, where they are part of an offering in which the minimum investment is $10,000 or less.[26]

In those cases where the minimum investment exceeds $10,000, whether a security is freely transferable will be determined under the final regulation based on all the relevant facts and circumstances. In such cases, the minimum investment restriction as well as any other type of restriction applicable to a security should be considered in determining whether the security is freely transferable. The Department emphasizes, however, that the existence of the kinds of restrictions on transfer that fit within one or more of the specific categories discussed above would not necessarily result in a determination that securities are not freely transferable, even where the minimum permitted investment in the securities exceeds $10,000. However, the presumption that such restrictions do not affect the free transferability of the securities would not be available in these circumstances.

The Department believes these rules will allow publiclyoffered entities to meet certain federal and state requirements while still assuring that the publicly-offered exclusion in the final regulation will only apply to securities which in fact provide a plan investor a reasonable opportunity to liquidate its investment.

V. The Significant Participation Exception

A. The Proposed Regulation

Under the proposal, the underlying assets of an entity in which a plan invests would have included plan assets only if equity participation in the entity by benefit plan investors is "significant." The proposal indicated that equity participation in an entity would be "significant" on any date if, immediately after the most recent acquisition of any equity interest in the entity, 20 percent or more of the value of any class of equity interests is held by "benefit plan investors". The proposal

[25] Section 11018(a) of Pub. L. 99-272, in effect establishes an effective date provision for the final plan assets regulation to the extent that it would characterize the assets of publicly-offered real estate entities as including plan assets. This provision is discussed in more detail below.

[26] On the basis of the record, it appears to the Department that the offering value of minimum investment units of widely distributed collective investment vehicles is $10,000 or less. Thus, with regard to those collective investment vehicles with minimum investment units valued within this range, the Department has determined that a plan's ability to dispose of its investment would not, in general, be greatly affected by the permissible restrictions listed in paragraph (b)(4).

defined the term "benefit plan investor" to include: (1) Any employee pension or welfare benefit plan whether or not the plan is subject to Title I of ERISA; (2) any plan described in section 4975(e)(1) of the Internal Revenue Code; and (3) any entity whose underlying assets include plan assets by reason of plan investment in the entity.

The preamble to the proposed regulation indicated that the significant participation test was based on the Department's conclusion that where there is substantial plan investment in an investment fund there is an expectation on the part of the investing plans that the assets of the fund will be managed in furtherance of the objectives of the investing plans and that in such circumstances the manager of the fund is likely to take the objectives of the investing plans into account in making investment decisions for the fund.

Finally, equity interests in an entity held by any person who would be a fiduciary if the assets of the entity included plan assets (as well as any equity interests held by an affiliate of such a person) were disregarded for purposes of the significant participation test in the proposed regulation.

B. Discussion of Comments and the Terms of the Final Regulation

A number of commentators objected to various aspects of the significant participation test. In particular, they asserted: (1) That the definition of the term "benefit plan investor" was too broad; (2) that the 20 percent test for "significant" plan investment was too low; (3) that the degree of investment by plan investors changes constantly and cannot be controlled by an entity's management, and that, even in an initial offering, the manager of an entity may not know the degree of plan investment. The commentators also stated that the significant participation exception is especially important in cases involving private offerings which do not meet the "publicly-offered security" exception. These entities are primarily venture capital companies and certain real estate companies.

1. *The 20 Percent Limitation.* Several commentators suggested modification of the 20 percent figure used in the significant participation test. These commentators contended that 20 percent ownership of a class of equity securities by benefit plan investors is not sufficient to establish the existence of the two factors on which the test was predicated—i.e., special solicitation of plan investors and an expectation on the part of the plan investors that the assets of the entity will be managed in furtherance of their investment objectives.

The commentators stated that much of the nation's private capital is now concentrated in benefit plans and that, accordingly, it is quite possible that as much as 50 percent of an entity's equity capital may be provided by benefit plans without any special solicitation of such investors. Moreover, the commentators asserted that there is no reason to assume that a group of plan investors owning only 20 percent of an entity's outstanding securities will be able to influence the management of the entity. For these reasons, the commentators urged the Department to adopt a 50 percent test.

In addition, some commentators expressed the belief that even a 50 percent limitation would not necessarily be consistent with the underlying rationale for the exception. These commentators stated that where no single plan or group of related plans owns a large interest in an entity, benefit plan investment can be insignificant for purposes of influencing an entity's investment policies even where it is in excess of 50 percent of the aggregate investment in the entity. These commentators suggested that the final regulation should include two percentage tests related to plan investments: one relatively high percentage test which would be intended to identify cases where there has been special solicitation of plan investments by an entity's management and a smaller percentage limitation relating to individual plan investment to identify cases where a particular investor has the potential to influence the entity's business objectives.

Some commentators requested that the percentage test be applied on the basis of aggregate ownership of all classes of equity securities of a single entity rather than on a class by class basis.

Some commentators also objected to the exclusion of the value of equity interests owned by the entity manager (or its affiliates) in calculating whether there is significant plan investment in an entity. These commentators asserted that such an exclusion effectively lowers the percentage test, making it much more likely that there will be significant plan investment, without providing any additional evidence that the entity is managing its assets in furtherance of benefit plan investment goals.

—The Final Regulation

In the final regulation, the Department has increased the threshold percentage for the significant participation test to 25 percent. Although this revision makes the "safe harbor" provided by the significant participation test available to entities in which there is a slightly greater degree of plan investment, the Department has retained the general approach of the proposal.

With respect to the comments urging a more substantial increase in the threshold percentage, the Department notes that the significant participation test was intended to provide a mechanical test which would permit entity managers and investing plans to more easily analyze the consequences under the regulation of an investment where characterization of the investment under other provisions of the regulation (such as the operating company exception) is unclear. The Department believes that such a safe harbor rule must be formulated narrowly in order to prevent its use as a method of evading the application of the fiduciary responsibility rules of ERISA. Thus, in the Department's view, the exception should only apply where plan investment is not so substantial that any special solicitation of plan investments is likely to have occurred and where there is no reasonable expectation that the investment policies of the entity will be affected by the special objectives of the plan investors.

The Department has also concluded that it is necessary to apply the significant participation test to each class of securities and to disregard investments by the entity's managers and their affiliates for purposes of applying the test. In the Department's view, without these restrictions the test could be easily manipulated so as to avoid a determination that plan investment is significant, even where plans provide a substantial degree of the entity's capital and constitute most of the outside investors in the entity. None of the comments suggested ways of avoiding this potential for manipulation.

2. *Benefit Plan Investor Definition.* Several commentators suggested that the Department should narrow the definition of "benefit plan investor" to include only Title I plans (or only plans subject to ERISA or the prohibited transaction provisions of the Code). These commentators argued that since Congress did not believe the protections of the fiduciary responsibility rules are necessary for plans that are not subject to Title I, it would be inappropriate for the Department to take non-covered plans into account in determining whether an entity holds plan assets. The commentators also noted that, in some circumstances, an entity has no means of determining whether an investor is a "benefit plan investor". In addition,

some commentators suggested that different categories of benefit plan investors may not necessarily have similar investment goals. For example, according to the commentators, foreign plans which are included in the "benefit plan investor" definition, but are not subject to ERISA, might have different objectives than domestic plans.

—The Final Regulation

The Department has adopted the definition of "benefit plan investor" as it was proposed. In reaching this decision, the Department has considered two factors. First, as noted above, the safe harbor rule embodied in the significant participation test is intended to exclude only those entities in which plan investment is so insignificant that it is unlikely that such investment has been especially sought or that the investment objectives of the entity will be influenced by the plan investors. In the Department's view, a broad definition of benefit plan investor is necessary in order to avoid manipulation of the significant participation test. Although the specific investment objectives of different kinds of plans may vary, the Department has concluded that unless all kinds of plans are taken into account for purposes of the test, entity managers would be able to avoid ERISA fiduciary status by rationing investments to plans that are covered by ERISA and offering the remaining investments to other plans that are not covered. Thus, it has concluded that all benefit plan investments should be taken into account in determining whether aggregate investment by plans is more than incidental.

With respect to the definition of benefit plan investor, the Department emphasizes that (as noted in the preamble to the proposed regulation) nothing in the regulation imposes responsibilities on fund managers with respect to plan investors that are not subject to ERISA or to the prohibited transaction provisions of the Code. Plan investors that are not subject to these statutes are merely taken into account for purposes of determining whether plan investment in the aggregate is "significant." This point is made clear in an example that was included in the proposed regulation and which is also included in the final regulation (see paragraph (j)(2) of the final regulation).

3. *Timing of Calculations of Significant Plan Participation.* Several commentators noted that since compliance with the significant participation test would be tested after each new investment, the test could operate in such a way that the consequences of a plan's investment in an entity for plan assets purposes might be affected by subsequent events. In this respect, the commentators contended that the proposal could create administrative burdens for the managers of investment vehicles because frequent changes in the degree of plan ownership could cause frequent changes in the entity's status under the plan assets regulation and because it would be difficult to determine whether an entity meets the requirements for the exception at any particular time.

The commentators suggested two possible changes to address the problems that might be created under the approach of the proposed regulation. First, some commentators suggested that determinations of significant plan investment should be made as of the most recent acquisition of any equity interest in an entity from an issuer or an underwriter. Second, some commentators suggested that determinations of significant plan investment should be made only once with respect to each plan investment in an entity, at the time of the plan's investment. Under this approach, an entity's managers would have fiduciary obligations only to plans that invest in the entity at times when aggregate plan investment exceeds the threshold percentage.

—The Final Regulation

The Department has decided that the regulation should not be revised to permit determinations of significant participation less frequently than the proposal required, *i.e.*, after each new investment. Such continual testing assures consistent treatment of all plan investors in an entity and provides for more accurate characterization of the degree of plan investment in an entity at a given time. The Department also notes that, because of the broad publicly-offered exception that has been included in the final regulation, interests in most of the entities for which the significant participation exception will be dispositive are privately-offered. It should be relatively easy for managers of a privately-offered entity to identify plan investors and to determine whether or not there is significant benefit plan investor participation in an entity. Thus, many of the practical problems of compliance that were identified by the commentators (most of which related to large, public offerings) would not exist under the final regulation.

The significant participation test is not intended to affect the consequences of a plan's investment in debt or publicly-offered securities. Thus, for example, if an investment fund issues a class of publicly-offered securities in which plans invest and issues a second class of equity securities in a private placement exclusively to plans, then the assets of the plans that acquired the privately-offered securities would include an interest in the underlying assets of the fund (because participation in the fund by benefit plan investors is significant since all of the private class of securities is held by plans). However, the assets of the plans that purchased the publicly-offered securities would consist only of those securities and would not include an interest in any of underlying assets of the issuer. Thus, the managers of the investment fund would be fiduciaries only with respect to the plans that purchased the privately-offered securities.

VI. Operating Companies

A. In General

1. *The Proposed Regulation.* The proposed regulation also contained an exception to the look-through rule of the proposal for plan investments in "operating companies." This exclusion was intended to distinguish between companies that carry on an active trade or business, and which thus are not likely vehicles for the indirect provision of investment management services, from investment funds which may well serve as conduits for the provision of such services. Under the proposed regulation, the term "operating company" included any company that is primarily engaged, either directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital.

The proposal also contained definitions describing two specific kinds of operating companies: "venture capital operating companies" and "real estate operating companies". Venture capital companies and many real estate companies have characteristics of both operating companies and investment funds, and the specific definitions were intended to provide guidance in determining whether the operating company exclusion would be available for such companies.

2. *Comments Relating to the General Operating Company Definition and Discussion of the General Definition in the Final Regulation.* Most of the comments received by the Department with respect to the operating company exception raised issues with respect to venture capital operating companies and real estate operating companies. These comments are discussed below.

However, several commentators urged the Department to clarify how companies engaged in various different kinds of businesses would be treated under the general operating company definition. These included comments filed on behalf of persons engaged in such activities as equipment leasing and oil and gas ventures.

—The Final Regulation

In general, whether a particular company is, or is not, an operating company under the final regulation is a factual question to be resolved taking into account the particular characteristics of the entity under consideration. As demonstrated by the comments, companies in which plans invest engage in a vast number of different activities. Although in most cases it is relatively easy to characterize an entity as either an operating company or an investment fund, some companies do carry on both kinds of activities. The Department has concluded, however, that, other than with respect to real estate companies and venture capital companies, it would be impractical to provide detailed guidance concerning the types of activities necessary for characterization as an operating company. Accordingly, the general operating company definition in the final regulation is the same as that in the proposal.

B. The Venture Capital Operating Company Exception

1. *The Proposed Regulation.* Under the proposed regulation, there were two elements to the definition of "venture capital operating company". First, at least 85 percent of the firm's assets (not including short-term investments) would have been required to be invested in "venture capital investments" or "derivative investments" (as defined in the proposed regulation). Second, a venture capital firm would have been required to actually exercise "management rights" in at least one of the portfolio companies in which it invests. The proposed regulation also indicated that whether an entity meets the 85 percent test is determined annually on a fixed date and that assets would be valued at their fair market value.

A "venture capital investment" was defined in the proposal as an investment in an enterprise with respect to which the investor has or obtains "management rights" and certain "derivative" investments which are related to investments which provide for management rights.

The term "management rights" was defined in the proposal as rights to substantially participate in, or substantially influence the conduct of, the management of an enterprise. The preamble to the proposed regulation stated that the fact that the holder of corporate securities has the right to appoint one or more directors of the corporation would indicate that the securities are venture capital investments, as would the fact that a representative of the holder of such securities serves as a corporate officer. The preamble also suggested that special rights to examine the books of a nonpublic entity and the fact that an investment constitutes a significant portion of the equity capitalization of a nonpublic issuer may be indicative of management rights.

An example in the proposed regulation indicated that a company must also actually exercise management rights in the ordinary course of its business, and not on a sporadic basis in order to be treated as a venture capital operating company. The proposed regulation also indicated that it is sufficient for a venture capital company to actually participate in the management of only one company in order to meet this requirement. The preamble to the proposal made it clear, however, that substantial resources must be devoted to management efforts.

2. *Discussion of Comments and the Terms of the Final Regulation.* Several venture capital firms commented on the venture capital operating company definition of the proposed regulation. There were three main aspects of the proposal which most concerned these commentators. First, the commentators expressed reservations about the requirement that 85 percent of a venture capital operating company's assets must be invested in companies with respect to which it obtains management rights. Second, the commentators were also concerned with certain aspects of the method of determining compliance with the 85 percent test and the method of valuing securities for purposes of that test. Third, the commentators requested the Department to clarify in the final regulation what kinds of investment covenants and other rights constitute "management rights." The commentators' concerns with each of these aspects of the proposal, and the Department's conclusions with respect to these points, are discussed below.

a. *The Percentage Test.* Most of the venture capital commentators suggested that the Department lower the 85 percent test. Their primary argument was that the 85 percent level does not allow enough flexibility for ordinary venture capital activities and would operate to deprive venture capital companies of the opportunity to diversify investments.

The problem most frequently voiced by the commentators was that the 85 percent test would effectively preclude participation in "later stage" financings because management rights have been ceded to early and middle stage investors and later stage investors ordinarily do not acquire those rights. The commentators expressed similar concerns with respect to investments in newly issued public securities of emerging growth companies because management rights typically are not given in public offerings. According to the commentators, a lower percentage test would also provide venture capital companies with more flexibility to respond to fluctuations in the business cycle.

The most frequently suggested alternative to the 85 percent test was a 50 percent test. However, several commentators suggested alternative levels between 60 percent and 85 percent.

—The Final Regulation

In the final regulation, the Department has replaced the 85 percent test in the definition of venture capital operating company with a 50 percent test. In the Department's view, this level provides venture capital companies with flexibility to respond to changing economic conditions and will enable venture capital companies to diversify investments and thus mitigate the risk associated with venture capital investments. Since companies must devote at least half of their assets on an ongoing basis to venture capital investments, however, the Department is also of the view that the exclusion for venture capital operating companies will continue to be confined to those companies that have demonstrated a substantial ongoing commitment to the venture capital business.

b. *Computation of the Percentage Test and Valuation of Assets.* Several commentators also suggested alternatives to the annual determination of compliance with the percentage test in the definition of venture capital operating company and with the requirement that such computation be based on the fair market value of the company's assets. Specifically, some commentators suggested that compliance with the percentage standard should be determined on an acquisition basis.[27] Finally, several

[27] Under an acquisition test, a company, once it has initially complied with the applicable percentage test, would cease to be treated as a

Continued

commentators suggested that a company's assets should be valued at book value (generally cost) rather than fair market value for purposes of determining compliance with the percentage test.

Some commentators also indicated that compliance with the annual valuation test in the proposed regulation would be particularly difficult for venture capital companies that have recently been formed as well as for venture capital companies that are winding up their affairs.

—The Final Regulation

The Department has made several revisions to the computational aspects of the definition of venture capital operating company.

First, in the final regulation, assets are to be valued at their cost for purposes of applying the 50 percent test. This modification should eliminate the difficulties that were identified by the commentators in valuing assets for which there is no recognized market. Moreover, the Department has determined that valuing assets at cost is a more appropriate way of applying the percentage test because that method focuses on the degree of a company's commitment of resources to venture capital activities and because, under that method, a company's compliance with the percentage test will not be affected by the relative success or failure of venture capital investments relative to other investments.

Second, the Department has modified the annual method of determining compliance with the percentage test. Under the revised test, a venture capital operating company must meet the 50 percent standard when it first makes long-term investments.[28] Thereafter, a company is treated as a venture capital operating company if on any day during an annual "valuation period" it complies with the 50 percent test. In the Department's view, the use of an annual valuation period will provide venture capital companies with some additional flexibility in complying with the annual 50 percent test while assuring that an entity's compliance with the requirements for treatment as a venture capital operating company is regularly tested.[29]

A "valuation period" is a fixed period which must occur annually, which may not exceed 90 days in duration, and which must begin no later than the anniversary of the date on which the company first becomes a venture capital operating company. The operation of the percentage test is illustrated by the following example: A venture capital company, A, makes a long-term investment on July 15, 1987 and immediately after such investment, A meets the 50 percent test described in paragraph (d)(1)(i). A's "initial valuation date" is July 15, 1987 (see paragraph (d)(1)). Since the initial annual valuation period must begin no later than the anniversary of the initial valuation date (see paragraph (d)(5)(ii)), A's first valuation period may begin no later than July 15, 1988. A establishes the period from July 15 until October 12 as its annual valuation period. Since the regulation provides that a company which complies with the 50 percent test on its initial valuation date is treated as a venture capital operating company until the end of its first valuation period (see paragraph (d)(1)), A does not need to demonstrate compliance with the 50 percent test until October 12, 1988. Thereafter, A must comply with the percentage test on at least one day within the period that begins with July 15 and ends with October 12 of each year.[30]

Third, the definition of venture capital operating company also includes a special rule for companies that are in the process of distributing assets to investors.[31] Under this rule, once a venture capital operating company elects to enter a "distribution period" (after it has distributed 50 percent of its assets, on a cost basis, to investors) it will continue to be treated as a venture capital operating company for the remainder of the distribution period. However, under this rule, a company that has elected to begin a distribution period will cease to be treated as a venture capital operating company if it makes any new portfolio investment (an investment in a company in which the venture capital operating company has not maintained a venture capital investment at all times since the beginning of the distribution period) or upon the expiration of 10 years after the beginning of the distribution period. For example, assume that a venture capital operating company makes three investments. Investment A is a venture capital investment and had a cost of $500,000. Investment B is also a venture capital investment and had a cost of $250,000. Investment C is not a venture capital investment and had a cost of $200,000. Assume further that the venture capital operating company sells Investment A for $1,000,000 and distributes the proceeds to investors in the venture capital company. After this sale, the venture capital operating company may elect to enter a distribution period because it has distributed the proceeds of at least 50 percent of its total investments valued at cost. If the company elects to enter a distribution period, it will continue to be treated as a venture capital operating company notwithstanding that it may thereafter fail to satisfy the annual 50 percent test (for example, by selling Investment B, the remaining venture capital investment, and distributing the proceeds to investors before selling Investment C, the non-venture capital investment). This treatment would continue until the earliest of (1) the date the venture capital operating company distributes all of its assets, (2) the date 10 years from the beginning of the distribution period, or (3) the date on which the company makes a "new portfolio investment."

c. *Venture Capital Investments.* A number of commentators suggested that the Department expand the definition of management rights. These commentators urged particularly that a venture capital company should be considered to have acquired management rights in cases where it participates in a syndication in which management rights are given only to a lead investor. The commentators indicated that syndications are common in the venture capital industry and that

venture capital operating company only if it makes an investment that is not a venture capital investment the effect of which would be to cause the initial cost of the company's non-venture capital investments to exceed the applicable percentage of the initial cost of all the company's investments.

[28] In the case of an existing venture capital or real estate company, the initial valuation date is any date designated by the company within the 12 month period ending on the effective date of the regulation.

[29] As in the proposed regulation, short-term investments pending long-term commitment are disregarded for purposes of applying the 50 percent test. In the final regulation, the Department has also made it clear that short-term investments made pending distributions to investors also may be disregarded. The Department intends that the investments which are disregarded under this exclusion would be confined to investments—such as commercial paper and similar instruments—that are in fact short-term and which in fact are held by the venture capital company pending long-term investment or distribution to investors. Thus, a venture capital operating company could not hold a portfolio of short-term investments indefinitely and continue to disregard them for purposes of the 50 percent test.

[30] However, the company for "good cause"—such as a change in fiscal year for independent business reasons—may change the fixed annual valuation period.

[31] The Department notes that distributions of assets (or proceeds) in this context could also include in-kind distributions.

management rights acquired by the lead investor in a syndicate should in effect be attributed to the other investors in such syndicate.

Several commentators also suggested that the Department treat "later stage" investments in portfolio companies as venture capital investments even though management rights with respect to the company have been ceded to early stage investors. These commentators urged that the final regulation indicate that if a portfolio company grants management rights to any investor (or group of investors) these management rights will be deemed also to have been granted to later stage investors so long as management rights remain in effect at the time subsequent investors acquire securities from the company. In the alternative, some commentators suggested several characteristics of later stage investments which should be treated as indicative of the existence of management rights. These included: special rights to examine books and records of an issuer, appointment of an employee of a venture capital fund to serve as a corporate officer of a public or nonpublic issuer, investment in five percent or more of the voting securities of an issuer, and rights to redeem securities, preemptive rights, or rights of co-sale with respect to a public or nonpublic issuer.

Other commentators suggested that the final regulation make it clear that newly issued public securities of emerging growth companies would be considered venture capital investments.

Several commentators also suggested revisions to the definition of "derivative investments" in the proposed regulations. These commentators noted that venture capital investors sometimes lose management rights with respect to an investment for reasons other than an initial public offering—for example, as a result of a merger or reorganization. These commentators suggested that securities acquired in exchange for venture capital investments as a result of such changes in corporate structure should be treated as derivative investments.

Some commentators also expressed concern that the standards in the proposed regulation limiting the period during which an investment may be treated as a derivative investment might have the effect of forcing a venture capital company to dispose of a derivative investment at an inopportune time. These commentators suggested that a derivative investment should in all cases continue to be treated as such an investment until the expiration of some stated period after it first becomes a derivative investment.

Finally, some commentators suggested that a venture capital fund of funds (which invests in numerous venture capital companies and in turn sells shares to plans) should be excluded from plan asset treatment by expanding the definition of "venture capital investments" to include investments in an entity which is a "venture capital operating company".

—The Final Regulation

The general definition of venture capital investments in the proposed regulation has been retained in the final regulation. The comments on the proposed regulation and the testimony at the public hearing demonstrated that venture capital companies engage in a variety of different kinds of investment activities and that the kinds of rights to participate in management that such companies obtain vary widely. Thus, it is difficult to develop standards of general application regarding what constitute venture capital investments. In addition, it would be extremely difficult, if not impossible, to fashion a definition that would be responsive to the points made by the commentators, but which would not be so inclusive that virtually any investment would qualify as a venture capital investment. In this respect, the 50 percent test in the final regulation will provide substantially greater flexibility to venture capital companies than the 85 percent test included in the proposal, particularly since determinations of compliance with the percentage test will be made on the basis of the cost of investments. Thus, the Department has concluded that there is less need for additional guidance regarding the precise scope of the term "venture capital investments".

The Department has made some clarifying modifications to the definition of venture capital investment, however. First, the regulation has been revised to make it clear that management rights must be direct contractual rights running from an operating company to a venture capital operating company. Thus, under the final regulation, management rights that are acquired by the lead investor in a syndication would not be attributed to other companies that participate in the syndication and therefore the investments through the syndication would not be venture capital investments for companies other than the lead investor.

Similarly, where management rights may be exercised only by a group of investors acting together, those rights would not be attributed to the individual members of the group. In these circumstances, an individual member of the group has a right to participate in collective decisions with respect to the group's management rights, but it has not itself obtained rights to influence, or participate in, the management of a portfolio company. However, where members of such a group of investors appoint one lead investor to act on behalf of the group, the group has effectively delegated its contractual management rights to the lead investor and that investor would therefore be considered to have obtained management rights with respect to its investment even though it exercises those rights pursuant to an agreement with the group rather than pursuant to an agreement directly with the portfolio company. In addition, the Department notes that different venture capital investors in a single entity may obtain different kinds of management rights. For example, in a syndication arrangement, the lead venture capital investor may obtain a contractual right to appoint a member of the portfolio company's board while other venture capital investors in the syndication may contract for other kinds of management rights.

Second, the Department has modified the definition of "venture capital investment" in the proposal to make it clear that portfolio companies in which venture capital operating companies invest must themselves be operating companies. As noted above, venture capital operating companies have characteristics of passive investment funds as well as operating company characteristics. The exclusion for venture capital operating companies is based on the Department's determination that the "operating" activities of such companies predominate because they obtain and exercise management rights in portfolio companies that are actively engaged in the production or sale of a product or service other than the investment of capital. Thus, this revision is consistent with the purposes underlying the venture capital operating company exception as well as with the Department's understanding of the activities of venture capital companies. Where a company is primarily engaged in the business of investing in venture capital operating companies, however, its relationship to the management of companies that actually produce or sell a product or service is much more remote. Accordingly, as revised, the definition of venture capital investment does not extend to investments in venture capital operating companies. Thus, the venture capital operating company exception would not be available for a venture capital fund of

funds even where such a fund obtains management rights with respect to the venture capital operating companies in which it invests.

Third, the Department has modified the examples in the final regulation relating to venture capital companies to avoid an implication that management rights may only be acquired with respect to nonpublic companies.

Fourth, the Department has modified the definition of derivative investments to include certain securities acquired in a merger or corporate reorganization (provided the merger or reorganization is undertaken for independent business reasons other than extinguishing an investor's management rights) and to provide that a derivative investment will retain its status until the later of 10 years after the acquisition of the original venture capital investment to which the derivative investment relates, or 30 months after the investment becomes a derivative investment.

d. *Small Business Investment Companies.* Some commentators suggested that the Department specifically include small business investment companies (SBICs) within the definition of a "venture capital operating company". SBICs are created under the Small Business Investment Company Act of 1958, the commentators noted, and are investment firms created for the exclusive purpose of providing growth capital and management support for new and growing small business concerns. These companies are licensed and regulated by the Small Business Administration. The commentators noted that SBICs are similar to venture capital operating companies and are subject to oversight by another federal agency. Thus, the commentators argued, the policy considerations supporting other exclusions from the proposed regulation (particularly the venture capital operating company exception and the exclusion for registered investment companies) also support exclusion of SBICs.

—The Final Regulation

The Department has decided not to include a specific reference to small business investment companies in the definition of an "operating company" because many of the practical problems of compliance identified by the commentators would not exist under the final regulation due to changes made to the "venture capital operating company" exception. The Department has also concluded that it would be inappropriate to treat a SBIC as an additional specific kind of "operating company" unless it satisfies the definition of "operating company" provided in the final regulation, which includes the modified definition of a "venture capital operating company". Thus, a small business investment company may qualify as a venture capital operating company under the final regulation if it invests at least 50 percent of its assets (valued at cost) in operating companies as to which it has or obtains management rights. Moreover, a small business investment company that initially meets the requirements for treatment as a venture capital operating company would, of course, be subject to the "distribution period" rule, discussed above, with respect to determinations regarding its continued qualification.

C. The Real Estate Operating Company Exception

1. *The Proposed Regulation.* As noted above, the proposed regulation also contained an exception from plan asset treatment for "real estate operating companies." This provision was similar to the venture capital operating company exception. Thus, the term "real estate operating company" was defined as a company at least 85 percent of the assets of which are devoted directly to the management or development of real estate. As with the venture capital operating company exception, the proposal provided for an annual determination of compliance with the percentage test and assets would have been valued at their fair market value.

The preamble to the proposed regulation indicated that, to qualify as a real estate operating company, a firm must actively participate in, or influence, management decisions with respect to the properties in which it has an interest. The preamble also stated that the enterprise must in fact devote substantial resources to its management and development activities.

The proposal also included several examples illustrating the operation of the real estate operating company exception. One example indicated that a company may qualify for the exception notwithstanding that some of its real estate management and development activities are performed by independent contractors. Another example indicated that an entity may acquire rights to manage or develop real estate through the acquisition of certain kinds of mortgages on real property as well as through the acquisition of equity ownership interests. Another example in the proposed regulation made it clear, however, that mere equity ownership of real property is not sufficient to qualify for the real estate operating company exception.

2. *Discussion of Comments and the Terms of the Final Regulation.* As in the case of the proposed definition of venture capital operating company, several commentators expressed concern that the 85 percent test incorporated in the definition of real estate operating company would be too restrictive and thus that the exception would not extend to actively managed real estate companies which should be treated as operating companies. Several commentators also expressed concern about various aspects of the requirement that a real estate operating company be involved "directly" in the management or development of real estate. The comments with respect to each of these issues are discussed in more detail below.

a. *The Percentage Test.* Several commentators asserted that the 85 percent requirement was not sufficiently flexible and might deprive real estate companies of the opportunity to make certain advantageous real estate investments. A number of these commentators suggested that the Department adopt a 50 percent test. Such a test, they suggested, would be sufficient to meet the Department's concern that the exception be available only to those real estate firms that have made a substantial ongoing commitment to active real estate management or development activities, but would also provide additional flexibility to real estate firms. Another commentator suggested a "two tier" alternative to the 85 percent test. Under this approach, a firm would initially qualify for treatment as a real estate operating company if a specified, relatively high, percentage of its assets are devoted to real estate management and development activities. After the company meets this initial qualification test, however, it would not lose its qualification unless the percentage of assets devoted to real estate management or development activities falls below another, lower percentage. Another group of commentators suggested that the Department adopt a percentage level between 50 and 80 percent (such as 60 or 70 percent) in lieu of the 85 percent test in the proposed rule.

Finally, several commentators suggested that the Department indicate more clearly whether real estate which is owned and actively managed or developed by an entity would be considered assets "devoted to" the management or development of real estate.

—The Final Regulation

The Department has decided that an entity should be treated as a real estate

operating company if at least 50 percent of its assets are invested in real estate which is managed or developed and with respect to which the entity has the right to substantially participate directly in the management or development activities. Further, in the ordinary course of its business, the entity must actually engage in real estate management or development activities. This approach is consistent with the approach taken with respect to venture capital operating companies and implements similar policy objectives—to ensure that only those entities which demonstrate a substantial ongoing commitment to managing and developing real estate will qualify for treatment as real estate operating companies—while providing additional flexibility to companies that are engaged in the real estate business. In addition, for the reasons discussed above with respect to venture capital operating companies, the Department has concluded that determinations of a company's status as a real estate operating company should be made during an annual valuation period rather than on a fixed valuation date and that assets should be valued at their cost rather than fair market value for purposes of determining whether a company complies with the test.[32]

Moreover, the definition of real estate operating company has been revised to conform more closely to the venture capital operating company definition. Thus, the cost of an entity's entire investment in real estate which is actually managed or developed will be taken into account for purposes of applying the percentage test provided the entity has the right to participate in such management or development activities.

b. *Management or Development of Real Estate.* Several commentators expressed concern about the portion of the definition of real estate operating company that relates to the requirement that a specified percentage of the company's assets be devoted "directly" to the management or development of real estate. Most of these commentators urged the Department to make it clear that the reference to "direct" management or development of real estate does not require that a company's real estate management or development activities be performed by the company's own employees in order for the company to qualify for the exception. These commentators asserted that no legitimate policy purpose would be served if the regulation implicitly or expressly includes such a requirement because a company is not the less engaged in real estate management or development activities because it conducts its business through independent contractors than it would be if it conducts such activities solely through its own employees.

Several commentators also requested the Department to clarify what would constitute "management or development" of real estate in certain circumstances. Specifically, those commentators requested that the Department make it clear that certain activities that involve leasing, particularly shopping center management, should be considered real estate management activities for purposes of the definition of real estate operating company.

In addition, some commentators urged the Department to expand the principle (illustrated in one of the examples) that a real estate operating company could obtain management or development rights through investments in mortgages. Specifically, they urged that management activity should include the management of mortgage loan portfolios, including servicing mortgages and identifying appropriate mortgage investments.

—The Final Regulation

Under the final regulation, a company will not fail to qualify for treatment as a real estate operating company solely because it uses independent contractors (including affiliates of general partners) exclusively in conducting its real estate management or development activities. This is made clear in an example in the final regulation (see paragraph (j)(8)). Based on the comments received, it appears that independent contractors are widely used in the real estate industry and that often using an independent contractor may be the most efficient way of managing property. Thus, the regulation indicates that the fact that a particular entity does, or does not, have its own employees who engage in real estate development or management activities would be only one factor in determining whether an entity is actively managing or developing real estate.

With respect to comments raising issues as to whether particular kinds of conduct constitute management or development activities, the Department has concluded that a determination whether a company is actively involved in the management or development of a particular parcel of real estate is ultimately a factual question that must be resolved on a case by case basis. In the Department's view, however, an entity would not be engaged in the management or development of real estate for purposes of the definition of real estate operating company in the final regulation merely because it services mortgages on real property.[33] The Department has added an example to the regulation to illustrate the application of the management or development standard in certain circumstances. This example (paragraph (j)(8)) indicates that certain management activities associated with shopping center leasing may qualify as management activities.

VII. Entities That Always Hold Plan Assets.

A. Group Trusts, Bank Common and Collective Trust Funds and Insurance Company Separate Accounts.

1. *The Proposed Regulation.* Under the proposed regulation, the assets of insurance company separate accounts, group trusts and bank common or collective trust funds would generally include plan assets regardless of any other provisions of the proposal. Thus, for example, the proposed regulation provided that an insurance company managing a pooled separate account would be subject to the fiduciary responsibility rules of ERISA even though the account might otherwise qualify as a real estate operating company.

The proposal also stated, however, that the rule described above would not apply to a separate account registered as an investment company under the Investment Company Act of 1940 or to insurance company separate accounts that are maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable to the plan and to any annuitant under the plan are not affected in any manner by the investment performance of the account.

2. *Discussion of the Comments and Terms of the Final Regulation.*

[32] As in the case of the venture capital operating company exception, a company may disregard short-term investments pending long-term commitment or distribution to investors. As discussed in more detail above with respect to the definition of venture capital operating company, the Department intends this exclusion to apply only to a limited category of investments.

[33] Some commentators suggested that private mortgage pools are similar to guaranteed governmental mortgage pools under 29 CFR 2550.401b-1 redesignated under this regulation as 29 CFR 2510.3 101(i)) and should receive similar treatment. The Department believes there are differences between those mortgage investments which are guaranteed by agencies or instrumentalities of the federal government and other mortgage pools which do not provide for such guarantees. The Department also notes, however, that many private mortgage pools may qualify for the publicly-offered exception in the final regulation.

Representatives of several insurance companies and banks urged the Department to revise the regulation so that it would apply to separate accounts and bank common and collective trust funds in the same manner as it applies to other entities in which plans invest, thereby permitting separate accounts and common and collective trust funds to take advantage of the exceptions to the look-through rule, for example, the publicly-offered security exception and the real estate operating company exception. These commentators argued that separate accounts and common and collective trust funds are no different from other arrangements involving the pooling of investments of two or more plans in terms of the types of portfolio investments, the potential return or the services performed by the managers of the funds.

In addition, one commentator noted that some group trusts are also registered as investment companies under the Investment Company Act of 1940 and urged the Department to extend the exclusion relating to separate accounts that are registered investment companies to include registered investment companies that are also group trusts.

—The Final Regulation

In general, the Department has adopted the provisions relating to group trusts, bank common and collective trust funds and insurance company pooled separate accounts as they were proposed. This approach conforms with the express requirements of ERISA and the relevant legislative history.[34] Moreover, these provisions are also consistent with interpretive positions taken by the Department regarding group trusts, bank collective trust funds, and insurance company separate accounts.[35] The Department has, however, modified the final regulation to make it clear that the assets of a group trust or bank common or collective trust fund do not include plan assets if the trust is registered as an investment company under the Investment Company Act of 1940.[36] This modification is consistent with the rule for insurance company separate accounts and with sections 3(21)(B) and 401(b)(1) of ERISA.

The Department emphasizes that even though the other exceptions in the regulation do not apply to a plan's investment in a group trust, bank common or collective trust fund or insurance company separate account, those exceptions might be applicable to a trust's or separate account's portfolio investments. Thus, for example, although the assets of an insurance company separate account always include plan assets under the final regulation, the underlying assets of the issuer of publicly-offered securities acquired by the separate account would not include plan assets.

B. Entities that are Wholly-Owned by a Plan

1. *The Proposed Regulation.* The proposed regulation also provided that when a plan owns all of the outstanding equity interests in an entity, the assets of the plan include those equity interests and all of the underlying assets of the entity. This provision reflected the Department's conclusion that when a plan is the sole owner of an entity there is no meaningful difference between the assets of the entity and the assets of the plan. Under the proposal, this rule applied without regard to the nature of the business activities of an entity owned by a plan. Thus, the assets of an operating company that is owned entirely by a plan would have been considered plan assets.

2. *Discussion of Comments Received and the Terms of the Final Regulation.* A number of commentators objected to the proposed rule relating to entities that are wholly-owned by plans. These commentators indicated that many wholly-owned entities are operating companies and that the operating company exception should be available for such entities. According to the commentators, it would be extremely difficult for the officers and employees of an operating company to manage the assets of the company in accordance with the fiduciary responsibility provisions of ERISA, particularly the prohibited transaction rules. Several commentators emphasized that the special rule for wholly-owned companies would be particularly disruptive to employee stock ownership plans (ESOPs).

—The Final Regulation

The final regulation generally retains the rule relating to entities that are wholly-owned by a plan and extends the rule to entities wholly-owned by a "related group" of plans.[37] The Department continues to believe that, as a general matter, where all of the outstanding equity interests in an entity are owned by a plan, there is no practical difference between the assets of the plan and the assets of the entity which is owned by the plan. The extension of the rule to entities wholly-owned by a related group of plans will assure that or more plans this rule will not be subject to manipulation, for example, by the purchase of the entire equity interest in an entity by two defined benefit plans, one of an employer and one of an affiliate of that employer. Finally, the Department has made a minor modification to the wholly-owned rule to make it clear that an entity will be considered wholly-owned by a plan even in those instances where shares are owned by others due to a state law requiring such ownership.

Under the final regulation, the rule relating to wholly-owned entities would not apply, however, in the case of one or more eligible individual account plan(s) (as defined in section 407(d)(3) of the Act) maintained by the same employer and which own(s) qualifying employer securities (described in section 407(d)(5) of the Act), provided that substantially all of the participants in the plan(s) are, or have been, employed by the issuer of such securities or by members of a group of affiliated corporations of which the issuer is a member.[38] In general,

[34] See "Overview of the Plan Assets Issue," above, for a discussion of the statutory provisions and legislative history relating to bank common and collective trust funds and insurance company separate accounts.

[35] See, *e.g.*, DOL Advisory Opinion 82-31A (group trusts), preamble to the proposed Prohibited Transaction Class Exemption 78-19, 42 FR 54887 (October 11, 1977) (separate accounts), and preamble to Prohibited Transaction Class Exemption 80-51, 45 FR 49709 (July 25, 1980) (bank common and collective trust funds).

[36] The final regulation also includes the exception set forth in the proposed regulation for insurance company separate accounts that are maintained solely in connection with certain guaranteed obligations of an insurance company. The Department notes that this provision deals solely with the issue of whether such a separate account holds "plan assets." By including such an exception, the Department is not, however, addressing any issues which may arise under sections 403(c)(1) or 404(a) of ERISA with respect to the use of such separate accounts.

[37] A related group of plans is defined as two or more plans each of which receives 10 percent or more of its aggregate contributions from the same employer (or members of the same controlled group of corporations) or each of which is maintained by, or pursuant to a collective bargaining agreement negotiated by the same employee organization or affiliated organizations. The concept of a related group of plans is also used in the regulation published elsewhere in the Federal Register today which provides a reporting and disclosure alternative method of compliance for plans which invest in certain entities whose underlying assets include plan assets.

[38] For purposes of this provision, whether a corporation is an affiliate of another corporation is determined by applying the definition of "affiliate" in section 407(d)(7) of the Act. In general, under that definition, a "corporation" is an affiliate of another corporation if it is a member of a "controlled group of corporations" of which such latter corporation is a member, applying the principles of section 1563(a) of the Internal Revenue Code, but using a 50 percent ownership test rather than the 80 percent ownership test set forth in section 1563(a).

under section 407(d)(3) of the Act the term eligible individual account plan includes profit-sharing, stock bonus, thrift or savings plans and employee stock ownership plans. In such circumstances, the consequences under the final regulation of the plan's ownership of the employer securities would be determined under the other provisions of the regulation. For example, if an eligible individual account plan owns all of the outstanding stock of an operating company that is an employer of substantially all of the participants in the plan, then the operating company exception would be applicable, and accordingly the assets of the plan would include the employer securities, but would not include any interest in the underlying assets of the employer.

The provision relating to qualifying employer securities is consistent with provisions of ERISA which permit certain individual account plans to hold up to 100 percent of their assets in qualifying employer securities in order to provide an incentive to employees by allowing them to participate in the earnings of the employer through plan investments.[39]

VIII. Effective Date/Transitional Rule Provision

A. The Proposed Regulation

The proposed general effective date for the regulation was 90 days after publication of the final rule. In addition, the proposed regulation indicated that once the regulation becomes effective it would apply to all plan assets determinations made after the effective date with respect to plan investments, regardless of when those investments are made. Thus, under the general effective date provision, the plan assets regulation would apply to both new and existing plan investments. The proposal also included a transitional rule, however, under which the regulation would not apply to plan investments in certain entities.

The proposed transitional rule had two requirements. First, the entity seeking coverage under the rule was required to be in existence on June 30, 1986. Second, the transitional rule would have applied only if no plan acquires an interest in the entity from an issuer or an underwriter at any time after June 30, 1986, except pursuant to a binding contract in effect on that date.[40] The preamble to the proposal indicated that plan assets determinations for entities that qualify for the transitional relief would be made taking into account the provisions of ERISA itself, the legislative history of ERISA, the Department's rules and regulations and relevant judicial decisions.

B. Comments Received

A large number of commentators on the proposed regulation urged the Department to modify the effective date provision. Several commentators objected to the general approach reflected in the effective date provision of the proposal and urged the Department to apply the regulation only to new plan investments. Most of the comments, however, urged the Department to modify the expiration date of the transitional rule. These suggestions fell into two categories. The first, and most frequent, suggestion was that the expiration date for the transitional rule should be set at a specified number of days after publication of the final rule (or, as suggested by some commentators, at the later of June 30, 1986 or a set number of days after issuance of the final rule). The comments varied with respect to the period that would be appropriate. Some commentators suggested that a 90 day period would be sufficient; others indicated that 180 days would be appropriate. The second approach, suggested by only a few commentators, was to move the expiration date of the transitional period to some other fixed date beyond June 30, 1986.

Some commentators sought clarification of whether certain contractual arrangements to acquire additional securities (*i.e.*, warrants) entered into before the expiration date of the transitional rule would be considered binding contracts under that rule. Those commentators suggested that a plan's exercise of warrants after the expiration date should not cause the entity to lose its qualification for transitional relief.

C. Public Law 99-272

Section 11018 of Pub. L. 99-272 establishes a statutory transitional rule for the application of the plan assets regulation to the extent it would apply to certain publicly-offered real estate entities that are described in the statute. This statutory provision has two primary effects. First, it prohibits the application of the plan assets regulation to plan investments in public real estate companies that have certain characteristics. In general, the statutory limitation applies only to publicly-offered real estate companies which first offer interests to plans on or before a date 120 days after the date of publication of the final regulation and in which no plan invests on or after a date 270 days from the date of publication of the regulation. Second, the statute provides that the assets of a public real estate company that meets the requirements described above would not include plan assets if they would not have been characterized as plan assets under Interpretive Bulletin 75-2 or under any of the Department's previous proposed plan assets regulations. Section 11018 of Pub. L. 99-272, however, does not prohibit the application of the regulation to such a publicly-offered real estate entity to the extent the regulation would provide a defense (*i.e.*, to the extent the assets of the entity would not include plan assets under the final regulation).

D. The Final Regulation

The Department has decided that the general approach reflected in the effective date/transitional rule provisions should be retained as proposed. To amend the effective date so that the regulation would apply only to new plan investments would delay the implementation of a final regulation because many plans have substantial outstanding long-term investments and thus it may be several years until all, or even most, of these assets are held in investments made after the effective date. Moreover, if the regulation were applied only to new plan investments, similarly situated plan investors would have different rights and remedies based solely on the date of their investment in an entity.

The Department has concluded, however, that both the effective date of the regulation and the expiration of the transitional period should be set at the later of January 1, 1987 or a date 120 days from the date of publication of the regulation. This provision will assure that affected persons will have time to assess the impact of the final regulation before the expiration of the transitional period.

The Department has also decided that warrants acquired by a plan before the expiration of the transitional period should not be considered binding contracts for purposes of the transitional rule. The binding contract provision of the transitional rule is intended to assure that the relief provided by that rule will remain available even where a

[39] See section 404(a)(2), 407(d)(3), and 407(b) of ERISA; see also S. Rep. No. 383, 93d Cong., 1st Sess. 32-33, 100 (1973).

[40] As originally proposed, the transitional rule required that an entity be in existence on January 4, 1985 and that no plan acquire an interest in the entity after May 8, 1985. On February 15, 1985 the Department published an amendment to the proposal which extended the expiration date to June 30, 1986.

plan makes new equity investments in an entity after the expiration of the transitional period if the plan had obligated itself to make the investment before the expiration date. If the provision were to apply where the plan merely has an option to make such additional equity investments (but is not obligated to make the investment), an issuer could effectively continue to offer interests to plans indefinitely by issuing a large amount of warrants before the expiration of the transitional period.

The assets of most of the publicly-offered real estate companies described in section 11018 of Pub. L. 99–272 would not include plan assets because plan investments in securities issued by such companies would ordinarily qualify under the publicly-offered exception in the final regulation. The statutory transitional rule also applies, however, to a few entities that, in the absence of the availability of transitional relief, might hold plan assets under the final regulation.[41]

In view of the provisions of section 11018 of Pub. L. 99–272, the effective date provision of the final regulation also provides that the regulation will not apply, except as a defense, to entities that qualify for the statutory transitional relief. Under this rule, plan investments in a publicly-offered real estate entity that is described in section 11018(a) of Pub. L. 99–272, but which do not qualify for the publicly-offered exception (because, for example, there are not 100 independent investors) would nonetheless not be subject to the regulation. Of course, this additional rule would only be applicable to investments in entities that meet all of the requirements of section 11018(a), including the requirement that interests in the entity are first offered to plans before the expiration of 120 days from the date of publication of the regulation and the requirement that the entity refrain from offerings to plans after 270 days from the date of publication of the regulation. However, since the additional rule does not apply to the extent the final regulation provides a defense, a real estate company that does qualify for the publicly-offered exception under the final regulation may rely on that exception as soon as the regulation becomes effective.

The Department has also decided that other entities that are described in the transitional rule (*i.e.*, entities in which no plan acquires an interest from an issuer or underwriter after the effective date), should also be permitted to rely on the final regulation after it becomes effective to the extent it provides a defense. Thus, for example, even though the transitional rule would be available for an operating company in which there are no new plan investments after the effective date of the final regulation (whether or not the entity is described in section 11018(a) of Pub. L. 99–272) the company's managers may nonetheless rely on the operating company exception of the regulation as a defense to allegations of misconduct by plan investors that are predicated on the managers' status as ERISA fiduciaries. In the Department's view, this rule will assure consistent treatment for similarly situated entities under the final regulation.

IX. Revision and Clarification of Interpretive Bulletin 75–2

As indicated in the preamble to the proposed regulation, the Department has revised Interpretive Bulletin 75–2 to coordinate it with the final regulation. As revised, the interpretive bulletin indicates that the rules established by the final "plan assets" regulation apply only for purposes of identifying plan assets on or after the effective date of the regulation and that the interpretive bulletin is effective for periods prior to that date and for investments that are subject to the transitional rule.

The remainder of the Interpretive Bulletin which discusses certain prohibited transactions under section 406 of ERISA (and section 4975 of the Code), is not affected by the final "plan assets" regulation. Also, the Department notes that the portion of Interpretive Bulletin 75–2 dealing with contracts or policies of insurance is not affected by the regulation being issued here.

The Department does not intend to effect any substantive change in the rules in the interpretive bulletin by making these revisions.[42]

X. Reporting and Disclosure

As noted above, the regulation will apply for purposes of the reporting and disclosure requirements of ERISA as well as to the definitional provisions of the Act and the fiduciary responsibility provisions. As indicated in the proposed regulation, the Department is aware that special difficulties are presented in reporting transactions involving collective investment funds whose assets include plan assets. In order to deal with these issues, the Department published a proposed alternative method of compliance with the reporting and disclosure requirements for entities whose assets include "plan assets."[43] The alternative method is similar to the procedure established under the statutory and regulatory provisions now governing reporting for plan assets held in bank collective trust funds, insurance company separate accounts and master trusts. The final alternative method of compliance is being published separately in today's **Federal Register.**

XI. Guaranteed Governmental Mortgage Pool Certificates

The proposed regulation indicated that the Department's existing regulation dealing with governmental mortgage pools would be redesignated and incorporated into the final plan assets regulation. Thus, paragraph (i) of the final regulation sets forth the rule relating to governmental mortgage pools that now appears at 29 CFR 2550.401b–1.

XII. Miscellaneous Issues

A. Definition of Fiduciary

Paragraph (a)(2)(ii) of the proposed regulation stated that any person who has authority or control respecting the management or disposition of the underlying assets of any entity whose assets include plan assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan.

Several commentators suggested that the Department indicate that the provision quoted above was not intended to expand the definition of fiduciary in section 3(21)(A) of ERISA and section 4975(e)(3) of the Code or to affect the principles set forth in Interpretive Bulletins 75–5 and 75–8.[44]

The final regulation is not intended to address issues relating to the kinds of activities with respect to plan assets that would cause a person to be a fiduciary. Thus, where the underlying

[41] These include entities the interests in which are not widely-held because they are held by less than 100 *independent* investors (see section 11018(a)(1)(C)(i) of Pub. L. 99–272) and certain partnerships organized prior to the enactment of Pub. L. 99–272 in which plans have acquired interests in a private placement which have a value of less than $20,000.

[42] In this regard, the Department notes that the final paragraph of Interpretive Bulletin 75–2 states that the Department would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the application of the fiduciary responsibility provisions of the Act to be in contravention of the provisions of section 404(a) of the Act. However, it is the Department's view that the mere fact a fiduciary makes or retains an investment in a corporation or partnership which does not hold plan assets under the final regulation does not mean the fiduciary has engaged in a transaction for the purposes of avoiding the application of the fiduciary responsibility rules within the meaning of the final paragraph of Interpretive Bulletin 75–2.

[43] 50 FR 3362, January 24, 1985.

[44] See 29 CFR 2509.75–5 and 2509.75–8.

assets of an entity include plan assets, determinations whether a person is a fiduciary with respect to such assets would be made under the standards set forth in section 3(21) of ERISA, and the Department's regulations, including Interpretive Bulletins 75–5 and 75–8. In this respect, the Department has, in accordance with the suggestion of one commentator, modified paragraph (a)(2) of the regulation to conform to the language of section 3(21) of ERISA.

B. Burden of Proof

In the preamble to the proposed regulation, the Department indicated that the burden of showing that the operating company exception or the significant participation exception applies, should be assigned to the person making that assertion. Some commentators objected to this observation, asserting that the Department does not have the authority to change normal judicial standards regarding burden of proof.

The observations regarding burden of proof in the preamble to the proposed regulation were not intended to effect any change in normal judicial standards relating to burden of proof, but rather to provide a clear indication of the Department's intent. The Department has also endeavored to draft the final regulation in such a way that, in practice, the burden of proof with respect to matters regarding application of the regulation will be assigned in the manner described in the preamble to the proposal.

C. Jointly Owned Property

The proposed regulation provided that where a plan owns property jointly with others, or where the value of a plan's equity interest relates solely to identified property of an entity, such property would be considered for purposes of the regulation as the sole property of a separate entity.

Some commentators suggested that where an independent investor enters into a venture with a plan pursuant to which it holds property jointly with the plan, such an independent investor is acting on its own behalf and is not, directly or indirectly, providing any investment advisory or investment management services to the plan. According to the commentators, it would be inappropriate to impose fiduciary responsibilities on the independent investor in such cases. Other commentators urged the Department to make it clear that plan "investments" in the hypothetical entity contemplated by the jointly owned property rule would be subject to the exceptions in the regulation, for example, the operating company exception.

The Department has retained the jointly owned property rule in the final regulation because it has concluded that the rule is essential in order to prevent circumvention of the other provisions of the regulation. However, the extent of any investor's fiduciary responsibilities in cases where the rule applies would depend on the kind of activities that the investor conducts with respect to the property.[45]

The Department does intend that the exceptions in the regulation would be applicable to plan investments in the hypothetical entity contemplated by the jointly owned property rule. Thus, for example, if a plan jointly owns a parcel of real property with others, that property may be considered a real estate operating company if the conditions to that exception are met.

Regulatory Flexibility Act

The Department has determined that this regulatory action would not have any significant economic effect on small plans or small business entities. First, small employee benefit plans (those with fewer than 100 participants) virtually never invest in privately placed pools such as those offered by venture capital or real estate organizations. Small plans tend to invest in pools whose certificates are publicly-offered. The underlying assets of these pools are not plan assets under the final rule. Hence, small plans would not generally be affected by the regulation. In rare instances, a small plan could lose money under the final regulation as compared to the 1985 proposal since under the final regulation a fiduciary will not be managing the plan's assets and, thus, the plan will not have a potential ERISA claim if losses occur.

Second, some smaller entities like those dependent on venture capital or real estate pools as sources of financing also have a stake in this regulation. The final regulation, however, substantially reduces the impact on most entities affected by the regulation. Most venture capital pools either do or will meet the 50 percent management test, and all such entities that accept less than 25 percent plan monies are exempt. Moreover, even if less plan money is made available, other investors are expected to fill this gap. To the extent that plan investments decrease, rates of return on these investments will increase, thereby drawing more non-plan monies into these industries. On balance, it is expected that the regulation will not substantially affect the amounts of money available to finance new ventures and real estate developments.

Executive Order 12291

The Department has determined that the final regulatory action would not constitute a "major rule" as that term is used in the Executive Order 12291 because the action would not result in: an annual effect on the economy of $100 million; a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export matters.

The Department has prepared an evaluation of the cost impact of the final regulation which states that the maximum cost impact of the regulation would be $41 million; however, the Department anticipates that the actual cost impact will be much lower.

Paperwork Reduction Act

The final plan assets regulation does not contain any new information collection requirements and does not modify any existing requirements. Some plans which have invested in entities affected by the regulation may have additional reporting requirements by virtue of the underlying assets of the entities clearly being considered plan assets, others may have less than they do currently. Since these burdens have, on average, already been included in the burden for the annual reports (Form 5500 series), the regulation will not result in any additional burden in the aggregate.

Statutory Authority

The regulation is adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and under section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979); 3 CFR Part 1978 Comp., 332, under section 11018(d), Pub. L. 99–272 (100 Stat. 82); and Under Secretary of Labor's Order No. 1–86.

List of Subjects

29 CFR Part 2509

Employee Benefit Plans, Employee Retirement Income Security Act, Fiduciaries, Pensions, Pension and Welfare Benefits Administration, Plan assets, Trusts and trustees.

[45] See the discussion regarding the definition of fiduciary at Part XII, A, above.

29 CFR Part 2510

Employee Benefit Plans, Employee Retirement Income Security Act, Pensions, Pension and Welfare Benefits Administration, Plan assets.

29 CFR Part 2550

Employee Benefit Plans, Employee Retirement Income Security Act, Employee Stock Ownership Plans, Exemptions, Fiduciaries, Investments, Investments foreign, Party in interest, Pensions, Pension and Welfare Benefits Administration, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and trustees.

For the reasons set out in the preamble, Chapter XXV of Title 29 of the Code of Federal Regulations is amended as set forth below.

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for Part 2509 is revised to read as set forth below and the authority citations following all the sections in Part 2509 are removed.

Authority: 29 U.S.C. 1135.

Section 2509.75–1 also issued under 29 U.S.C. 1114.

Section 2509.75–10 and § 2509.75–2 also issued under 29 U.S.C. 1052, 1053, 1054. Secretary of Labor's Order No. 1–86.

2. In Part 2509, § 2509.75–2 is revised to read as follows:

§ 2509.75–2 Interpretive bulletin relating to prohibited transactions.

On February 6, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75–2, with respect to whether a party in interest has engaged in a prohibited transaction with an employee benefit plan where the party in interest has engaged in a transaction with a corporation or partnership (within the meaning of section 7701 of the Internal Revenue Code of 1954) in which the plan has invested.

On November 13, 1986 the Department published a final regulation dealing with the definition of "plan assets". See § 2510.3–101 of this title. Under that regulation, the assets of certain entities in which plans invest would include "plan assets" for purposes of the fiduciary responsibility provisions of the Act. Section 2510.3–101 applies only for purposes of identifying plan assets on or after the effective date of that section, however, and § 2510.3–101 does not apply to plan investments in certain entities that qualify for the transitional relief provided for in paragraph (k) of that section. The principles discussed in paragraph (a) of this Interpretive Bulletin continue to be applicable for purposes of identifying assets of a plan for periods prior to the effective date of § 2510.3–101 and for investments that are subject to the transitional rule in § 2510.3–101(k). Paragraphs (b) and (c) of this Interpretive Bulletin, however, relate to matters outside the scope of § 2510.3–101, and nothing in that section affects the continuing application of the principles discussed in those parts.

a. *Principles applicable to plan investments to which § 2510.3–101 does not apply.* Generally, investment by a plan in securities (within the meaning of section 3(20) of the Employee Retirement Income Security Act of 1974) of a corporation or partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity "plan assets" and thereby make a subsequent transaction between the party in interest and the corporation or partnership a prohibited transaction under section 406 of the Act.

For example, where a plan acquires a security of a corporation or a limited partnership interest in a partnership, a subsequent lease or sale of property between such corporation or partnership and a party in interest will not be a prohibited transaction solely by reason of the plan's investment in the corporation or partnership.

This general proposition, as applied to corporations and partnerships, is consistent with section 401(b)(1) of the Act, relating to plan investments in investment companies registered under the Investment Company Act of 1940. Under section 401(b)(1), an investment by a plan in securities of such an investment company may be made without causing, solely by reason of such investment, any of the assets of the investment company to be considered to be assets of the plan.

(b) *Contracts or policies of insurance.* If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company will not, solely because the plan has been issued such a contract or policy of insurance, be a prohibited transaction.

(c) *Applications of the fiduciary responsibility rules.* The preceding paragraphs do not mean that an investment of plan assets in a security of a corporation or partnership may not be a prohibited transaction. For example, section 406(a)(1)(D) prohibits the direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the plan and section 406(b)(1) prohibits a fiduciary from dealing with the assets of the plan in his own interest or for his own account.

Thus, for example, if there is an arrangement under which a plan invests in, or retains its investment in, an investment company and as part of the arrangement it is expected that the investment company will purchase securities from a party in interest, such arrangement is a prohibited transaction.

Similarly, the purchase by a plan of an insurance policy pursuant to an arrangement under which it is expected that the insurance company will make a loan to a party in interest is a prohibited transaction.

Moreover, notwithstanding the foregoing, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if the plan may, by itself, require the corporation or partnership to engage in such transaction.

Similarly, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if such party in interest, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest may, with the aid of the plan but without the aid of any other persons, require the corporation or partnership to engage in such a transaction. However, the preceding sentence does not apply if the parties in interest engaging in the transaction, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest, may, by themselves, require the corporation or partnership to engage in the transaction.

Further, the Department of Labor emphasizes that it would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the application of the fiduciary responsibility provisions of the Act to be in contravention of the provisions of section 404(a) of the Act.

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

3. The authority citation for Part 2510 is revised to read as set forth below and the authority citations following all the sections in Part 2510 are removed.

Authority: Sec. 3(2), 111(c), 505, Pub. L. 93–406, 88 Stat. 852, 894, (29 U.S.C. 1002(2), 1031, 1135); Secretary of Labor's Order No. 27–74, 1–86 and Labor-Management Services Administration Order No. 2–6, unless otherwise noted.

Section 3–101 is also issued under Sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1978); 3 CFR 1978 Comp. 332, and section 11018(d) of Pub. L. 99–272, 100 Stat. 82.

4. Part 2510 is amended by adding a new § 2510.3–101 in the appropriate place to read as follows:

§ 2510.3–101 Definition of "plan assets"—plan investments.

(a) *In general.* (1) This section describes what constitute assets of a plan with respect to a plan's investment in another entity for purposes of Subtitle A, and Parts 1 and 4 of Subtitle B, of Title I of the Act and section 4975 of the Internal Revenue Code. Paragraph (a)(2) of this section contains a general rule relating to plan investments. Paragraphs

(b) through (f) of this section define certain terms that are used in the application of the general rule. Paragraph (g) of this section describes how the rules in this section are to be applied when a plan owns property jointly with others or where it acquires an equity interest whose value relates solely to identified assets of an issuer. Paragraph (h) of this section contains special rules relating to particular kinds of plan investments. Paragraph (i) describes the assets that a plan acquires when it purchases certain guaranteed mortgage certificates. Paragraph (j) of this section contains examples illustrating the operation of this section. The effective date of this section is set forth in paragraph (k) of this section.

(2) Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940 its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that—

(i) The entity is an operating company, or

(ii) Equity participation in the entity by benefit plan investors is not significant.

Therefore, any person who exercises authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan.

(b) *"Equity interests" and "publicly-offered securities"*. (1) The term "equity interest" means any interest in an entity other than an instrument that is treated as indebtedness under applicable local law and which has no substantial equity features. A profits interest in a partnership, an undivided ownership interest in property and a beneficial interest in a trust are equity interests.

(2) A "publicly-offered security" is a security that is freely transferable, part of a class of securities that is widely held and either—

(i) Part of a class of securities registered under section 12(b) or 12(g) of the Securities Exchange Act of 1934, or

(ii) Sold to the plan as part of an offering of securities to the public pursuant to an effective registration statement under the Securities Act of 1933 and the class of securities of which such security is a part is registered under the Securities Exchange Act of 1934 within 120 days (or such later time as may be allowed by the Securities and Exchange Commission) after the end of the fiscal year of the issuer during which the offering of such securities to the public occurred.

(3) For purposes of paragraph (b)(2) of this section, a class of securities is "widely-held" only if it is a class of securities that is owned by 100 or more investors independent of the issuer and of one another. A class of securities will not fail to be widely-held solely because subsequent to the initial offering the number of independent investors falls below 100 as a result of events beyond the control of the issuer.

(4) For purposes of paragraph (b)(2) of this section, whether a security is "freely transferable" is a factual question to be determined on the basis of all relevant facts and circumstances. If a security is part of an offering in which the minimum investment is $10,000 or less, however, the following factors ordinarily will not, alone or in combination, affect a finding that such securities are freely transferable:

(i) Any requirement that not less than a minimum number of shares or units of such security be transferred or assigned by any investor, provided that such requirement does not prevent transfer of all of the then remaining shares or units held by an investor;

(ii) Any prohibition against transfer or assignment of such security or rights in respect thereof to an ineligible or unsuitable investor;

(iii) Any restriction on, or prohibition against, any transfer or assignment which would either result in a termination or reclassification of the entity for federal or state tax purposes or which would violate any state or federal statute, regulation, court order, judicial decree, or rule of law;

(iv) Any requirement that reasonable transfer or administrative fees be paid in connection with a transfer or assignment;

(v) Any requirement that advance notice of a transfer or assignment be given to the entity and any requirement regarding execution of documentation evidencing such transfer or assignment (including documentation setting forth representations from either or both of the transferor or transferee as to compliance with any restriction or requirement described in this paragraph (b)(4) of this section or requiring compliance with the entity's governing instruments);

(vi) Any restriction on substitution of an assignee as a limited partner of a partnership, including a general partner consent requirement, provided that the economic benefits of ownership of the assignor may be transferred or assigned without regard to such restriction or consent (other than compliance with any other restriction described in this paragraph (b)(4)) of this section;

(vii) Any administrative procedure which establishes an effective date, or an event, such as the completion of the offering, prior to which a transfer or assignment will not be effective; and

(viii) Any limitation or restriction on transfer or assignment which is not created or imposed by the issuer or any person acting for or on behalf of such issuer.

(c) *"Operating company"*. (1) An "operating company" is an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. The term "operating company" includes an entity which is not described in the preceding sentence, but which is a "venture capital operating company" described in paragraph (d) or a "real estate operating company" described in paragraph (e).

(d) *"Venture capital operating company"*. (1) An entity is a "venture capital operating company" for the period beginning on an initial valuation date described in paragraph (d)(5)(i) and ending on the last day of the first "annual valuation period" described in paragraph (d)(5)(ii) (in the case of an entity that is not a venture capital operating company immediately before the determination) or for the 12 month period following the expiration of an "annual valuation period" described in paragraph (d)(5)(ii) (in the case of an entity that is a venture capital operating company immediately before the determination) if—

(i) On such initial valuation date, or at any time within such annual valuation period, at least 50 percent of its assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, are invested in venture capital investments described in paragraph (d)(3)(i) or derivative investments described in paragraph (d)(4); and

(ii) During such 12 month period (or during the period beginning on the initial valuation date and ending on the last day of the first annual valuation period), the entity, in the ordinary course of its business, actually exercises management rights of the kind described in paragraph (d)(3)(ii) with respect to one or more of the operating companies in which it invests.

(2)(i) A venture capital operating company described in paragraph (d)(1) shall continue to be treated as a venture capital operating company during the "distribution period" described in paragraph (d)(2)(ii). An entity shall not be treated as a venture capital operating company at any time after the end of the distribution period.

(ii) The "distribution period" referred to in paragraph (d)(2)(i) begins on a date established by a venture capital operating company that occurs after the first date on which the venture capital operating company has distributed to investors the proceeds of at least 50 percent of the highest amount of its investments (other than short-term investments made pending long-term commitment or distribution to investors) outstanding at any time from the date it commenced business (determined on the basis of the cost of such investments) and ends on the earlier of—

(A) The date on which the company makes a "new portfolio investment", or

(B) The expiration of 10 years from the beginning of the distribution period.

(iii) For purposes of paragraph (d)(2)(ii)(A), a "new portfolio investment" is an investment other than—

(A) An investment in an entity in which the venture capital operating company had an outstanding venture capital investment at the beginning of the distribution period which has continued to be outstanding at all times during the distribution period, or

(B) A short-term investment pending long-term commitment or distribution to investors.

(3)(i) For purposes of this paragraph (d) a "venture capital investment" is an investment in an operating company (other than a venture capital operating company) as to which the investor has or obtains management rights.

(ii) The term "management rights" means contractual rights directly between the investor and an operating company to substantially participate in, or substantially influence the conduct of, the management of the operating company.

(4)(i) An investment is a "derivative investment" for purposes of this paragraph (d) if it is—

(A) A venture capital investment as to which the investor's management rights have ceased in connection with a public offering of securities of the operating company to which the investment relates, or

(B) An investment that is acquired by a venture capital operating company in the ordinary course of its business in exchange for an existing venture capital investment in connection with:

(*1*) A public offering of securities of the operating company to which the existing venture capital investment relates, or

(*2*) A merger or reorganization of the operating company to which the existing venture capital investment relates, provided that such merger or reorganization is made for independent business reasons unrelated to extinguishing management rights.

(ii) An investment ceases to be a derivative investment on the later of:

(A) 10 years from the date of the acquisition of the original venture capital investment to which the derivative investment relates, or

(B) 30 months from the date on which the investment becomes a derivative investment.

(5) For purposes of this paragraph (d) and paragraph (e)—

(i) An "initial valuation date" is the later of—

(A) Any date designated by the company within the 12 month period ending with the effective date of this section, or

(B) The first date on which an entity makes an investment that is not a short-term investment of funds pending long-term commitment.

(ii) An "annual valuation period" is a preestablished annual period, not exceeding 90 days in duration, which begins no later than the anniversary of an entity's initial valuation date. An annual valuation period, once established may not be changed except for good cause unrelated to a determination under this paragraph (d) or paragraph (e).

(e) "*Real estate operating company*". An entity is a "real estate operating company" for the period beginning on an initial valuation date described in paragraph (d)(5)(i) and ending on the last day of the first "annual valuation period" described in paragraph (d)(5)(ii) (in the case of an entity that is not a real estate operating company immediately before the determination) or the expiration of an annual valuation period described in paragraph (d)(5)(ii) (in the case of an entity that is a real estate operating company immediately before the determination) if:

(1) On such initial valuation date, or on any date within such annual valuation period, at least 50 percent of its assets, valued at cost (other than short-term investments pending long-term commitment or distribution to investors), are invested in real estate which is managed or developed and with respect to which such entity has the right to substantially participate directly in the management or development activities; and

(2) During such 12 month period (or during the period beginning on the initial valuation date and ending on the last day of the first annual valuation period) such entity in the ordinary course of its business is engaged directly in real estate management or development activities.

(f) *Participation by benefit plan investors.* (1) Equity participation in an entity by benefit plan investors is "significant" on any date if, immediately after the most recent acquisition of any equity interest in the entity, 25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors (as defined in paragraph (f)(2)). For purposes of determinations pursuant to this paragraph (f), the value of any equity interests held by a person (other than a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded.

(2) A "benefit plan investor" is any of the following—

(i) Any employee benefit plan (as defined in section 3(3) of the Act), whether or not it is subject to the provisions of Title I of the Act,

(ii) Any plan described in section 4975(e)(1) of the Internal Revenue Code,

(iii) Any entity whose underlying assets include plan assets by reason of a plan's investment in the entity.

(3) An "affiliate" of a person includes any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph (f)(3), "control", with respect to a person other than an individual, means the power to exercise a controlling influence over the management or policies of such person.

(g) *Joint ownership.* For purposes of this section, where a plan jointly owns property with others, or where the value of a plan's equity interest in an entity relates solely to identified property of the entity, such property shall be treated as the sole property of a separate entity.

(h) *Specific rules relating to plan investments.* Notwithstanding any other provision of this section—

(1) Except where the entity is an investment company registered under the Investment Company Act of 1940, when a plan acquires or holds an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity:

(i) A group trust which is exempt from taxation under section 501(a) of the Internal Revenue Code pursuant to the principles of Rev. Rul. 81-100, 1981-1 C.B. 326,

(ii) A common or collective trust fund of a bank,

(iii) A separate account of an insurance company, other than a separate account that is maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account.

(2) When a plan acquires or holds an interest in any entity (other than an insurance company licensed to do business in a State) which is established or maintained for the purpose of offering or providing any benefit described in section 3(1) or section 3(2) of the Act to participants or beneficiaries of the investing plan, its assets will include its investment and an undivided interest in the underlying assets of that entity.

(3) When a plan or a related group of plans owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity. This paragraph (h)(3) does not apply, however, where all of the outstanding equity interests in an entity are qualifying employer securities described in section 407(d)(5) of the Act, owned by one or more eligible individual account plan(s) (as defined in section 407(d)(3) of the Act) maintained by the same employer, provided that substantially all of the participants in the plan(s) are, or have been, employed by the issuer of such securities or by members of a group of affiliated corporations (as determined under section 407(d)(7) of the Act) of which the issuer is a member.

(4) For purposes of paragraph (h)(3), a "related group" of employee benefit plans consists of every group of two or more employee benefit plans—

(i) Each of which receives 10 percent or more of its aggregate contributions from the same employer or from members of the same controlled group of corporations (as determined under section 1563(a) of the Internal Revenue Code, without regard to section 1563(a)(4) thereof); or

(ii) Each of which is either maintained by, or maintained pursuant to a collective bargaining agreement negotiated by, the same employee organization or affiliated employee organizations. For purposes of this paragraph, an "affiliate" of an employee organization means any person controlling, controlled by, or under common control with such organization, and includes any organization chartered by the same parent body, or governed by the same constitution and bylaws, or having the relation of parent and subordinate.

(i) *Governmental mortgage pools.* (1) Where a plan acquires a guaranteed governmental mortgage pool certificate, as defined in paragraph (i)(2), the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate.

(2) A "guaranteed governmental mortgage pool certificate" is a certificate backed by, or evidencing an interest in, specified mortgages or participation interests therein and with respect to which interest and principal payable pursuant to the certificate is guaranteed by the United States or an agency or instrumentality thereof. The term "guaranteed governmental mortgage pool certificate" includes a mortgage pool certificate with respect to which interest and principal payable pursuant to the certificate is guaranteed by:

(i) The Government National Mortgage Association;

(ii) The Federal Home Loan Mortgage Corporation; or

(iii) The Federal National Mortgage Association.

(j) *Examples.* The principles of this section are illustrated by the following examples:

(1) A plan, P, acquires debentures issued by a corporation, T, pursuant to a private offering. T is engaged primarily in investing and reinvesting in precious metals on behalf of its shareholders, all of which are benefit plan investors. By its terms, the debenture is convertible to common stock of T at P's option. At the time of P's acquisition of the debentures, the conversion feature is incidental to T's obligation to pay interest and principal. Although T is not an operating company, P's assets do not include an interest in the underlying assets of T because P has not acquired an *equity* interest in T. However, if P exercises its option to convert the debentures to common stock, it will have acquired an equity interest in T at that time and (assuming that the common stock is not a publicly-offered security and that there has been no change in the composition of the other equity investors in T) P's assets would then include an undivided interest in the underlying assets of T.

(2) A plan, P, acquires a limited partnership interest in a limited partnership, U, which is established and maintained by A, a general partner in U. U has only one class of limited partnership interests. U is engaged in the business of investing and reinvesting in securities. Limited partnership interests in U are offered privately pursuant to an exemption from the registration requirements of the Securities Act of 1933. P acquires 15 percent of the value of all the outstanding limited partnership interests in U, and, at the time of P's investment, a governmental plan owns 15 percent of the value of those interests. U is not an operating company because it is engaged primarily in the investment of capital. In addition, equity participation by benefit plan investors is significant because immediately after P's investment such investors hold more than 25 percent of the limited partnership interests in U. Accordingly, P's assets include an undivided interest in the underlying assets of U, and A is a fiduciary of P with respect to such assets by reason of its discretionary authority and control over U's assets. Although the governmental plan's investment is taken into account for purposes of determining whether equity participation by benefit plan investors is significant, nothing in this section imposes fiduciary obligations on A with respect to that plan.

(3) Assume the same facts as in paragraph (j)(2), except that P acquires only 5 percent of the value of all the outstanding limited partnership interests in U, and that benefit plan investors in the aggregate hold only 10 percent of the value of the limited partnership interests in U. Under these facts, there is no significant equity participation by benefit plan investors in U, and, accordingly, P's assets include its limited partnership interest in U, but do not include any of the underlying assets of U. Thus, A would not be a fiduciary of P by reason of P's investment.

(4) Assume the same facts as in paragraph (j)(3) and that the aggregate value of the outstanding limited partnership interests in U is $10,000 (and that the value of the interests held by benefit plan investors is thus $1000). Also assume that an affiliate of A owns limited partnership interests in U having a value of $6500. The value of the limited partnership interests held by A's affiliate are disregarded for purposes of determining whether there is significant equity participation in U by benefit plan investors. Thus, the percentage of the aggregate value of the limited partnership interests held by benefit plan investors in U for purposes of such a determination is approximately 28.6% ($1000/$3500). Therefore there is significant benefit plan investment in T.

(5) A plan, P, invests in a limited partnership, V, pursuant to a private offering. There is significant equity participation by benefit plan investors in V. V acquires equity positions in the companies in which it invests, and, in connection with these investments, V negotiates terms that give it the right to participate in or influence the management of those companies. Some of these investments are in publicly-offered securities and some are in securities acquired in private offerings. During its most recent valuation period, more than 50 percent of V's assets, valued at cost, consisted of investments with respect to which V obtained management rights of the kind described above. V's managers routinely

consult informally with, and advise, the management of only one portfolio company with respect to which it has management rights, although it devotes substantial resources to its consultations with that company. With respect to the other portfolio companies, V relies on the managers of other entities to consult with and advise the companies' management. V is a venture capital operating company and therefore P has acquired its limited partnership investment, but has not acquired an interest in any of the underlying assets of V. Thus, none of the managers of V would be fiduciaries with respect to P solely by reason of its investment. In this situation, the mere fact that V does not participate in or influence the management of all its portfolio companies does not affect its characterization as a venture capital operating company.

(6) Assume the same facts as in paragraph (j)(5) and the following additional facts: V invests in debt securities as well as equity securities of its portfolio companies. In some cases V makes debt investments in companies in which it also has an equity investment; in other cases V only invests in debt instruments of the portfolio company. V's debt investments are acquired pursuant to private offerings and V negotiates covenants that give it the right to substantially participate in or to substantially influence the conduct of the management of the companies issuing the obligations. These covenants give V more significant rights with respect to the portfolio companies' management than the covenants ordinarily found in debt instruments of established, creditworthy companies that are purchased privately by institutional investors. V routinely consults with and advises the management of its portfolio companies. The mere fact that V's investments in portfolio companies are debt, rather than equity, will not cause V to fail to be a venture capital operating company, provided it actually obtains the right to substantially participate in or influence the conduct of the management of its portfolio companies and provided that in the ordinary course of its business it actually exercises those rights.

(7) A plan, P, invests (pursuant to a private offering) in a limited partnership, W, that is engaged primarily in investing and reinvesting assets in equity positions in real property. The properties acquired by W are subject to long-term leases under which substantially all management and maintenance activities with respect to the property are the responsibility of the lessee. W is not engaged in the management or development of real estate merely because it assumes the risks of ownership of income-producing real property, and W is not a real estate operating company. If there is significant equity participation in W by benefit plan investors, P will be considered to have acquired an undivided interest in each of the underlying assets of W.

(8) Assume the same facts as in paragraph (j)(7) except that W owns several shopping centers in which individual stores are leased for relatively short periods to various merchants (rather than owning properties subject to long-term leases under which substantially all management and maintenance activities are the responsibility of the lessee). W retains independent contractors to manage the shopping center properties. These independent contractors negotiate individual leases, maintain the common areas and conduct maintenance activities with respect to the properties. W has the responsibility to supervise and the authority to terminate the independent contractors. During its most recent valuation period more than 50 percent of W's assets, valued at cost, are invested in such properties. W is a real estate operating company. The fact that W does not have its own employees who engage in day-to-day management and development activities is only one factor in determining whether it is actively managing or developing real estate. Thus, P's assets include its interest in W, but do not include any of the underlying assets of W.

(9) A plan, P, acquires a limited partnership interest in X pursuant to a private offering. There is significant equity participation in X by benefit plan investors. X is engaged in the business of making "convertible loans" which are structured as follows: X lends a specified percentage of the cost of acquiring real property to a borrower who provides the remaining capital needed to make the acquisition. This loan is secured by a mortgage on the property. Under the terms of the loan, X is entitled to receive a fixed rate of interest payable out of the initial cash flow from the property and is also entitled to that portion of any additional cash flow which is equal to the percentage of the acquisition cost that is financed by its loan. Simultaneously with the making of the loan, the borrower also gives X an option to purchase an interest in the property for the original principal amount of the loan at the expiration of its initial term. X's percentage interest in the property, if it exercises this option, would be equal to the percentage of the acquisition cost of the property which is financed by its loan. The parties to the transaction contemplate that the option ordinarily will be exercised at the expiration of the loan term if the property has appreciated in value. X and the borrower also agree that, if the option is exercised, they will form a limited partnership to hold the property. X negotiates loan terms which give it rights to substantially influence, or to substantially participate in, the management of the property which is acquired with the proceeds of the loan. These loan terms give X significantly greater rights to participate in the management of the property than it would obtain under a conventional mortgage loan. In addition, under the terms of the loan, X and the borrower ratably share any capital expenditures relating to the property. During its most recent valuation period, more than 50 percent of the value of X's assets valued at cost consisted of real estate investments of the kind described above. X, in the ordinary course of its business, routinely exercises its management rights and frequently consults with and advises the borrower and the property manager. Under these facts, X is a real estate operating company. Thus, P's assets include its interest in X, but do not include any of the underlying assets of X.

(10) In a private transaction, a plan, P, acquires a 30 percent participation in a debt instrument that is held by a bank. Since the value of the participation certificate relates solely to the debt instrument, that debt instrument is, under paragraph (g), treated as the sole asset of a separate entity. Equity participation in that entity by benefit plan investors is significant since the value of the plan's participation exceeds 25 percent of the value of the instrument. In addition, the hypothetical entity is not an operating company because it is primarily engaged in the investment of capital (*i.e.*, holding the debt instrument). Thus, P's assets include the participation and an undivided interest in the debt instrument, and the bank is a fiduciary of P to the extent it has discretionary authority or control over the debt instrument.

(11) In a private transaction, a plan, P, acquires 30% of the value of a class of equity securities issued by an operating company, Y. These securities provide that dividends shall be paid solely out of earnings attributable to certain tracts of undeveloped land that are held by Y for investment. Under paragraph (g), the property is treated as the sole asset of a separate entity. Thus, even though Y is an operating company, the hypothetical entity whose sole assets are the undeveloped tracts of land is not an operating company. Accordingly, P is considered to have acquired an undivided interest in the tracts of land held by Y. Thus, Y would be a fiduciary of P to the extent it exercises discretionary authority or control over such property.

(12) A medical benefit plan, P, acquires a beneficial interest in a trust, Z, that is not an insurance company licensed to do business in a State. Under this arrangement, Z will provide the benefits to the participants and beneficiaries of P that are promised under the terms of the plan. Under paragraph (h)(2), P's assets include its beneficial interest in Z and an undivided interest in each of its underlying assets. Thus, persons with discretionary authority or control over the assets of Z would be fiduciaries of P.

(k) *Effective date and transitional rules.* (1) In general, this section is effective for purposes of identifying the assets of a plan on or after March 13, 1987. Except as a defense, this section shall not apply to investments in an entity in existence on March 13, 1987, if no plan subject to Title I of the Act or plan described in section 4975(e)(1) of the Code (other than a plan described in section 4975(g)(2) or 4975(g)(3)) acquires an interest in the entity from an issuer or underwriter at any time on or after March 13, 1987 except pursuant to a contract binding on the plan in effect on March 13, 1987 with an issuer of underwriter to acquire an interest in the entity.

(2) Notwithstanding paragraph (k)(1), this section shall not, except as a defense, apply to a real estate entity described in section 11018(a) of Pub. L. 99–272.

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

5. The authority citation for Part 2550 is revised to read as set forth below and the authority citations following all the sections in Part 2550 are removed.

Authority: 29 U.S.C. 1135.

Section 2550.407c–3 also issued under 29 U.S.C. 1107.

Section 2550.412–1 also issued under 29 U.S.C. 1112. Section 2550.414b–1 also issued under 29 U.S.C. 1114.

Secretary of Labor Order No. 1–86.

6. Part 2550 is amended by removing § 2550.401b–1.

Signed at Washington, DC, this 6th day of November, 1986.

Dennis M. Kass.

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 86–25512 Filed 11–12–86; 8:45 am]

BILLING CODE 4510–29–M

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29 CFR Part 2520

Exemption and Alternative Method of Annual Reporting for Plans Investing in Certain Entities

AGENCY: Department of Labor.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) which would provide a limited exemption from the reporting and disclosure requirements of ERISA and an alternative method of annual reporting for plan investments in certain entities. Under a final regulation published elsewhere in today's **Federal Register**, the assets of certain entities in which plans invest would be deemed to include plan assets. This regulation will facilitate the reporting of financial information by plans with respect to investments in such entities.

DATE: The final regulation will be effective March 13, 1987, and will apply to plan years ending on or after that date.

FOR FURTHER INFORMATION CONTACT: George M. Holmes, Jr., Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 523–8515 (not a toll free number) or Daniel J. Maguire, Esq., Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, (202) 523–9595 (not a toll free number).

SUPPLEMENTARY INFORMATION:

A. Background

This document adopts a final regulation which provides an alternative method of compliance for plan investments in entities which would hold "plan assets" under the Department's final regulation defining that term which is published separately in today's **Federal Register.**[1]

Under the Department of Labor's final regulations relating to the term "plan assets", when a plan invests in certain entities its assets are considered to include an undivided interest in each of the underlying assets of the entity for purposes of the reporting and disclosure and fiduciary responsibility provisions of ERISA.[2] This "look-through" rule applies in cases where the plan, although nominally investing in another entity, is as a practical matter retaining the persons managing the entity to provide investment management services to the plan.

In cases where the "look-through" rule of the plan assets regulation applies, information regarding both the plan's investment and the underlying assets of the entity to which the investment relates would have to be included as part of the plan's annual report required by sections 103 and 104 of ERISA to be filed with the Department and made available to plan participants and beneficiaries. In these circumstances, the plan administrator would, in the absence of a reporting alternative, be responsible for obtaining detailed information about the underlying assets of the entity and about certain transactions to which the entity is a party. The alternative method of reporting is intended to reduce the burden of complying with these annual reporting requirements. As discussed in more detail below, the Department received only two comments on the proposed reporting alternative, and the Department has decided to adopt it in the form proposed.

B. Description of the Reporting Alternative

The reporting alternative will be codified at 29 CFR 2520.103–12. Under paragraph (a) of that section, the plan administrator need not include in the plan's annual report any information regarding the underlying assets and individual transactions of an entity the assets of which include plan assets; instead, the administrator is required to report only the value of the plan's investment or units of participation in the entity on the appropriate reporting form (Form 5500 Series), in the manner prescribed in the instructions to the form. As a condition to using this alternative, however, certain information regarding the entity must be filed directly with the Secretary on behalf of the plan administrator no later than the date on which the plan's annual report is due.[3] Such information, described in paragraph (b) of the regulation, relates primarily to the financial condition of the entity for its fiscal year ending with or within the plan year for which the plan's annual report is made. Although this information would not be included with the form filed by the plan administrator, it would, nevertheless, constitute part of the plan's annual report for purposes of the reporting and disclosure requirements of ERISA.

ERISA requires a plan administrator to engage an independent public accountant to examine and provide an opinion with respect to the financial statements and schedules included in the plan's annual report. The information with respect to an entity which is required to be reported to the Department under the reporting alternative also includes a report of an independent public accountant. In this respect, the Department is amending 29 CFR 2520.103–1 to make it clear that an independent public accountant, in conducting the required audit of a plan that uses the reporting alternative, would be permitted to omit certain procedures which the accountant might ordinarily use in the course of an audit made for the purpose of expressing the opinions required by ERISA. In particular, the regulation would allow the plan's accountant to limit the scope of his opinion by relying on the entity's financial report which has been certified by an independent accountant in a

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[1] The reporting alternative that is being adopted here was proposed on January 24, 1985 (50 FR 3362). The plan assets regulation to which it relates was published as a proposed regulation on January 8, 1985 (50 FR 961) and modified by a notice published on February 15, 1985 (50 FR 6361).

[2] The plan assets regulation is codified at 29 CFR 2510.3–101.

[3] This alternative permits the plan administrator and the manager of the entity to develop a suitable procedure whereby the plan administrator can establish to his satisfaction that the Department will receive, on behalf of the plan, all the information required in paragraph (b) of the alternative regarding the assets of the entity. The alternative does not contain any detailed rules relating to the exchange of information between the plan and the entity or the certification as to the accuracy of such information. The alternative does not, of course, affect a plan administrator's responsibility to monitor the conduct of the entity manager and to obtain whatever financial information concerning the entity that is necessary for the administrator to perform his duties under ERISA.

manner which satisfies the standards in 29 CFR 2520.103-1.[4]

C. Discussion of Comments

The Department received two letters of comment in response to the proposal. One commentator urged the Department to adopt the proposed reporting alternative in final form as quickly as possible. The commentator noted that until such time as the proposal is adopted, a plan which invests in an entity the assets of which include plan assets must file information regarding both the plan's investment in the entity and such plan's interest in the underlying assets of the entity as part of such plan's annual report. The commentator indicated that a plan's reporting in this manner would be of questionable value.

In order to assure that the reporting alternative will be available to plans and other entities that are affected by the Department's final regulation defining the term "plan assets", the Department has made the reporting alternative effective for plan years ending on or after the later of January 1, 1987 or 120 days after publication in order to confor? to the effective date of the plan assets regulation.[5] Thus, the reporting alternative will be available to persons affected by the plan assets regulation at all times after the effective date of that regulation. In this respect, the Department is engaged in a comprehensive review of the annual reporting forms under the reporting and disclosure provisions of ERISA, and it anticipates that revised forms will be available for plan years beginning in 1987. The Department also anticipates that these revised forms will reflect the availability of the reporting alternative. For plan years beginning in 1986, plans may make use of the reporting alternative by disclosing the value of any investment to which the look-through rule of the plan assets regulation applies and by assuring that the manager of the entity to which the investment relates files the information contemplated by the reporting alternative directly with the Department.

Another commentator asserted that the proposal did not clearly indicate how to report information when a pooled trust in which plans invest makes an equity investment in another entity (a "subentity") which holds title to real estate. The commentator noted that this is particularly a problem when the subentity is a real estate partnership the assets of which are managed and controlled by a partner other than the pooled trust. The commentator stated that the pooled trust could report to its investing plans on the assets and liabilities of the partnership, but that the trust would not necessarily be in a position to report information, particularly regarding disbursement activities, with respect to the details of operation of the underlying real estate assets of the partnership even if the subentity is required to distribute audited financial statements to its investors. The commentator suggested that an entity which holds plan assets by reason of direct plan investment should only be required to report the information specified in proposed regulation § 2520.103-12 at the subentity level when the reporting entity either (i) has or had the power and responsibility to negotiate the terms and conditions establishing such subentity or (ii) has or had the power and authority to substantially influence the operation or management of that subentity.

In the Department's view, the extent to which an entity holding plan assets would submit information concerning the underlying assets of subentities depends on the characterization of the assets of the subentity under the final plan assets regulation. If the assets of the subentity do not include plan assets—for example, because the subentity is an operating company of the kind described in the regulation—then the entity in which the plan has invested would only report the value of its investment in the subentity. If, on the other hand, the assets of a subentity do include plan assets, information regarding the underlying assets of the subentity would have to be provided to the plan or reported pursuant to the alternative method of compliance.

In this respect, the Department notes that, under paragraph (c), the reporting alternative is available with respect to any plan investment in an entity whose assets include plan assets under the Department's plan assets regulation provided two or more unrelated plans have invested in the entity. The Department intends that this would include situations where the plan has invested indirectly in a subentity whose assets include plan assets.

Finally, the Department has made a minor change to the definition of "related group of plans" to conform that portion of the definition relating to "affiliated employee organizations" to that contained in the Department's final plan assets regulation.

D. Departmental Findings

The reporting alternative is issued under section 110 of ERISA which authorizes alternative methods of compliance with the reporting and disclosure requirements applicable to pension plans and under section 104(a)(3) of ERISA which authorizes the Department to exempt any welfare plan from all or part of the reporting and disclosure requirements of Title I of ERISA or to provide for simplified reporting and disclosure.

With respect to pension plans, section 110 of ERISA permits the Department to prescribe alternative methods of complying with any of the reporting and disclosure requirements of ERISA if it finds: (1) That the use of the alternative is consistent with the purposes of ERISA and that it provides adequate disclosure to plan participants and beneficiaries and to the Department; (2) that application of the statutory reporting and disclosure requirements would increase the costs to the plan or impose unreasonable administrative burdens with respect to the operation of the plan; and (3) that the application of the statutory reporting and disclosure requirements would be adverse to the interests of plan participants in the aggregate.

With respect to the first requirement, the reporting alternative is intended to establish a reporting method for investments to which the "look-through" rule of the plan assets regulation applies that is comparable to the method established by the Department for other kinds of collective investment arrangements.[6] Thus, the Department has concluded that the reporting alternative will provide more meaningful disclosure to participants and to the Department than would be the case if the statutory requirements were applied. The Department has also concluded that the reporting alternative is consistent with the purposes of ERISA because it results in consistent reporting of collective investment arrangements involving plans.

With respect to the second factor, the Department has determined that application of the statutory annual reporting requirements without modification would impose an unreasonable administrative burden on

[4] In general, 29 CFR 2520.103-1(b)(5) requires that an accountant's report must state whether the audit has been conducted in accordance with generally accepted auditing standards and must contain the accountant's opinion with respect to the financial statements and schedules covered by the report.

[5] In general, the effective date of the plan assets regulation will be no earlier than January 1, 1987.

[6] See section 103(b)(3)(G) of ERISA and 29 CFR 2520.103-1(e) (assets held in master trusts); 29 CFR 2520.103-3 (assets held in common or collective trusts); 29 CFR 2520.103-4 (assets held in insurance company pooled separate accounts).

plans because it would be extremely difficult for plan administrators to identify and report the value of the plan's ratable interest in each of the underlying assets of an entity in which it invests in cases where the assets of the entity include plan assets.

Finally, based on the above, the Department has determined that application of statutory requirements without the availability of an alternative reporting method would be adverse to the interests of the participants and beneficiaries of such plans.

The reporting alternative also applies to welfare plans, and, insofar as it is applicable to such plans, it is being issued under section 104(a)(3) of ERISA. That section states that the Secretary may exempt any welfare plan from all or part of the reporting and disclosure requirements if he finds such requirements to be inappropriate. The Department has determined that application of the statutory reporting requirements in cases where the "look-through" rule of the plan assets regulation applies would also be inappropriate in the context of welfare plans for the reasons discussed above in the context of pension plans.

Regulatory Flexibility Act

For the purpose of analyzing the effect of the final regulation, small entities were defined as employee benefit plans covering fewer than 100 persons. While some larger employers have small plans, in general, most small plans are maintained by small businesses. Therefore, assessing the regulation's impact on small plans is an appropriate substitute for evaluating its effects on small entities.

This regulation will provide administrators of employee benefit plans with a less burdensome and less costly means of complying with the annual reporting requirements under Title I of ERISA where a plan invests in certain entities the underlying assets of which include plan assets. Based on an informal review of plan investment practices, it was determined that typically only those plans with $7 million or more in assets invest in the types of entities which generally would be considered to be holding plan assets. Based on data derived from the Form 5500 annual return/reports, less than 0.02 percent of plans covering fewer than 100 persons have assets of $7 million or more.

In addition, available data indicates that very few of the entities in which plans invest would be considered small entities. Based on available data, it appears that approximately $1 billion of plan monies are invested in entities which may be considered to be holding plan assets. While the range of total dollars (plan and non-plan) invested per entity varies from $1 million to over $500 million, data suggests that few entities handling plan assets would fall within the lower dollar ranges (i.e., $1 million to $10 million).

For the above reasons, the undersigned hereby certifies under section 605(b) of the Regulatory Flexibility Act that this regulation will not have a significant economic impact on a substantial number of small plans or small entities in which such plans might invest. Therefore, compliance with sections 603 and 604 of the Regulatory Flexibility Act is waived.

Executive Order 12291

The Department has determined that this regulation is not a "major rule" as that term is used in Executive Order 12291 because the regulation will not result in: an annual effect on the economy of $100 million; a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. This conclusion is based on the fact that this regulation, rather than increasing costs and burdens on employee benefit plans or entities in which they might invest, will provide administrators of plans which invest in certain entities (i.e., entities the underlying assets of which are considered to include plan assets) with a less burdensome and costly means of complying with the statutory requirement to file annual reports with the Secretary.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the reporting provisions that are included in this regulation have been submitted to the Office of Management and Budget for its review and approval.

Statutory Authority

The regulation is adopted pursuant to the authority contained in sections 104, 110, and 505 of ERISA (Pub. L. 93-406; 88 Stat. 894; 29 U.S.C. 1024, 1030 and 1135).

List of Subjects in 29 CFR Part 2520

Accountants, Actuaries, Disclosure requirements, Employee Benefit Plans, Employee Retirement Income Security Act, Health insurance, Life insurance, Pensions, Pension and Welfare Benefits Administration, Reporting requirements.

Final Regulation

For the reasons set out in the preamble, Chapter XXV of Title 29 of the Code of Federal Regulations is amended as set forth below.

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

1. The authority citation for Part 2520 is revised to read as set forth below and the authority citations following all the sections in Part 2520 are removed.

Authority: Secs. 101, 102, 103, 104, 105, 109, 110, 111(b)(2), 111(c), 505, Pub. L. 93-406, 88 Stat. 840-52, 894 (29 U.S.C. 1021-25, 1029-31, 1135); Secretary of Labor's Order No. 27-74, No. 13-76, No. 1-86; Labor-Management Services Administration Order No. 2-6.

2. Part 2520 is amended by adding a new § 2520.103-12 to Subpart C in the appropriate place to read as follows:

§ 2520.103-12 Limited exemption and alternative method of compliance for annual reporting of investments in certain entities.

(a) This section prescribes an exemption from and alternative method of compliance with the annual reporting requirements of Part 1 of Title I of ERISA for employee benefit plans whose assets are invested in certain entities described in paragraph (c). A plan utilizing this method of reporting shall include as part of its annual report the current value of its investment or units of participation in the entity in the manner prescribed by the Return/Report Form and the instructions thereto. The plan is not required to include in its annual report any information regarding the underlying assets or individual transactions of the entity, provided the information described in paragraph (b) regarding the entity is reported directly to the Department on behalf of the plan administrator no later than the date on which the plan's annual report is due. The information described in paragraph (b), however, shall be considered as part of the annual report for purposes of the requirements of § 104(a)(1)(A) of the Act and §§ 2520.104a-5 and 2520.104a-6.

(b) The following information regarding the entity must be reported for the fiscal year of the entity ending with or within the plan year for which the plan's annual report is made:

(1) Name, Address and EIN of the entity;

(2) A list of all plans investing in the entity identified by plan name, plan number, and name and EIN of the plan

sponsor as they appear on the annual return/report;

(3) Annual statement of assets and liabilities of the entity;

(4) Statement of income and expenses of the entity;

(5) Assets held for investment (including acquisitions and dispositions), leases and obligations in default, and compensation paid by the entity for services—in the manner required by the instructions to the Annual Return/Report Form 5500;

(6) Report of an independent qualified public accountant regarding the statements and schedules described in paragraphs (b)(2)–(5) of this section which meets the requirements of § 2520.103–1(b)(5).

(c) This method of reporting is available to any employee benefit plan which has invested in an entity the assets of which are deemed to include plan assets under § 2510.3–101, provided the entity holds the assets of two or more plans which are not members of a "related group" of employee benefit plans as that term is defined in paragraph (e) of this section. The method of reporting is not available for investments in an insurance company pooled separate account or a common or collective trust maintained by a bank, trust company, or similar institution.

(d) The examination and report of an independent qualified public accountant required by § 2520.103–1 for a plan utilizing the method of reporting described in this section need not extend to any information concerning an entity which is reported directly to the Department under paragraph (b) of this section.

(e) A "related group" of employee benefit plans consists of every group of two or more employee benefit plans—

(1) Each of which receives 10 percent or more of its aggregate contributions from the same employer or from members of the same controlled group of corporations (as determined under section 1563(a) of the Internal Revenue Code, without regard to section 1563(a)(4) thereof); or

(2) Each of which is either maintained by, or maintained pursuant to a collective bargaining agreement negotiated by, the same employee organization or affiliated employee organizations. For purposes of this paragraph, an "affiliate" of an employee organization means any person controlling, controlled by, or under common control with such organization, and includes any organization chartered by the same parent body, or governed by the same constitution and bylaws, or having the relation of parent and subordinate.

3. Section 2520.103–1(b)(5)(ii)(B) is revised to read as follows: Contents of the annual report.

* * * * *

(b) * * *

(5) * * *

(ii) * * *

(B) Shall designate any auditing procedures deemed necessary by the accountant under the circumstances of the particular case which have been omitted, and the reasons for their omission. Authority for the omission of certain procedures which independent accountants might ordinarily employ in the course of an audit made for the purpose of expressing the opinions required by paragraph (b)(5)(iii) of this section is contained in §§ 2520.103–8 and 2520.103–12.

* * * * *

Signed at Washington, DC, this 6th day of November, 1986.

Dennis M. Kass,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 86–25513 Filed 11–12–86; 8:45 am]

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federal register

Thursday
November 13, 1986

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Part 159

Carriage of Weapons and Other Dangerous Objects at Washington National Airport and Washington Dulles International Airport; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 159

[Docket No. 25123; Notice No. 86-18]

Carriage of Weapons and Other Dangerous Objects at Washington National Airport and Washington Dulles International Airport

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to clarify the rule governing the carriage of weapons and other dangerous objects on Washington National Airport and Washington Dulles International Airport so that it more closely conforms to Federal Aviation Regulations governing aviation security and to existing local gun control ordinances. These clarifications would make it easier for the traveling public to comply with the airports' rule without compromising airport security.

DATES: Comments must be received on or before January 12, 1987.

ADDRESSES: Comments on the proposal may be mailed in duplicate to: Federal Aviation Administration, Office of Chief Counsel, Attention, Rules Docket (AGC-204). Docket No. 25123, 800 Independence Avenue, SW. Washington, DC 20591.

Or delivered in duplicate to: Room 915G, 800 Independence Avenue, SW., Washington, DC 20591.

Comments must be marked: Docket No. 25123.

Comments received may be inspected at Room 915G between 8:30 a.m. and 5:00 p.m., Monday through Friday, except for Federal holidays.

FOR FURTHER INFORMATION CONTACT: Edward S. Faggen, or Jana E. McIntyre, Legal Counsel, AMA-7, Hangar 9, Washington National Airport, Washington, DC 20001, Telephone: (703) 557-8123.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in this proposed rulemaking action by submitting written data, views or arguments. Communications should identify the regulatory docket and notice number and be submitted in duplicate to the Rules Docket at the address above. All communications received on or before the closing date for comments will be considered by the Administrator before taking further rulemaking action. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 25123." The postcard will be date/time stamped and returned to the commenter. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public comment with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center (APA-430), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 426-8058. Communications must identify the notice number of this NPRM.

Persons interested in being placed on the mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

Washington National Airport and Washington Dulles International Airport (the "Airports") are owned and operated by the Federal Government. The Secretary of Transportation has control over and responsibility for the care, operation, maintenance, and protection of the airports, and the authority to promulgate rules and regulations necessary for this purpose. This authority has been delegated to the Administrator of the Federal Aviation Administration.

Existing FAA regulation 14 CFR 159.79(a) prohibits any person, except a Peace Officer, an authorized post office, Airport, or air carrier employee, or a member of an Armed Force on official duty, from carrying any weapon, explosive or inflammable material on or about his person, openly or concealed, on the airports without the written permission of the airport manager. This rule was adopted by the FAA on September 22, 1962 (27 FR 9444) and was designed to assist airport law enforcement and security efforts by maintaining tight control over the presence of weapons and other dangerous objects on the airports.

The existing rule has created confusion among persons who are carrying weapons on the airport for the lawful purpose of checking these weapons with their baggage or who are carrying them after retrieving them from lawfully checked baggage. The Federal Aviation Regulations (FAR) forbid the carriage of weapons on or about an individual's person or accessible property when that person enters the sterile area of an airport (§ 107.21), the area behind the security screening point. The rules, however, do allow air carriers to develop their own rules permitting passengers to ship unloaded weapons aboard the aircraft. Among other requirements, the weapons must be carried in a container deemed by the carrier to be appropriate for air transportation and the weapons must be placed in an area of the aircraft that is inaccessible to passengers (§ 108.11(d)). Many passengers, although aware of these security regulations, are unaware that they may be prosecuted if they fail to have the airport manager's permission to carry weapons in securely packed baggage onto any area of Washington National Airport or Washington Dulles International Airport, including the terminals, for the purpose of checking them in an inaccessible part of the aircraft. It should be noted that historically the rule has not been used to prosecute individuals who are carrying a weapon to be checked as baggage and who do not otherwise enter a secured area. The potential exists, however, for prosecuting for a federal misdemeanor persons who possess weapons on the airport as baggage incident to legitimate air travel either before checking their baggage aboard an air carrier or after retrieving it from a carrier, but who do not have the airport manager's permission to have the weapon on the airport.

Persons carrying weapons properly prepared for air transportation do not pose a threat to the security of the airport because their weapons are unloaded and carried in containers which are suitable for air transportation. Weapons prepared in this manner are not immediately accessible. Therefore, the FAA is considering clarifying the existing rule to make it explicitly inapplicable to these persons. The FAA's goal is to control weapons on the airport and preserve the airport's security in a practical manner, but at the same time not unduly burden travelers.

The Proposed Revisions

FAA proposes to permit persons to bring weapons on or about their persons onto Washington National or Washington Dulles International Airports only if the weapons are unloaded or deactivated, if possible, and are packed in a secure container for shipment. Permission of the manager would not be required. However, all loaded or activated weapons, and all openly carried weapons not securely packed for shipment would be prohibited on the airports unless otherwise permitted by the airport manager. The proposed rule is intended to control the presence of weapons on the airports, but not unduly interfere with the legitimate shipment of weapons. Once a person reaches a security screening point or enters a sterile area, however, there is no legitimate reason to carry a weapon. Therefore, the proposed rule would prohibit persons from carrying even unloaded, securely packaged weapons when inspection has begun before entering a sterile area or while in a sterile area. Persons who violate the rule would be subject to criminal prosecution for a misdemeanor or to a civil enforcement action under the FAA's administrative procedures.

The current rule refers to weapons "on or about his person." The proposed rule would add "or accessible property." While the FAA considers accessible property to be carried "about the person," placing this language in the rule is intended to foreclose any arguments to the contrary.

The proposed rule would define "unloaded" to mean that a firearm has no live round of ammunition, cartridge, detonator or powder in the chamber or in a clip, magazine or cylinder inserted in it. By requiring that the firearm be unloaded, it would not be possible for the firearm to discharge if the package in which it is being carried is accidentally dropped. Further, a firearm which is unloaded under this definition would be more difficult to use, because it would take time to load it.

The proposed rule is similar to many of the local ordinances governing carriage of weapons, such as the District of Columbia's ordinance (D.C. Code section 22-3204). For this reason, the proposed rule would be less likely to be a surprise to airport patrons. The D.C. and other local ordinances have been developed to control the carriage of weapons in a congested city environment. This environment is comparable to the busy and often congested environment at the airport's where the open display of weapons could alarm or endanger large numbers of persons.

It is anticipated that the proposed rule would achieve the FAA's goals of maintaining airport security in a practical manner. Passengers who are carrying weapons on the airports which are securely packaged with the intent to meet the conditions developed by the air carriers under § 108.11(d) for carriage of weapons aboard aircraft could not be viewed as being in violation of the airports' weapon rule unless they attempt to pass through a security checkpoint with the weapon. The proposed rule would permit law enforcement officials to continue to enforce the airport's rules against individuals who breach the security screening points with a weapon. Persons who attempt to breach the security screening points or sterile areas with weapons may also be charged with violation of § 107.21 or 49 U.S.C. 1472(l)(1).

It also should be noted that compliance with the airport's proposed rule would not automatically mean that the weapon would meet the air carriers' own security requirements regarding weapons. Individual air carrier security rules may be more restrictive concerning the weapons that may be carried on the aircraft and the containers in which they may be stored. The carrier should always be consulted prior to bringing a securely packaged weapon on the airport.

Carriage of Explosive and Incendiary Materials on the Airports

The proposed rule would retain the existing requirement that all persons must obtain the written permission of the airport manager prior to bringing any explosive or incendiary on the airport on or about their persons in either an open or a concealed fashion. Enforcement of this portion of the existing rule has posed few problems for the airports. Since these materials are carried less frequently by airport partrons than weapons, compliance with this portion of the rule has not been shown to be difficult for airport patrons. Control over these substances is necessary for airport security because of the inherently dangerous nature of these materials. Shippers of these materials who properly package them and transport them through authorized shipping practices would not be deemed to have these materials "on or about their person," however.

Exemption of Law Enforcement Officers

The existing rule exempts Peace Officers, authorized post office, airport or air carrier employees, and members of the Armed Forces on official duty from the provisions of the rule. The proposed rule would change the rule to exempt only "law enforcement officers" on official duty. This proposed rule would not be intended to interfere with those who have a legitimate need to carry weapons, explosive or incendiaries on the airport. However, the category of exempt individuals should be limited; others with a need to carry these items on the airport may seek permission from the airport to do so. Such permission granted by the airport manager will only serve to exempt individuals from paragraphs (a)(1) or (a)(2), however. Exemptions to paragraph (a)(3) are governed by the provisions of §§107.21, 108,11 and 129.27.

In addition, the rule would not apply to any person who is authorized to carry a weapon aboard an aircraft as described in §§ 107.21, 108.11 or 129.27. This would prevent such persons from violating the airport's rule if the FAA has authorized them to carry weapons on aircraft.

Weapon

The existing regulations, § 159.79(c), defines weapon to include "a gun, dirk, bowie knife, black jack, switch blade knife, slingshot, or metal knuckles." While this definition is intended to give guidance to the public, it is not intended to exclude from the definition other items which may be weapons. The FAA proposes to change this definition of weapons to add additional items to clarify the point that is all inclusive and to eliminate redundant references. Comments are requested from interested persons on how this definition could be further improved to better alert the public as to what is considered to be a weapon.

Regulatory Evaluation

The proposed rule would not be expected to have any significant economic impact because it would not impose any significant additional requirements on persons carrying dangerous objects on the airports and would not require any significant changes in the airports' security enforcement procedures. A minimal economic benefit would accrue to those persons who previously would have sought written permission to legitimately carry weapons on the airports.

The various regulations proposed in the NPRM would have no impact on

trade opportunities for both U.S. firms doing business overseas and foreign firms doing business in the U.S.

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure, among other things, that small entities are not disproportionately affected by government regulations. The proposed rule would have only a minimal cost impact on affected persons. Therefore, the FAA has determined that, under the criteria of the RFA, the proposed regulations would not have a significant economic impact in a substantial number of small entities.

Conclusion

The proposed rule would not be expected to impose any significant economic impact because it would not impose significant additional requirements on persons complying with the rule and would not impose any major changes in the activities it addresses. Therefore, the FAA has determined that this proposed amendment involves a regulation which is not major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures. (44 FR 11034; February 26, 1979). For the same reasons, it is certified that this proposed amendment should not have a significant economic impact on a substantial number of small entities. Because the cost of this proposal is so minimal no regulatory evaluation has been prepared.

List of Subjects in 14 CFR Part 159

Weapons.

The Proposed Amendment

PART 159—NATIONAL CAPITAL AIRPORTS

In consideration of the foregoing, it is proposed to amend Part 159 of the Federal Aviation Regulations (14 CFR Part 159) as follows:

1. By revising the authority citation for Part 159 to read as follows:

Authority: 49 U.S.C. 2402, 2404, 2424, and 2428.

2. In §159.79, by revising paragraphs (a) and (c) and adding new paragraphs (d), (e) and (f) to read as follows:

§ 159.79 Weapons, explosives and incendiaries.

(a) Except as provided in paragraph (d), no person may—

(1) Carry any deadly or dangerous weapon, concealed or unconcealed, on or about his or her person or accessible property on the airport unless the weapon—

(i) If a firearm, is unloaded or, if not a firearm, is deactivated to the extent possible; and

(ii) Is packaged for shipment in a container that is locked or otherwise secure;

(2) Carry any explosive or incendiary, concealed or unconcealed, on or about his or her person or accessible property on the airport; or

(3) Carry any explosive, incendiary, or deadly or dangerous weapon on or about his or her person or accessible property—

(i) When performance has begun of the inspection of the individual's person or accessible property before entering the sterile area; or

(ii) When entering or in a sterile area.

* * * * *

(c) For the purposes of this section a weapon includes, but is not limited to, a firearm, a pellet pistol or rifle, a knife, blackjack, bow and arrow, slingshot or metal knuckles.

(d) Paragraph (a) of this section does not apply to Special Agents and Security Officers of the Department of Transportation, persons authorized to carry a weapon aboard an aircraft as described in §§ 107.21, 108.11 and 129.27 of this chapter or to a law enforcement officer on official duty. Paragraph (a)(1) of this section does not apply to any person who has received the permission of the airport manager to carry a weapon on the airport. Paragraph (a)(2) of this section does not apply to any person who has received the permission of the airport manager to carry an explosive or incendiary on the airport.

(e) For the purpose of this section, "unloaded" means the firearm has no live round of ammunition, cartridge, detonator or powder in the chamber or in a clip, magazine or cylinder inserted in it.

(f) For the purpose of this section, "sterile area" means "sterile area" as defined in § 107.1 of this chapter.

Issued in Washington, DC, on November 4, 1986.

James A. Wilding,

Director, Metropolitan Washington Airports.

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H.R. 4154/Pub. L. 99-592

Age Discrimination in Employment Amendments of 1986. (Oct. 31, 1986; 4 pages) Price: $1.00

H.R. 4576/Pub. L. 99-593

To designate the United States Attorney's Building for the Southern District of New York as the "Silvio James Mollo Federal Building." (Oct. 31, 1986; 1 page) Price: $1.00

H.R. 5215/Pub. L. 99-594

To authorize the construction by the Secretary of Agriculture of a salinity laboratory at Riverside, California. (Oct. 31, 1986; 1 page) Price: $1.00

H.R. 5679/Pub. L. 99-595

To extend the exclusion from Federal unemployment tax of wages paid to certain alien farmworkers. (Oct. 31, 1986; 1 page) Price: $1.00

H.R. 5682/Pub. L. 99-596

To authorize the Secretary of the Navy to make a certain conveyance of real property. (Nov. 3, 1986; 1 page) Price: $1.00

S. 2948/Pub. L. 99-597

To authorize the President to promote posthumously the late Lieutenant Colonel Ellison S. Onizuka to the grade of Colonel. (Nov. 3, 1986; 1 page) Price: $1.00

H.R. 2484/Pub. L. 99-598

To amend title 28, United States Code, relating to quiet title actions against the United States, with respect to actions brought by States. (Nov. 4, 1986; 2 pages) Price: $1.00

H.R. 4118/Pub. L. 99-599

To designate the building commonly known as the Old Post Office in Worcester, Massachusetts, as the "Harold D. Donohue Federal Building." (Nov. 5, 1986; 1 page) Price: $1.00

H.R. 5167/Pub. L. 99-600

To declare that the United States holds certain public domain lands in trust for the Pueblo of Zia. (Nov. 5, 1986; 3 pages) Price: $1.00

H.R. 5564/Pub. L. 99-601

To amend the National Housing Act to provide for the eligibility of certain property for single family mortgage insurance. (Nov. 5, 1986; 1 page) Price: $1.00

H.J. Res. 645/Pub. L. 99-602

To designate 1988 as the "National Year of Friendship with Finland." (Nov. 5, 1986; 1 page) Price: $1.00

S. 1200/Pub. L. 99-603

Immigration Reform and Control Act of 1986. (Nov. 6, 1986; 87 pages) Price: $2.50