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

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

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

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

WASHINGTON, DC

WHEN: May 23; at 9:00 a.m.
WHERE: Office of the Federal Register, First Floor Conference Room, 1100 L Street NW., Washington, DC
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Rules and Regulations

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

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 401

[Amdt. 18; Docket No. 6742S]

General Crop Insurance Regulations; Cranberry Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, by adding a new section, 7 CFR 401.127, the Cranberry Endorsement. The intended effect of this rule is to provide the provisions of crop insurance protection on cranberries in an endorsement to the general crop insurance policy.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations appeared in the proposed rule as April 1, 1992. This date is corrected herein to reflect the five-year period set by Departmental Regulation 1512-1 and is established as April 1, 1994.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, Federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC herewith adds to the General Crop Insurance Regulations (7 CFR Part 401), a new section to be known as 7 CFR 401.127, the Cranberry Endorsement, effective for the 1990 and succeeding crop years, to provide the provisions for insuring cranberries.

On Monday, January 23, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 3042, to provide the provisions of crop insurance protection on cranberries in an endorsement to the general crop insurance policy. The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the rule published at 54 FR 3042, as a final rule.

List of Subjects in 7 CFR Part 401

Crop insurance, Cranberries.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, as follows:

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

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

2. Title 7 CFR Part 401 is amended to add a new section to be known as 7 CFR 401.127, Cranberry Endorsement, effective for the 1990 and Succeeding Crop Years, to read as follows:

§ 401.127 Cranberry endorsement.

The provisions of the Cranberry Crop Insurance Endorsement for the 1990 and subsequent crop years are as follows:

Federal Crop Insurance Corporation

Cranberry Endorsement

1. Insured Crop

a. The crop insured will be cranberries which are grown for processing or fresh market.

b. Except by written agreement between you and us or unless provided by the actuarial table, we do not insure any acreage:

(1) Unless at least four growing seasons have elapsed between the date the vines were set out and the date insurance attaches;

(2) With less than 90 percent of a stand of bearing vines based on the original planting pattern; or

(3) That is being renovated and not being used to produce a full crop for the current year.

2. Causes of Loss

a. The insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period:

(1) adverse weather conditions;
(2) fire;
(3) wildlife;
(4) earthquake;
(5) volcanic eruption;
(6) insects;
(7) plant disease;
(8) if applicable, failure of the irrigation water supply due to an unavoidable cause occurring after insurance attaches; or
(9) failure or breakdown of irrigation equipment or facilities due to direct damage to the irrigation equipment or facilities from an insurable cause of loss if the cranberry crop is damaged by freezing temperatures

within 72 hours of such equipment or facilities failure and the equipment or facilities could not have been made operational or replaced within such 72-hour time period;
unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy.

b. We do not insure against any loss caused by the failure or breakdown of irrigation equipment or facilities except as provided in section 2.a.(9) above.

3. Annual Premium

The annual premium amount is computed by multiplying the production guarantee times the price election, times the premium rate, times the insured acreage, times your share on the date insurance attaches.

4. Insurance Period

a. In addition to the provisions in section 7 of the general crop insurance policy, for unharvested acreage, the date by which acreage should have been harvested is added as one of the dates, the earliest of which is used to designate the end of the insurance period. The calendar date for the end of the insurance period is November 20. The calendar date for the beginning of the insurance period is November 21.

b. If you obtain any insurable acreage of cranberries on or before January 5 of any crop year, insurance will be considered to have attached to such acreage at the beginning of the insurance period if we inspect such acreage and accept it in writing. If you convey any acreage of cranberries on or before January 5 of any crop year, insurance will not be considered to have attached to such acreage for that crop year.

5. Unit Division

Cranberry acreage that would otherwise be one unit, as defined in section 17 of the general crop insurance policy, may be divided into more than one unit if you agree to pay an additional premium if required by the actuarial table and if for each proposed unit:

a. you maintain written verifiable records of acreage and harvested production for at least the previous crop year and production reports based on those records are timely filed to obtain an insurance guarantee; and

b. the acreage planted to insured cranberries in the county is located on non-contiguous land.

If you have a loss on any unit, production records for all harvested units must be provided. Production that is commingled between optional units will cause those units to be combined.

6. Notice of Damage or Loss

In addition to section 8 of the general crop insurance policy, in case of damage or probable loss:

a. You must immediately give us written notice of the loss or probable loss, including the dates of damage, if probable loss is determined within 15 days prior to or during harvest.

b. If you are going to claim an indemnity on any unit, you must give us notice not later than 72 hours after the earliest of:

(1) Total destruction of the cranberries on the unit;

(2) Discontinuance of harvest of any acreage on the unit; or

(3) The date harvest would normally start in the area if any acreage on the unit is not to be harvested.

c. Unless notice has been given under section b. above, and in addition to the other notices required by this section, if you are going to claim an indemnity on any unit, you must give us written notice not later than 10 days after the earlier of:

(1) Harvest of the unit; or

(2) November 20 of the crop year.

7. Claim for Indemnity

a. In addition to the provisions of subsection 9.b. of the general crop insurance policy, we will not pay any indemnity unless you authorize us, in writing, to examine and obtain any records from any person or entity pertaining to the production and marketing of the insured cranberries.

b. The indemnity will be determined on each unit by:

(1) Multiplying the insured acreage by the production guarantee;

(2) Subtracting from that result the total production of cranberries to be counted (see subsection 7.c.);

(3) Multiplying the remainder by the price election; and

(4) Multiplying this result by your share.

c. The total production (in barrels) to be counted for a unit will include all harvested and appraised production.

(1) Cranberry production which, due to insurable causes, is determined not to meet quality requirements of the receiving handler, would not meet those requirements if properly handled, and has a value of less than 75 percent of the market price for cranberries meeting the minimum requirements will be adjusted by:

(a) Dividing the value per barrel of such cranberries by the market price per barrel for cranberries meeting the minimum requirements; and

(b) Multiplying the result by the number of barrels of such cranberries.

(2) Appraised production to be counted will include:

(a) Potential production lost due to uninsured causes and failure to follow recognized good cranberry farming practices;

(b) Not less than the guarantee for any acreage which is abandoned, damaged solely by an uninsured cause or destroyed by you without our consent; and

(c) Any unharvested production.

(3) Any appraisal we have made on insured acreage will be considered production to count unless such acreage is:

(a) Not harvested before the harvest of cranberries becomes general in the county and reappraised by us;

(b) Further damaged by an insured cause and reappraised by us; or

(c) Harvested.

(4) We may determine the amount of production of any unharvested cranberries on the basis of field appraisals conducted after the end of the insurance period.

8. Cancellation and Termination Date

The cancellation and termination date is November 20.

9. Contract Changes

All contract changes will be available at your service office by August 31 preceding the cancellation date.

10. Meaning of Terms

a. "Barrel" means 100 pounds of cranberries.

b. "Direct damage" means actual physical damage to the equipment or facilities which is the direct result of an insurable cause of loss.

c. "Harvest" means picking of the cranberries from the vines for the purpose of removal from the land.

d. "Irrigation equipment, facilities, and water supply" means the supply of water and the mechanical and constructed equipment and facilities used to deliver the water to the cranberry crop so as to prevent damage due to drought or freeze.

e. "Non-contiguous land" means land which is not touching at any point. Land that is separated only by a public or private right-of-way will be considered contiguous.

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11364 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 401

[Amdt. No. 47; Docket No. 6743S]

General Crop Insurance Regulations; Canning and Processing Bean Endorsement

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1989 and succeeding crop years, to provide for a different end of insurance period for snap beans produced in the State of Utah insured under the Canning and Processing Bean Endorsement. The intended effect of this rule is to amend the policy for insuring beans to show a later end of insurance date which more nearly reflects the growing season of snap beans in Utah.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of

these regulations under those procedures. The sunset review date established for these regulations is April 1, 1994.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

On Wednesday, March 2, 1988, FCIC published a final rule in the **Federal Register** at 53 FR 6559, to add a new section 7 CFR 401.118, the Canning and Processing Bean Endorsement.

Subsequently, on Monday, March 21, 1988, a document correcting such final rule was published at 53 FR 9099, which added the inadvertently omitted State of Utah to the policy for insuring beans. In adding Utah, and without further delineation, the end of insurance period fell in the "all other states" category of September 20 (7 CFR 401.118.4.). As a matter of practice, snap beans are not harvested until 15 days later in Utah which has the effect of leaving insured crops without protection.

In order to provide insurance protection through the full growing season for these crops, it is necessary to change the end of insurance period for insured snap beans produced in the State of Utah from September 20 to October 5.

On Tuesday, February 21, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 53 FR 7432, to provide for a different end of insurance period for snap beans produced in the State of Utah insured under the Canning and Processing Bean Endorsement, which more nearly reflects the growing season of snap beans in that state. The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the rule published at 53 FR 7432 as a final rule.

List of Subjects in 7 CFR Part 401

Crop insurance regulations; Beans.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the General Crop Insurance Regulations (7 CFR Part 401), by amending the Canning and Processing Bean Endorsement (7 CFR 401.118), effective for the 1989 and succeeding crop years, as follows:

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

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

2. 7 CFR 401.118, Canning and Processing Bean Endorsement, is amended by revising subsection 4. to read as follows:

§ 401.118 Canning and Processing Bean Endorsement.

* * * * *

4. Insurance period.

In addition to the provisions in section 7 of the general crop insurance policy, for unharvested acreage, the date by which acreage should have been harvested is added as one of the dates, the earliest of which is used to designate the end of the insurance period. The calendar date for the end of the insurance period is the applicable date of the year in which the beans are normally harvested, as follows:

Delaware, Maryland, and New Jersey—All Beans	October 15.
New York—Snap Beans	September 30.
Utah—All Beans	October 5.
All other states—Snap Beans	September 20.
All other states—Lima Beans	October 5.

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11365 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 401

[Amdt. 48 Docket No. 6811S]

General Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, by changing several endorsements to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1992.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden

for individuals, small businesses, and other persons.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of several crop endorsements to the General Crop Insurance Policy, contained in the General Crop Insurance Regulations (7 CFR Part 401), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1983 or 1984 crop year under the terms and conditions contained in their particular crop insurance endorsement for 1984 or 1985. The insured will continue to receive the benefit of such reduction subject to several conditions, one of which being that no premium reduction will be retained after the 1989 or 1990 crop year.

The FCIC Board of Directors has suggested that the present premium reduction be continued, and directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders.

Accordingly, FCIC herein amends all listed applicable crop insurance endorsements issued under 7 CFR Part 401 to allow a continuation of the good experience discount provision so that no premium reduction will be retained after the 1991 crop year.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9825, to amend the General Crop Insurance Regulations (7 CFR Part 401) by changing several endorsements to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the rule published at 54 FR 9825 as a final rule without change.

List of Subjects in 7 CFR Part 401

Crop insurance.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the General Crop Insurance Regulations (7 CFR Part 401), effective for the 1990 and succeeding crop years, in the following instances:

PART 401—[AMENDED]

1. The authority citation for 7 CFR Part 401 continues to read as follows:

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

§§ 401.101, 401.103, 401.105, 401.106, 401.111, 401.113, 401.116, 401.117, and 401.124 [Amended]

2. Title 7 CFR 401.101—Wheat Endorsement; 401.103—Barley Endorsement; 401.105—Oat Endorsement; 401.106—Rye Endorsement; 401.111—Corn (Grain) Endorsement; 401.113—Grain Sorghum Endorsement; 401.116—Flaxseed Endorsement; 401.117—Soybean Endorsement; and 401.124—Sunflower Endorsement, are amended by revising subsection 3.b.(1) to read as follows:

3. Annual Premium

* * * * *

b. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

§ 401.114 [Amended]

3. 7 CFR 401.114—Canning and Processing Tomato Endorsement, is amended by revising subsection 4.b.(1) to read as follows:

4. Annual Premium

* * * * *

b. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

§ 401.110 [Amended]

4. 7 CFR 401.110—Almond Endorsement, is amended by revising subsection 4.b.(1) to read as follows:

4. Annual Premium

* * * * *

b. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

Done in Washington, DC on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11378 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 402

[Amdt. 1; Docket No. 6806S]

Raisin Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Raisin Crop Insurance Regulations (7 CFR Part 402), effective for the 1990 and succeeding crop years, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is January 1, 1990.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and

other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of the Raisin Crop Insurance Regulations (7 CFR Part 402), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1983 crop year under the terms and conditions contained in their raisin crop insurance policy for 1984. The insured will continue to receive the benefit of such reduction subject to several conditions, one of which being that no premium reduction will be retained after the 1989 crop year.

The FCIC Board of Directors directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders. FCIC therefore believes that the status quo should be maintained until a determination is made on the good experience discount provisions.

Accordingly, FCIC herein amends the Raisin Crop Insurance Regulations (7 CFR Part 402) to allow a continuation of the good experience discount provision through the 1991 crop year.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9826, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the proposed rule published at 54 FR 9826 as a final rule without change.

List of Subjects in 7 CFR Part 402

Crop insurance, Raisins.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Raisin Crop Insurance Regulations (7 CFR Part 402), effective for the 1990 and succeeding crop years, in the following instances:

PART 402—[AMENDED]

1. The authority citation for 7 CFR Part 402 is revised to read as follows:

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

2. Section 7(d) of the Raisin Crop Insurance Regulations (7 CFR 402.7) is amended by revising subsection 5.c.(1) to read as follows:

§ 402.7 The application and policy.

* * * * *

(d) * * *

5. Annual Premium

* * * * *

c. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11368 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 411

[Amdt. No. 2; Docket No. 6834S]

Grape Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Grape Crop Insurance Regulations (7 CFR Part 411), effective for the 1990 and succeeding crop years, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1990 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1990.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) an annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of the Grape Crop Insurance Regulations (7 CFR Part 411), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1984 crop year under the terms and conditions contained in their grape crop insurance policy for 1985. The insured will continue to receive the benefit of such reduction subject to several

conditions, one of which being that no premium reduction will be retained after the 1990 crop year.

The FCIC Board of Directors directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders. FCIC therefore believes that the status quo should be maintained until a determination is made on the good experience discount provisions.

Accordingly, FCIC herein amends the Grape Crop Insurance Regulations (7 CFR Part 411) to allow a continuation of the good experience discount provision through the 1991 crop year.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9827, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the proposed rule published at 54 FR 9827 as a final rule without change.

List of Subjects in 7 CFR Part 411

Crop insurance, Grapes.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Grape Crop Insurance Regulations (7 CFR Part 411), effective for the 1990 and succeeding crop years, in the following instances:

PART 411—[AMENDED]

1. The authority citation for 7 CFR Part 411 is revised to read as follows:

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

2. Section 7(d) of the Grape Crop Insurance Regulations (7 CFR 411.7) is amended by revising subsection 5.c.(1) to read as follows:

§ 411.7 The application and policy.

* * * * *

(d) * * *

5. Annual Premium.

* * * * *

c. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11366 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 416

[Amdt. 2; Doc. No. 6795S]

Pea Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Pea Crop Insurance Regulations (7 CFR Part 416), effective for the 1990 and succeeding crop years, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as August 1, 1989. These regulations are currently under review under the procedures established by Departmental Regulations 1512-1 and FCIC will issue a determination as to the need, currency, clarity, and effectiveness of these regulations on or before August 1, 1989.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of the Pea Crop Insurance Regulations (7 CFR Part 416), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1984 crop year under the terms and conditions contained in their pea crop insurance policy for 1985. The insured will continue to receive the benefit of such reduction subject to several conditions, one of which being that no premium reduction will be retained after the 1989 crop year.

The FCIC Board of Directors directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders. FCIC therefore believes that the status quo should be maintained until a determination is made on the good experience discount provisions.

Accordingly, FCIC herein amends the Pea Crop Insurance Regulations (7 CFR Part 416) to allow a continuation of the good experience discount provision through the 1991 crop year.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9828, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews

the entire good experience discount issue for all policyholders.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the proposed rule published at 54 FR 9828 as a final rule without change.

List of Subjects in 7 CFR Part 416

Crop Insurance, Peas.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Pea Crop Insurance Regulations (7 CFR Part 416), effective for the 1990 and succeeding crop years, in the following instances:

PART 416—[AMENDED]

1. The authority citation for 7 CFR Part 416 is revised to read as follows:

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

2. Section 7(d) of the Pea Crop Insurance Regulations (7 CFR 416.7) is amended by revising subsection 5.c.(1) to read as follows:

§ 416.7 The application and policy.

* * * * *

(d) * * *

5. Annual Premium

* * * * *

c. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11367 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 422

[Amdt. 3; Doc. No. 6800S]

Potato Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Potato Crop Insurance Regulations (7 CFR Part 422), effective for the 1990 and succeeding crop years, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as October 1, 1990.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of the Potato Crop Insurance Regulations (7 CFR Part 422), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1983 crop year under the terms and conditions contained in their potato crop insurance policy for 1984. The insured will continue to receive the benefit of such reduction subject to several conditions, one of which being that no premium reduction will be retained after the 1989 crop year.

The FCIC Board of Directors directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders. FCIC therefore believes that the status quo should be maintained until a determination is made on the good experience discount provisions.

Accordingly, FCIC herein amends the Potato Crop Insurance Regulations (7 CFR Part 422) to allow a continuation of the good experience discount provision through the 1991 crop year.

Various amendments to the Potato Crop Insurance Regulations (7 CFR Part 422 were published, some of which contained an incorrect amendment number. While this does not affect the purpose or intent of the rule, it is appropriate that these amendment numbers be corrected. Amendment 2, published in the **Federal Register** on June 22, 1987, at 52 FR 23424, should read Amendment 1. Amendment 4, published on January 24, 1989, at 53 FR 3416, should read Amendment 2.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9829, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the proposed rule published at 54 FR 9829 as a final rule without change.

List of Subjects in 7 CFR Part 422

Crop insurance; Potatoes.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Potato Crop Insurance Regulations (7 CFR Part 422), effective for the 1990 and succeeding crop years, in the following instances:

PART 422—[AMENDED]

1. The authority citation for 7 CFR Part 422 is revised to read as follows:

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

2. Section 7(d) of the Potato Crop Insurance Regulations (7 CFR 422.7) is amended by revising subsection 5.c.(1) to read as follows:

§ 422.7 The application and policy.

* * * * *

(d) * * *

5. Annual Premium

* * * * *

c. * * *

(1) No premium reduction will be retained after the 1991 crop year.

* * * * *

Done in Washington, DC on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11370 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 426

[Docket No. 6839S]

Combined Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule; removal and reservation of Part.

SUMMARY: Beginning with the 1988 crop year, the crops formerly insured under the combined crop insurance program were incorporated as separate endorsements under the General Crop Insurance Policy. Consequently, separate regulations for combined crop insurance are no longer necessary. The Federal Crop Insurance Corporation (FCIC) hereby removes and reserves Part 426 in Chapter IV of Title 7 of the Code of Federal Regulations (7 CFR Part 426), Combined Crop Insurance Regulations.

EFFECTIVE DATE: May 12, 1989.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC, 20250, telephone (202) 447-3325.

SUPPLEMENTARY INFORMATION: John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

The Combined Crop Insurance program, begun in the 1948 crop year, was, at one time, offered in a majority of counties throughout the country as a means of insuring a variety of crops at a reduced premium rate. The concept of a combined crop insurance program was designed to reflect the crop insurance needs of farmers which leaned strongly toward less risk management through crop diversification and covered Barley, Flax, Oats, Rye, Soybeans, and Wheat.

Over the years, participation in the combined crop insurance program dwindled to only five counties in North Dakota. Several of these counties had extremely low participation with the majority of producers preferring crop insurance coverage on an individual basis.

On October 9, 1986, the Board of Directors requested that the Corporation determine the feasibility of terminating combined crop insurance with the end of the 1987 crop year.

At that time, approximately 602 policyholders remained under the combined crop insurance program. These were offered individual crop insurance coverage under applicable endorsements for the 1988 crop year.

All of these policyholders with a continuing benefit from good insuring experience discount were permitted to continue receiving this benefit through the 1989 crop year, later amended to be continued through the 1991 crop year.

Beginning with the 1988 crop year, the crops formerly insured under the combined crop insurance program were incorporated as separate endorsements under the General Crop Insurance Policy (7 CFR Part 401, published on July 30, 1987, at 52 FR 28443), as follows:

Barley 7 CFR 401.103
Flax 7 CFR 401.116
Oats 7 CFR 401.105
Rye 7 CFR 401.106
Soybeans 7 CFR 401.117
Wheat 7 CFR 401.101

FCIC published a final rule on Tuesday, April 19, 1988, at 54 FR 12579, after the opportunity for public notice and comment, to allow coverage under the Combined Crop Insurance Regulations through the 1987 crop year.

Since this rule relates solely to internal agency management and does not effect the public, good cause is shown for publishing this rule as final without the opportunity for notice and comment.

List of Subjects in 7 CFR Part 426

Crop insurance, Combined crops.

Final Rule

PART 426—[REMOVED AND RESERVED]

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation herewith removes and reserves Part 426 of Chapter IV in Title 7 of the Code of Federal Regulations (Combined Crop Insurance Regulations).

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

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11362 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 430

[Amdt. 1; Docket No. 6808S]

Sugar Beet Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Sugar Beet Crop Insurance Regulations (7 CFR Part 430), effective for the 1990 and succeeding crop years, to provide that the premium reduction gained by

insureds through good insuring experience will extend beyond the present 1989 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as October 1, 1990.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) an annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of the Sugar Beet Crop Insurance Regulations (7 CFR Part 430), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1984 crop year (1985 in Arizona and California) under the terms and conditions contained in their sugar beet crop insurance policy for 1985 (1986 in Arizona and California). The insured will continue to receive the benefit of such reduction subject to several conditions, one of which being that no premium reduction will be retained after the 1990 crop year.

The FCIC Board of Directors directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders. FCIC therefore believes that the status quo should be maintained until a determination is made on the good experience discount provisions.

Accordingly, FCIC herein amends the Sugar Beet Crop Insurance Regulations (7 CFR Part 430) to allow a continuation of the good experience discount provision through the 1991 crop year.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9831, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the proposed rule published at 54 FR 9831 as a final rule without change.

List of Subjects in 7 CFR Part 430

Crop insurance, Sugar beets.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Sugar Beet Crop Insurance Regulations (7 CFR Part 430), effective for the 1990 and succeeding crop years, in the following instances:

PART 430—[AMENDED]

1. The authority citation for 7 CFR Part 430 is revised to read as follows:

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

2. Section 7(d) of the Sugar Beet Crop Insurance Regulations (7 CFR 430.7) is amended by revising subsection 5.c.(1) to read as follows:

§ 430.7 The application and policy.

* * * * *

(d) * * *

5. Annual Premium

* * * * *

c. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11372 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 433

[Amdt. 2; Docket No. 6835S]

Dry Bean Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Dry Bean Crop Insurance Regulations (7 CFR Part 433), effective for the 1990 and succeeding crop years, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as April 1, 1992.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases

in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of the Dry Bean Crop Insurance Regulations (7 CFR Part 433), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1984 crop year under the terms and conditions contained in their dry bean crop insurance policy for 1985. The insured will continue to receive the benefit of such reduction subject to several conditions, one of which being that no premium reduction will be retained after the 1989 crop year.

The FCIC Board of Directors directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders. FCIC therefore believes that the status quo should be maintained until a determination is made on the good experience discount provisions.

Accordingly, FCIC herein amends the Dry Bean Crop Insurance Regulations (7 CFR Part 433) to allow a continuation of the good experience discount provision through the 1991 crop year.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9831, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the proposed rule published at 54 FR 9831 as a final rule without change.

List of Subjects in 7 CFR Part 433

Crop Insurance, Dry bean.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Dry Bean Crop Insurance Regulations (7 CFR Part 433), effective for the 1990 and succeeding crop years, in the following instances:

PART 433—[AMENDED]

1. The authority citation for 7 CFR Part 433 is revised to read as follows:

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

2. Section 7(d) of the Dry Bean Crop Insurance Regulations (7 CFR 433.7) is amended by revising subsection 5.c.(1) to read as follows:

§ 433.7 The application and policy.

* * * * *

(d) * * *

5. Annual Premium.

* * * * *

c. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

Done in Washington, DC, on May 2, 1989.

John Marshall

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11369 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 436

[Amdt. 1; Docket No. 6814S]

Tobacco (Guaranteed Production Plan) Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Tobacco (Guaranteed Production Plan) Crop Insurance Regulations (7 CFR Part 436), effective for the 1990 and succeeding crop years, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction, while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is August 1, 1989. These regulations are currently under review under the procedures established by Departmental Regulations 1512-1 and FCIC will issue a determination as to the need, currency, clarity, and effectiveness of these regulations on or before August 1, 1989.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR

Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of the Tobacco (Guaranteed Production Plan) Crop Insurance Regulations (7 CFR Part 436), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1983 crop year under the terms and conditions contained in their tobacco crop insurance policy for 1984. The insured will continue to receive the benefit of such reduction subject to several conditions, one of which being that no premium reduction will be retained after the 1989 crop year.

The FCIC Board of Directors and directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders. FCIC therefore believes that the status quo should be maintained until a determination is made on the good experience discount provisions.

Accordingly, FCIC herein amends the Tobacco (Guaranteed Production Plan) Crop Insurance Regulations (7 CFR Part 436) to allow a continuation of the good experience discount provision through the 1991 crop year.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9833, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the proposed rule published at 54 FR 9833 as a final rule without change.

List of Subjects in 7 CFR Part 436

Crop insurance, Tobacco.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Tobacco (Guaranteed Production Plan) Crop Insurance Regulations (7 CFR Part 436), effective for the 1990 and succeeding crop years, in the following instances:

PART 436—[AMENDED]

1. The authority citation for 7 CFR Part 436 is revised to read as follows:

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

2. Section 7(d) of the Tobacco (Guaranteed Production Plan) Crop Insurance Regulations (7 CFR § 436.7) is amended by revising subsection 5.c.(1) to read as follows:

§ 436.7 The application and policy.

* * * * *

(d) * * *

5. Annual Premium

* * * * *

c. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11361 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 437

[Amdt. 1; Docket No. 6810S]

Sweet Corn Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Sweet Corn Crop Insurance Regulations (7 CFR Part 437), effective for the 1990 and succeeding crop years, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration. The intended effect of this rule is to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

EFFECTIVE DATE: June 12, 1989.

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

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as June 1, 1989. These regulations are currently under review under the procedures established by Departmental Regulations 1512-1 and FCIC will issue a determination as to the need, currency, clarity, and effectiveness of these regulations on or before August 1, 1989.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

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

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Under the provisions of the Sweet Corn Crop Insurance Regulations (7 CFR Part 437), an insured may be eligible for a premium reduction in excess of 5 percent based on that individual's insuring experience through the 1983 crop year under the terms and conditions contained in their sweet corn crop insurance policy for 1984. The insured will continue to receive the benefit of such reduction subject to several conditions, one of which being that no premium reduction will be retained after the 1989 crop year.

The FCIC Board of Directors directed that a study be made of the entire premium reduction for good experience issue as it might apply to all policyholders. FCIC therefore believes that the status quo should be maintained until a determination is made on the good experience discount provisions.

Accordingly, FCIC herein amends the Sweet Corn Crop Insurance Regulations (7 CFR Part 437) to allow a continuation of the good experience discount provision through the 1991 crop year.

On Wednesday, March 8, 1989, FCIC published a notice of proposed rulemaking in the **Federal Register** at 54 FR 9834, to provide that the premium reduction gained by insureds through good insuring experience will extend beyond the present 1989 crop year expiration to allow a continuation of good experience discount for all present policyholders who are eligible for a premium reduction while FCIC reviews the entire good experience discount issue for all policyholders.

The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the proposed rule published at 54 FR 9834 as a final rule without change.

List of Subjects in 7 CFR Part 437

Crop insurance, Sweet corn.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Sweet Corn Crop Insurance Regulations (7 CFR Part 437), effective for the 1990 and succeeding crop years, in the following instances:

PART 437—[AMENDED]

1. The authority citation for 7 CFR Part 437 is revised to read as follows:

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

2. Section 7(d) of the Sweet Corn Crop Insurance Regulations (7 CFR § 437.7) is amended by revising subsection 5.c.(1) to read as follows:

§ 437.7 The application and policy.

* * * * *

(d) * * *

5. Annual Premium

* * * * *

c. * * *

(1) No premium reduction will be retained after the 1991 crop year;

* * * * *

Done in Washington, DC, on May 2, 1989.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 89-11371 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-08-M

Agricultural Marketing Service

7 CFR Part 910

[Lemon Reg. 665]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 665 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 405,000 cartons during the period May 14 through May 20, 1989. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATES: Regulation 665 (§ 910.965) is effective for the period May 14 through May 20, 1989.

FOR FURTHER INFORMATION CONTACT: Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475-3861.

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

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

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

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

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

This regulation is consistent with the California-Arizona lemon marketing policy for 1988-89. The Committe met publicly on May 9, 1989, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended a quantity of lemons deemed advisable to be handled during the specified week. The Committee reports that demand for lemons is strong.

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

List of Subjects in 7 CFR Part 910

Marketing agreements and orders, California, Arizona, Lemons.

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

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

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

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

2. Section 910.965 is added to read as follows:

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

§ 910.965 Lemon Regulation 665.

The quantity of lemons grown in California and Arizona which may be handled during the period May 14, 1989, through May 20, 1989, is established at 405,000 cartons.

Dated: May 10, 1989.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 89–11590 Filed 5–11–89; 8:45 am]

BILLING CODE 3410-02-M

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7 CFR Part 919

[Docket No. FV-89-031]

Peaches Grown in Mesa County, Colorado; Increase in Expenses and Assessment Rate for 1988-89 Fiscal Period

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes an increase in expenditures for the Administrative Committee (committee) established under Marketing Order 919 for the 1988–89 fiscal year. The expenses are increased from $1,830 to $12,248.70. Of this increase, $5,716.35 would come from an increase in assessments from $0.01 to $0.042572 per bushel of fresh peaches produced and handled in the production area. The remainder of the increase will come from other funds available to the committee. The increase in funds is needed to cover administrative costs and other obligations through the remainder of the fiscal year. The increase in Federal assessments will be balanced by a refund to handlers of unused assessment funds from termination of a State marketing order which had operated jointly with the Federal program.

EFFECTIVE DATES: July 1, 1988 through June 30, 1989 [§ 919.227].

FOR FURTHER INFORMATION CONTACT: George Kelhart, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–So., Washington, DC 20090–6456, telephone (202) 475–3919.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order No. 919 [7 CFR Part 919] regulating the handling of peaches grown in Mesa County, Colorado. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the "Act."

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

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this final rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

Small agricultural producers have been defined by the Small Business Administration (SBA) [13 CFR 121.2] as those having annual gross revenues for the last three years of less than $500,000. Small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. It is estimated that approximately 28 handlers of Colorado peaches are currently subject to regulations under the marketing order each season. There are approximately 260 producers in Mesa County, Colorado. The majority of these handlers and producers may be classified as small entities.

A final rule establishing expenses in the amount of $1,830 for the committee for the fiscal period ending June 30, 1989, was published in the **Federal Register** on July 19, 1988 [53 FR 27153]. That final rule fixed an assessment rate of $0.01 per bushel to be levied on Mesa County peach handlers during the 1988–89 fiscal period.

Since 1939, the Federal marketing order program for peaches grown in Mesa County, Colorado, had been operated jointly with a State marketing order for peaches grown in the county. However, the Colorado Department of Agriculture terminated the State order effective March 1, 1989, after it failed in a continuance referendum conducted by the State. The Colorado Commissioner of Agriculture has determined that unused assessments collected under the State program are to be refunded to handlers in the industry. Because State assessments accounted for approximately 96 percent of the combined assessments collected by the two orders, the Federal committee has been placed in an emergency financial situation for the remainder of this fiscal year.

In a meeting held February 23, 1989, the committee voted unanimously to increase its budget of expenses from $1,830 to $12,248.70. Reserves and unexpended assessments accounted for $1,365.35 in Federal order funds at the time of the State order termination. Of the needed $10,418.70 increase in expenditures, $5,716.35 will come from the increased assessment of $0.042572 per bushel. An additional $4,667 will be provided from the State's marketing order budget to collect information relating to the number of orchards and trees, and the amount of mosaic disease found in Mesa County peach trees. This annual study has been conducted in the past under auspices of the State marketing order. However, the State government has approved the transfer of funds to the Federal order so that the study can be conducted this Spring. Finally, $500 will also be transferred from the State for another State order obligation already incurred, but for which an invoice had not been received at the time the State order was terminated.

Expenditures totalling $12,248.70 for the remainder of the fiscal year are expected to include personnel salary and benefits ($2,092.18), office expenses ($590.00), insurance ($250.00), committee expenses ($90.00), market research and development ($5,167.00) and contingency reserves ($4,059.52).

Notice inviting comments on the increase in expenses and assessment rate for the 1988–89 fiscal period was published in the **Federal Register** on April 6, 1989 [54 FR 13891]. The comment period ended April 17, 1989. One comment was received from the SBA which stated objections to the increase in the assessments.

In its comment, the SBA contends that the Department's RFA certification statement fails to prove that this action would not have a significant economic impact on a substantial number of small entities. The SBA also contends that the unanimous support for the assessment change by the committee should not

outweigh the demonstrated opposition to assessments revealed in the Colorado State referendum.

The SBA contends that because the bulk of the assessments were generated from the State order, and because the Colorado Department of Agriculture terminated the order for lack of support, the industry does not support the continuation of assessments in the range recommended by the committee and proposed by the Department. This conclusion is not valid for several reasons. The proposed assessment of just over 4 cents recommended by the committee is significantly less than the 29 cents that had been authorized under the State order for the 1988–89 fiscal period. Likewise, the 1988–89 assessment funds collected under the State order totalled approximately $39,000, while this reassessment will provide $5,716.35 in funding. A significant portion of the State's assessment was used for market promotion (paid advertising). However, projects involving paid advertising are not authorized under the Federal order. Also, the committee considers the Federal marketing order as the only available way to ensure continued shipments of high quality Mesa County peaches. The committee contends that minimum quality requirements are essential in fostering the consumer satisfaction needed to maintain and expand its markets. Without the Federal marketing order's regulation of peach quality, below-grade peaches could be marketed which could ultimately depress markets and reduce demand for the crop. Finally, lack of support for the State order does not necessarily mean there is no support of the Federal order. As noted, the two orders provided different services for the industry. The absence of adverse industry comments to the committee's recent, unanimous recommendation to continue the Federal order is an indication of the industry's support for the Federal order.

The SBA states that the proposed rule did not include a breakdown of the industry to show the number of small businesses that would be affected by the proposal, and that the Department did not attempt to quantify the amount of income lost as a result of the proposed increase in the assessment rate. Further, if did not attempt to quantify the effect on the profitability of the small firms in the Mesa County peach industry. Information on the number of handlers and producers of Mesa County peaches is included in this final rule. Such information was used by the AMS in arriving at its determination that this action will not have a significant economic impact on a substantial number of small entities.

The Department recognizes that this action will impose some additional costs on handlers and that some of these costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the Federal marketing order. In view of the foregoing, the comment from the SBA is denied.

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

After consideration of the information and recommendation submitted by the committee, the comment from the SBA and other available information it is found that this final rule will tend to effectuate the declared policy of the Act.

This final rule should be expedited because the committee needs to have authority to pay its expenses, which are incurred on a continuous basis for the remainder of the 1988–89 fiscal period, in view of the emergency financial situation caused by the termination of the State order. In addition, handlers are aware of this action which was recommended at a public meeting. Therefore, it is also 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].

List of Subjects in 7 CFR Part 919

Marketing agreement and order, Peaches, Colorado.

For reason set forth in the preamble, § 919.227 is amended as follows:

Note: The following section will not be published in the annual Code of Federal Regulation.

PART 919—PEACHES GROWN IN MESA COUNTY, COLORADO

1. The authority citation for 7 CFR Part 919 continues to read as follows:

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

2. Section 919.227 is amended as follows:

§ 919.227 (Amended)

Section 919.227 is amended by changing expenses from "$1,830" to "$12,248.70" and by changing the assessment rate from "$0.01" per bushel of assessable peaches to "$0.042572" per bushel of assessable peaches.

Dated: May 8, 1989.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division.

[FR Doc. 89–11400 Filed 5–11–89; 8:45 am]

BILLING CODE 3410-02-M

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7 CFR Part 928

[Docket No. FV-89-006]

Papayas Grown in Hawaii; Final Rule Reapportioning Membership on the Papaya Administrative Committee and Establishing Public Member Nomination Procedures

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule reapportions the membership on the Papaya Administrative Committee (committee) to bring grower and handler membership into more appropriate balance. This action reduces the number of grower members representing District 2 from two to one to reflect reduced production in that district. In addition, this rule adds a public member to the committee and establishes eligibility requirements and nomination procedures for that member in order to add public input to committee deliberations. It will also restrict any one grower organization from having more than two members and alternates on the committee in an effort to provide a wider range of viewpoints on the committee. This action was unanimously recommended by the Papaya Administrative Committee, established under Marketing Order 928.

EFFECTIVE DATE: May 12, 1989.

FOR FURTHER INFORMATION CONTACT: Patrick Packnett, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456; telephone 202–475–3862.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 928 [7 CFR Part 928; 53 FR 863, January 14, 1988], regulating the handling of papayas grown in Hawaii. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

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

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the

Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this final rule on small entities.

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

There are approximately 122 handlers of papayas regulated under this marketing order, and approximately 344 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having annual gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of papaya handlers and producers in Hawaii may be classified as small entities.

Pursuant to § 928.20 of the order, the committee currently consists of 13 members. Each member has an alternate. Ten of the members are growers and three are handlers. Seven grower members represent District 1, two grower members represent District 2, and one grower member represents District 3. Each grower organization is permitted to have up to three members on the committee. The three handler members are nominated from the production area at large.

Section 928.20 also allows the number of grower and handler members and alternate members on the committee and the composition of the committee between growers and handlers to be changed as provided in paragraph (o) of § 928.31. This section also provides that the committee may be increased by one public member and alternate member, to be nominated by the committee and selected by the Secretary. In addition, the committee, with the approval of the Secretary, may prescribe the qualifications of, and the nominating procedure for, the public member and alternate. Paragraph (o) of § 928.31 also authorizes the committee, with the approval of the Secretary, to redefine the districts into which the production area is divided, and reapportion membership on the committee. Any such changes are required to reflect, insofar as practicable, structural changes within the industry and shifts in papaya production within the production area.

Originally, the marketing order provided for a committee of 13 members which, were allocated among four districts. In 1985, a rule was put into effect to redesignate the area into three districts [50 FR 1439]. Committee membership was also reapportioned to provide for the current allocation. In 1988, the marketing order was amended to reflect these changes, to authorize and provide for the appointment of a public member and alternate, and to authorize changes to be made in the composition and size of the committee [53 FR 863].

To reflect current industry structure, this final rule revises § 928.120 to reallocate three of the seven grower member positions in District 1 as handler positions. This increases the number of handler positions on the committee from three to six. The six handler members will be nominated from the production area at large. The committee indicated that more marketing expertise is needed in committee deliberations and that the current handler membership is inadequate to meet these needs. The unanimous recommendation indicates that District 1 growers believe that they will be adequately represented with four members. Furthermore, the six major handlers in the industry are actually six packinghouses which, to a considerable extent, represent the interests of various grower groups which utilize the packing facilities.

Secondly, the number of grower members representing District 2 which is comprised of the county of Kauai which consists of the islands of Kauai and Niihau; the county of Maui which consists of the islands of Maui, Molakai, Lanai, and Kahoolawe; and Kalawao County is reduced from two to one. Papaya production in Hawaii totaled 67,500,000 pounds in 1988. Production in District 2 has declined from 6.7 million pounds in 1984 to 1.8 million pounds in 1988 as a result of weather and disease problems and the abandonment of substantial papaya plantings on the island of Maui. Production in Districts 1 and 3 has remained relatively stable during this period of time. Further, District 2 currently only accounts for approximately 2.7 percent of the total production in this area. Therefore, rather than increase the representation of Districts 1 and 3, the committee proposed to reduce the representation of District 2.

The third change adds a public member and alternate to the committee. This change was recommended by the committee in order to provide valuable consumer input in committee deliberations. The qualifications and nomination procedures for the public member will be prescribed in new § 928.122.

The public member and alternate member will be nominated by the PAC and will serve a two-year term to coincide with the term of office of the grower and handler members of the committee. To qualify to be nominated, public member and alternate member candidates will be expected to certify that they are able to devote sufficient time to regularly attend committee activities and to familiarize themselves with the background and economics of the papaya industry. The public member and alternate member must be residents of the production area and not represent any agricultural interest. The public member and alternate are not to have a financial interest in, or be associated with, the production, processing, financing, or marketing of papayas. These requirements are intended to ensure that a public member and alternate from within the production area is nominated who will have sufficient time to devote to committee activities, will fairly represent consumer interests, and will not be influenced by any factions within the industry.

The fourth and final change reduces the number of grower and alternate members any one grower organization is permitted to have on the committee from three to two. This will allow more grower organizations to become involved in committee decision-making and provide a wider range of viewpoints on the committee. Representation from many grower segments is desirable to assure that there will be full discussion on all matters before the committee and that all views are expressed before decisions are made.

Based on this action, the PAC will consist of six grower members, six handler members, and one public member and their respective alternates. With the reduction of one grower position in District 2, the committee size will remain at 13 members.

Notice of this action was published in the **Federal Register** on March 10, 1989 (54 FR 10155). The comment period ended April 10, 1989. No comments were received.

This action is intended to provide for additional handler and public input and equitable and balanced representation on the committee. This action will not impose any additional costs on producers or handlers. Furthermore, it will increase the effectiveness of the committee and benefit growers and handlers.

After consideration of the information and recommendation submitted by the

committee, it is found that this action will tend to effectuate the declared policy of the Act.

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

It is 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). It is important that the changes hereinafter set forth be in effect as soon as possible so that nomination meetings for the new term of office can be conducted and reflect the new committee composition as provided for in this final action. Nomination meetings are scheduled to begin on May 15, 1989.

The additional information collection requirements resulting from the addition of a public member to the committee have been approved by Office of Management and Budget under the Paperwork Reduction Act of 1980, 44 U.S.C., Chapter 35, and assigned OMB No. 0581-0102.

Lists of Subjects in 7 CFR Part 928

Marketing agreements and orders, Papayas, Hawaii.

For the reasons set forth in the preamble, 7 CFR Part 928 is amended as follows: (The following changes will be published in the Code of Federal Regulations.)

PART 928—PAPAYAS GROWN IN HAWAII

1. The authority citation for 7 CFR Part 928 continues to read as follows:

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

2. Section 928.120 is revised to read as follows:

§ 928.120 Committee reapportionment.

The Papaya Administrative Committee shall consist of 13 members and alternate members. Six of the members shall represent growers, and six shall represent handlers. Four grower members and their alternates shall represent District 1, one grower member and alternate shall represent District 2, and one grower member and alternate shall represent District 3. No grower organization shall have more than two members on the committee. The six handler members shall be nominated from the production area at large. One voting public member and alternate shall also be included on the committee. The eligibility requirements and nomination procedures for the public member and alternate are specified in § 928.122.

3. A new § 928.122 is added to read as follows:

§ 928.122 Public member eligibility requirements and nomination procedures.

(a) The public member and alternate member shall be nominated by the Papaya Administrative Committee and shall serve a two-year term which coincides with the term of the grower and handler members of the committee.

(b) Public member and alternate member candidates should be able to devote sufficient time to attend committee activities regularly and to familiarize themselves with the background and economics of the papaya industry.

(c) The public member and alternate member shall be residents of the production area.

(d) Public member and alternate member candidates shall not represent an agricultural interest and shall not have a financial interest in, or be associated with, the production, processing, financing, or marketing of papayas.

Dated: May 8, 1989.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 89-11399 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-02-M

Rural Electrification Administration

7 CFR Part 1772

[REA Bulletin 345-150, et al.; REA Form 515a et al.]

Telephone Standards and Specifications; Construction of Direct Buried Plant, et al.

AGENCY: Rural Electrification Administration, USDA.

ACTION: Final rules.

SUMMARY: The Rural Electrification Administration (REA) hereby amends 7 CFR 1772.97, Incorporation by Reference of Telephone Standards and Specifications, by issuing revised Bulletins: 345-150, Specifications and Drawings for Construction of Direct Buried Plant, REA Form 515a; 345-151, Specifications and Drawings for Conduit and Manhole Construction, REA Form 515c; 345-152, Specifications and Drawings for Underground Cable Installation, REA Form 515d; 345-153, Specifications and Drawings for Construction of Pole Lines and Aerial Cables, REA Form 515f; and 345-154, Specifications and Drawings for Service Entrance and Station Protector Installation, REA Form 515g. The latest revision of these specifications was September 1979. Since that date, significant changes have occurred within the telephone industry, including changes in construction materials, engineering designs and procedures, testing requirements and construction methods. These revised forms incorporate these changes into the outside plant specifications. The major changes are the addition of new construction units for (1) buried filled fiber optic cable, (2) aerial filled fiber optic cable, (3) aerial filled cable, (4) fiber optic splicing, (5) aerial, buried and underground splice closures and organizers for fiber optic cables, (6) network interface devices, (7) handholes, and (8) underground fiber optic cable. See the Background section of Notice for a more detailed listing of changes. These actions will make it possible for REA telephone borrowers to continue to provide their subscribers with the most modern and efficient telephone service.

DATE: These final rules are effective July 1, 1989.

FOR FURTHER INFORMATION CONTACT: Garnett G. Adams, Chief, Outside Plant Branch, Telecommunications Staff Division, Rural Electrification Administration, Washington, DC 20250-1500, telephone (202) 382-8667. The Final Regulatory Impact Analysis describing the options considered in developing these rules and the impact of implementing each option is available on request from the above office.

SUPPLEMENTARY INFORMATION: Pursuant to the Rural Electrification Act, as amended (7 U.S.C. 901 et seq.), REA hereby amends 7 CFR 1772.97, Incorporation by Reference of Telephone Standards and Specifications, by issuing revised Bulletins: 345-150, Specifications and Drawings for Construction of Direct Buried Plant, REA Form 515a; 345-151, Specifications and Drawings for Conduit and Manhole Construction, REA Form 515c; 345-152, Specifications and Drawings for Underground Cable Installation, REA Form 515d; 345-153, Specifications and Drawings for Construction of Pole Lines and Aerial Cables, REA Form 515f; and 345-154, Specifications and Drawings for Service Entrance and Station Protector Installation, REA Form 515g. These incorporations by reference were approved by the Director of the Federal Register on December 30, 1983.

These actions have been reviewed in accordance with Executive Order 12291, Federal Regulation. These actions will not (1) have an annual effect on the

economy of $100 million or more; (2) result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; (3) result in significant adverse effects on competition, employment, investment or productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, these rules have been determined to be "not major."

These actions do not fall within the scope of the Regulatory Flexibility Act. REA has concluded that promulgation of these rules would not represent a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969 (42 U.S.C. 432 *et seq.* [1976]) and, therefore, does not require an environmental impact statement or an environmental assessment.

This regulation contains no information or recordkeeping requirement which requires approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507 *et seq.*).

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.851, Rural Telephone Loans and Loan Guarantees, and 10.852, Rural Telephone Bank Loans. For the reasons set forth in the Final Rule related Notice to 7 CFR 3015, Subpart V (50 FR 47034, November 14, 1985), this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

The availability of the specifications is set forth in the bulletins.

Background

REA has issued a series of publications entitled "bulletins" which serve to implement the policies, procedures and requirements for administering its loan and loan guarantee programs and the security instruments which provide for and secure REA financing. In the bulletin series, REA issues standards and specifications for the construction of telephone facilities with REA loan funds. REA is revising REA Bulletins 345-150, 345-151, 345-152, 345-153, and 345-154. These specifications were last revised in September 1979. Since that time there have been many technical changes in telecommunications. New construction materials, such as fiber optic cable, filled aerial cable, and network interface devices, have been introduced. These new materials require new construction and installation specifications. There have also been changes in testing and grounding requirements and construction techniques. Following is a list of the main changes in each of the specifications:

1. REA Form 515a, Specifications and Drawings for Construction of Direct Buried Plant:

a. Addition of larger capacity buried plant pedestals and more optional accessory items for all sizes of pedestals.

b. Inclusion of an extra-large serving area interface cabinet and additional accessory options for all size cabinets.

c. Elimination of the Trenched Filled Cable and Wire Assembly Unit, BFCT. Provides a suffix "T" to the Buried Filled Cable Unit, BFC, for identification of cable which will be placed at the specified depth by trenching only.

d. Inclusion of suffix "P" to the BFC unit for identification of predesignated buried filled cable that will be very difficult to bury.

e. Provision for suffix "HIC" to the BFC unit to indicate screened cable designated for TIC carrier systems.

f. Inclusion of assembly units for the direct burial of filled fiber optic cable.

g. Inclusion of an assembly unit for the splicing of fiber optic cables.

h. Provisions for the use of mini loading coils.

i. Provisions for designating diameter and length of rod, including use of suffix "S" to identify sectional ground rods related to housing ground assemblies.

j. Establishment of (a) a Housing Ground Assembly Unit, BM2B, for the installation of a bonding connector bracket within an existing housing and (b) an existing facility bonding unit, BM2C for bonding new cables in existing facilities.

k. Clarification of Ripping-Unit, BM76, to include multiple passes, if necessary to achieve required depth.

l. Provisions for a suffix "O" to the HB unit to identify a buried splice closure for filled fiber optic cable, including the fiber organizer.

m. Clarification of the definition of the Cable Splicing Assembly Unit, HC.

n. Elimination of the use of a refraction seismograph in determining the soil composition for burying cable by plowing, ripping, and trenching.

2. REA Form 515c, Specifications and Drawings for Conduit and Manhole Construction:

a. Establishment of a Section UH—Handhole Assembly Unit (Pedestrian Traffic only)

b. Requirement that a test mandrel be pulled through all ducts of a completed section of conduit to ensure proper alignment.

c. Provision allowing precast manholes and collars as an acceptable alternative to poured manholes and brick collars.

3. REA Form 515d, Specifications and Drawings for Underground Cable Installation.

a. Clarification of the definition of the Cable Splicing Assembly Unit, HC.

b. Establishment of a Section HO—Fiber Optic Splicing Assembly Units.

c. Combining Sections HU and HUF into a new HU—Underground Splice Closure Assembly Units and elimination in the new HU unit of the distinction between straight and straight-branch type closures.

d. Provisions for HU unit options, identified by suffixes, for a filled splice closure, a filled fiber optic splice closure with fiber organizer and a pressurized splice closure.

e. Replacement in the new HU unit designations for sizing of the closure, with cable pair count and guage for previously-specified cable diameter and closure volume.

f. Provisions for suffixes "H" and "HIC" in Sections U and UF to indicate screened cables for TI and TIC carrier systems.

g. Provisions for the use of mini loading coils.

h. Establishment of a Section UO—Underground Filled Fiber Optic Cable Assembly Units.

4. REA Form 515f, Specifications and Drawings for Construction of Pole Lines and Aerial Cables:

a. Establishment of a Section CO—Aerial Filled Fiber Optic Cable Assembly Units.

b. Establishment of a Section CW—Aerial Filled Cable Assembly Units.

c. Provision for a sufix "A" in Sections C, CO, and CW to indicate when aluminum-clad steel strand will be used.

d. Provision for suffix "HIC" in Sections C, CF, and CW to indicate screened cable designated for TIC carrier systems.

e. Deletion of Section DW—Figure 8 Distribution Wire Assembly Units.

f. Provisions for broadening the types of aerial splice closures to include free-breathing, nonfilled, filled, filled type without encapsulant, pressurized, and splice closures and organizers for fiber optic cables, and deleting closures for Figure 8 distribution wire.

g. Clarification of the definition of the HC—Cable Splicing Assembly Units.

h. Establishment of a Section HO—Fiber Optic Splicing Assembly Units.

i. Provisions for an extra large serving area interface cabinet and additional accessory options for all size cabinets.

j. Elimination of the NPE, Guy Assembly Units on Existing Poles. Provided a suffix "N" under the PE unit

to identify guys installed on existing poles.

k. Provisions, under PF, for plate and screw type anchors.

l. Provisions for a five-pair unprotected terminal block and mini loading coils in the PG unit.

m. Deletion of assembly units PG5-1, PG17-1, PG17-3, PG33-1, and PG33-3 for Figure 8 distribution wire.

n. Deletion of assembly units PM30-26, 51, and 101, and PM52-2 from Section PM-Ground and Miscellaneous Assembly Units.

5. REA Form 515g, Specifications and Drawings for Service Entrance and Station Protector Installation:

a. Clarification of the measurement of the BM71-Rock Excavating Unit, by adding after the word trenching, the words blasting, sawing, etc.

b. Establishment of a Section NI-Network Interface Assembly Units. Provisions under the NI unit for numerous options, each being identified by a suffix, to indicate the many variations that the assembly unit may take.

c. Provision for fuffix "G" under Section P-Protector Assembly Units, to indicate that gas tube type station protectors are to be furnished.

d. Deletion of assembly units P1-9, P1-9F2, P1-9F6, P1-10, P1-10F2 and P1-10F6 from Section P-Protector Assembly Units.

e. Deletion of assembly unit PM3 from Section PM-Ground and Miscellaneous Assembly Units.

f. Deletion of, under Section SE-Service Entrance Assembly Unit, the requirement whereby a drop exceeding 300 feet is charged as 300 feet to SE and the remaining distance as a buried filled cable unit.

These additions and changes are included in the REA specifications so that telephone borrowers can continue to provide their subscribers with the most up-to-date and efficient telephone service.

No public comments were received as a result of publication of the proposed rules in the **Federal Register** on October 4, 1988.

List of Subjects in 7 CFR Part 1772

Loan programs—communications, Telecommunications, Telephone.

In view of the above, REA hereby amends 7 CFR 1772 by issuing revised Bulletins 345-150, 345-151, 345-152, 345-153, and 345-154.

PART 1772—[AMENDED]

1. The authority cited for Part 1772 is revised to read as follows, and all authorities following the sections are removed.

Authority: 7 U.S.C. 901 et seq., 7 U.S.C. 1921 et seq.

2. The table in § 1772.97 is amended by revising the entries for Bulletins 345-150, 345-151, 345-152, 345-153, and 345-154 to read as follows:

§ 1772.97 Incorporation by reference of telephone standards and specifications.

REA Bulletin No.	Specification No.	Date last issued	Tide of standard or specificiation
*	*	*	*
345-150	Form 515a	July 1989	REA Specifications and Drawings for Construction of Direct Buried Plant.
345-151	Form 515c	July 1989	REA Specifications and Drawings for Conduit and Manhole Construction.
345-152	Form 515d	July 1989	REA Specifications and Drawings for Underground Cable Installation.
345-153	Form 515f	July 1989	REA Specifications and Drawings for Construction of Pole Line and Aerial Cables.
345-154	Form 515g	July 1989	REA Specifications and Drawings for Service Entrance and Station Protection Installation.
*	*	*	*

Dated: May 8, 1989

Jack Van Mark,

Acting Administrator.

[FR Doc. 89-11404 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-15-M

Farmers Home Administration

7 CFR Parts 1944, 1955, and 1965

SFH Loan Making, Security Servicing and Management of Inventory Property

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule.

SUMMARY: Farmers Home Administration (FmHA) amends its regulations on the making of single family housing (SFH) subsequent loans, security servicing and the management of SFH inventory property. This action is taken to expand and clarify the intent of the regulations. The intended effect is to make FmHA regulations on loan making, security servicing and the management of inventory property clearer and more responsive to the needs of the Agency and the public.

EFFECTIVE DATE: June 12, 1989.

FOR FURTHER INFORMATION CONTACT: Joyce M. Halasz, Senior Realty Specialist, Property Management Branch, Single Family Housing Servicing and Property Management Division, Farmers Home Administration, USDA, Room 5309 South Agriculture Building, Washington, DC 20250, telephone (202) 382-1452.

SUPPLEMENTARY INFORMATION:

Classification

This final action has been reviewed under USDA procedures in Departmental Regulation 1512-1, which implements Executive Order 12291 and has been determined to be "nonmajor" since the annual effect on the economy is less than $100 million and there will be no significant increase in cost or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. Furthermore, there will be no 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 import markets. This action is not expected to substantially affect budget outlay or affect more than one agency or to be controversial. The net result is to provide better service to rural communities.

Background/Discussion

On July 25, 1988, FmHA published a proposed rule (53 FR 27863) on SFH loan making and management of inventory property. FmHA now publishes these proposed revisions for final rule. In addition, FmHA is making changes to implement provisions of recent legislation and to include two cross reference and clarification changes in its SFH security servicing regulations.

On September 14, 1988, FmHA published an interim final rule (with request for comments) (53 FR 35638) pursuant to the Agricultural Credit Act of 1987 which include changes to 7 CFR

Part 1955. That rulemaking action primarily affects farmer program (CONACT) portions of the aforementioned Part. This rulemaking action primarily affects housing borrowers/properties and has no impact on the intent or changes in 7 CFR Part 1955 as a result of the Agricultural Credit Act of 1987.

Programs Affected

These programs/activities are listed in the Catalog of Federal Domestic Assistance under Nos:

10.410	Low income housing loans.
10.411	Rural housing site loans.
10.415	Rural rental housing loans.
10.417	Very low income housing repair loans and grants.
10.427	Rural rental assistance payments.

Intergovernmental Consultation

For the reasons set forth in the Final Rule related Notice(s) to 7 CFR Part 3015, Subpart V, 10.410 and 10.417 and are excluded from the scope of Executive Order 12372 which requires Intergovernmental consultation with State and local officials. The remaining programs are subject to intergovernmental consultation with State and local officials.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR Part 1940, Subpart G, "Environmental Program." It is the determination of FmHA that this action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969, Public Law 91-90, an Environmental Impact Statement is not required.

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). The undersigned has determined and certified by signature of this document that this rule will not have a significant economic impact on a substantial number of small entities since this rulemaking action does not directly involve small entities nor does it add/remove any authorities which would affect small entities.

Discussion of Comments

The proposed rule published in the **Federal Register** (53 FR 27863) on July 25, 1988, provided for a 60-day comment period. Nine comments were received during the 60-day comment period. Four comments were received shortly after the comment period, and although received late, were considered in developing this final rule. Of the 13 comments, 12 were from housing advocacy groups relating to FmHA proposal to make single family houses available for lease to community based organizations to shelter the homeless. One comment was received relating to historic preservation as it relates to inventory property. No comments were received from Agency personnel. The following is a summary of the comments by section number:

Part 1944—Subpart A

Section 1944.17(f)—This section deals with making subsequent Section 502 loans for essential repairs even though the subsequent loan may cause the total indebtedness to exceed the market value of the security. No comments were received. Therefore, the Agency adopts the proposed rule.

Part 1955—Subpart B

Section 1955.55(e)—This section deals with off-site procurements. No comments were received. Therefore, the Agency adopts the proposed rule, however, it has been renumbered to § 1955.55(f).

Section 1955.60—This section deals with redemption rights. No comments were received. Therefore, the Agency adopts the proposed rule.

Section 1955.61—This section deals with evictions of persons occupying inventory property. No comments were received. Therefore, the Agency adopts the proposed rule.

Section 1955.63(c)—This section deals with the suitability determination of single family housing property. No comments were received. Therefore, the Agency adopts the proposed rule.

Section 1955.64—This section deals with the repair policy of housing property. A comment was received regarding § 1955.64(a). The commentor suggested that FmHA provide guidance on how a servicing official can identify historic property. Guidance on making this determination is currently contained in § 1955.137 of Subpart C of Part 1955. FmHA concurs that guidance should be provided in § 1955.64(a) and has included a reference to § 1955.137(b). A comment was received regarding FmHA policy, as it relates to historic property, of not repairing property defined as "Nonprogram (NP)" unless the cost of repairs would increase the market value of the property by at least the cost of the repairs. FmHA policy is not to repair any NP property unless the repairs will increase the market value by a like amount. However, the regulation has been expanded to clarify that FmHA will make necessary repairs to preserve the historic integrity of properties that are or are not eligible for listing on the National Register of Historic Places.

Section 1955.66—This section deals with leasing SFH inventory property. A commentor suggests that FmHA include in this section a provision on the leasing of historic properties to protect their historic integrity. FmHA concurs with this recommendation and has adopted same.

Section 1955.72—This section deals with utilization of inventory property by the Federal Emergency Management Agency (FEMA) or by public bodies and nonprofit organizations to shelter the homeless. With one exception, all the comments received on this proposed rule dealt with utilization of FmHA single family housing inventory property by the homeless. The comments can be summarized into nine separate areas which are addressed as follows:

1. The first comment addresses Exhibit C to 7 CFR Part 1955, Subpart B. This exhibit was not published in the **Federal Register**, however, it can be obtained at any FmHA office. The commentors recommend this exhibit be published in the **Federal Register**. The exhibit contains a fact sheet, the Agency's Memorandum of Understanding with the Department of Health and Human Services regarding the availability of FmHA properties for lease by public bodies and nonprofit organizations to provide transitional housing for the homeless, and a sample lease form. FmHA intention in not publishing this exhibit is to provide the necessary flexibility to administer such a program. The bulk of the exhibit is a sample lease. Leases vary from state to state. If a lease were published as a section of the subject regulation, no changes could be made to the sample without proper clearances. If the lease did not comply with a State law or contained a provision inconsistent with the intent of the lease, FmHA could not revise it without a lengthy and formal clearance process which could take several months and effectively prevent the utilization of property by the homeless. Through our network of over 2,000 local FmHA offices, we believe that the exhibit is readily available to the public, and provides the flexibility and responsiveness necessary to administer this program. Therefore, the Agency does not adopt this suggestion.

Based upon comments received, FmHA has broadened the information contained in the exhibit. The exhibit references changes (as addressed in this rulemaking document) and specifically addresses responsibilities of FmHA and

the public body or nonprofit organization to ensure success of the program. Due to intervening amendments made to Subpart B, the information which was contained in proposed Exhibit C is now contained in Exhibit D.

2. The second comment deals with FmHA intention to make available for lease to public bodies and nonprofit organizations to provide transitional housing for the homeless only properties which have been defined by the Agency as "Nonprogram (NP)." The commentors believe that FmHA should make both program and nonprogram (NP) units available for lease under this program. The purpose of the FmHA program is to provide financial assistance to program applicants with very-low, low, or moderate income to purchase adequate but modest housing in rural areas. Although there is no statutory requirement to do so, FmHA believes program properties should be made available for purchase by program applicants. This policy is strongly supported by housing advocacy groups. This furthers the objectives of the Section 502 rural housing program. Making program properties available for extended leases would remove these properties from the housing stock for potential applicants. Accordingly, FmHA does not adopt this comment. However, FmHA will sell a program property to a public body or nonprofit organization for shelter for the homeless and provide such entities with the same preference as a program purchaser.

3. The third comment deals with FmHA proposal to lease properties to public bodies and nonprofit organizations for a period not to exceed three years. Commentors recommended the period be extended from three to ten or fifteen years. This would permit use of Housing and Urban Development (HUD) transitional housing funds to cover operating costs, for which a 10-year lease is required. FmHA concurs with this comment, and will make properties available for lease up to 10 years.

4. The fourth comment deals with FmHA proposal to require the sponsor to bring the property to habitable condition, if not already habitable, before it can be utilized to shelter the homeless. The first concern was due to the proposed length of the lease (proposed for three years), which would not provide sponsors with the opportunity to recover such costs. The second concern had to do with the sponsors financial ability to make such repairs, possibly making the program unworkable. As mentioned above, FmHA will now make these properties available for lease for up to 10 years, therefore making recovery of repair costs feasible. In addition, FmHA will bear the costs of removing any health or safety hazards from the property prior to formally executing a lease. The sponsor will be responsible for cosmetic-type repairs such as painting, floor covering, etc.

5. The fifth comment deals with FmHA making inventory properties available for sale to public bodies and nonprofit organizations. The subject proposed rulemaking action only dealt with making properties available for lease, not sale, Therefore, FmHA will not address this comment at this time, but will propose another rulemaking action in the very near future to address sale of inventory property to shelter the homeless. In the interim, there is nothing to preclude a public body or nonprofit organization from purchasing FmHA inventory property under the sale provisions contained in Subpart C of Part 1955 of this chapter. Some of the suggested additions to our sale procedures to facilitate this program include: a special retention time for which (program or nonprogram) inventory properties are held exclusively for sale to public bodies and nonprofit organizations; a discount of 10 percent off the price at which the property was most recently offered for sale: payment of all closing costs of the transferee (the purchaser) by FmHA; priority to occupants of these properties to obtain FmHA financing should the sponsor desire to sell same; no program or nonprogram inventory properties should be sold to other than program applicants or public bodies and nonprofit organizations until after referral to HUD for a determination of whether the property should be made available to the homeless; a fifty year repayment plan, availability of two percent of the mortgage amount for transfer costs, reduced interest rates, and no down payment requirement when the sale is to a public body or nonprofit organization.

6. The sixth comment suggests that FmHA develop and maintain a list of community based organizations interested in obtaining such properties for lease, purchase or conversion for the benefit of very-low, low-income or homeless persons and families, and notify such organizations of the availability of FmHA inventory properties. While FmHA is interested in working with such organizations and public bodies, we believe such an entity should make contact with FmHA if they are interested in our inventory property. In Fiscal Year 1988, FmHA acquired approximately 15,000 single family dwellings. To notify all public bodies and nonprofit organizations of all available FmHA inventory property would be burdensome on FmHA personnel and the public body or nonprofit organization if there was no need for such properties. Each of our approximately 2000 county offices is aware of inventory properties available for sale and/or lease in the County Office area and will provide a list of such properties upon request from a public body or nonprofit organization. To create a constant stream of paperwork from FmHA to these entities does not appear to be cost or time effective for either party. FmHA stands ready and willing to assist any such entity which desires to purchase or lease an FmHA inventory property. Therefore, this comment is not adopted.

7. The seventh comment relates to prohibitions against the use of other federal funds or public monies in acquiring, leasing or otherwise making use of FmHA inventory units to shelter the homeless. There was no such prohibitions in the proposed rule nor do we intend to create same in this final rulemaking action. FmHA strongly supports the utilization of other public monies, or private funds, to support this endeavor.

8. The eighth comment centers around one of the conditions of the proposed sample lease of FmHA inventory property to public bodies and nonprofit organizations. The sample lease states that such properties will provide "temporary" housing for the homeless in rural areas. The commentor recommends that FmHA impose use restrictions on the sale of properties for low income and homeless persons and families, but that no such restrictions be imposed in any lease. FmHA partially concurs with this comment. We concur that the term, "temporary housing for the homeless," may be too restrictive, however, having no use restrictions in a lease could invite abuse and leave the Agency and the public body or nonprofit organization open to potential criticism. FmHA will amend the lease to limit the use of the property to provide transitional housing for the homeless. Comments concerning the sale of property are not appropriate to this rulemaking action, but we will consider the comment in the development of our proposed rulemaking action on the sale of the subject properties. Under present rules, if a public body or nonprofit organization wants to purchase a FmHA inventory property, no use restrictions are imposed.

9. The ninth comment suggested that FmHA provide technical assistance grants to public bodies and nonprofit organizations to implement this program. While FmHA concurs that public bodies and nonprofit organizations may need technical assistance to make this a successful endeavor and is pleased to make properties available to achieve this goal, there are no appropriations for this purpose; therefore, FmHA cannot adopt this comment.

10. A final comment was received relating to advertising and sale of FmHA inventory property in the State of Alabama. Although the subject rulemaking action does not address sale provisions or advertising practices of the Agency, contained in 7 CFR Part 1955, Subpart C, the comment is considered. The commentor's first concern is that FmHA is not providing, through real estate brokers, sufficient outreach or advertising to reach minority applicants for the purchase of inventory property. All open listing agreements and exclusive broker contracts between FmHA and real estate brokers contain Nondiscrimination Certifications. The Nondiscrimination Certification requires real estate brokers to follow "Fair Housing" guidelines; train agents in nondiscrimination policies and laws; utilize minority media when advertising FmHA properties for sale in predominantly white neighborhoods; and follow nondiscriminatory hiring policies. All advertising is required to contain the "Equal Opportunity Housing" logo. FmHA regulations (§ 1955.146(c)), require special efforts to reach minority purchasers. When FmHA lists five or more properties for sale under an exclusive listing agreement in the same subdivision, an "Affirmative Fair Housing Marketing Plan" is required. The commentor's second concern is that real estate brokers are discouraging sales to minority purchasers. No specific cases were mentioned, therefore FmHA could not investigate; however, the commentor stated they called real estate brokers handling FmHA inventory property sales and requested a list of all FmHA inventory properties available for sale. The brokers responded by recommending that the potential purchaser identify the area in which they desire to purchase a property and then recontact the broker to determine if any property is available. It is common practice for a real estate broker to ask a purchaser to identify his or her requirements in order to locate and show only those properties which would meet them. FmHA does not find reasonable cause for concern over these comments; however, we offer the following statistics to support this finding. According to the 1980 census, twenty-six percent of the residents of Alabama are minority. For the fiscal year ending September 30, 1988, forty-three percent of all FmHA SFH loans made in Alabama were to minorities. For that same period, forty-five percent of all FmHA credit sales in Alabama were made to minorities.

In addition to the aforementioned revisions, FmHA is also making the following cross-reference amendments and clarifications to Subpart C of Part 1965:

1. In § 1965.104(b)(3), a cross-reference is made to the revision made in this rulemaking action to Subpart A of Part 1944 of this chapter regarding subsequent SFH loans.

2. In § 1965.105(b)(2) regarding payment of taxes by FmHA on behalf of the borrower, there is insufficient guidance provided on how these taxes are amortized. Although § 1965.105 contains a paragraph on amortizing the tax voucher, there is no specific reference to this paragraph in paragraph (b)(2). Accordingly, we have included a cross-reference to clarify this section. This amendment was not proposed for rulemaking since it is merely an administrative cross-reference insertion.

3. In § 1965.104(e)(2) regarding amortizing tax vouchers, there is no cross-reference to Subpart G of Part 1951 of this chapter. Subpart G contains SFH servicing regulations and provisions on amortizing vouchers. Accordingly, we have included a cross-reference to clarify this subparagraph. This amendment was not proposed for rulemaking since it is merely an administrative cross-reference insertion.

List of Subjects

7 CFR Part 1944

Grant programs—Housing and community development, Home improvement, Loan programs—Housing and community development, Low and moderate income housing—Rental, Mobile homes, Mortgages, Rural housing, Subsidies.

7 CFR Part 1955

Government acquired property, Government property management.

7 CFR Part 1965

Administrative practice and procedure, Loan programs, Housing and community development, Low and moderate income housing—Rental, Rural areas.

Therefore, Chapter XVIII, Title 7, Code of Federal Regulations, is amended as follows:

PART 1944—HOUSING

1. The authority citation for Part 1944 continues to read as follows:

Authority: 42 U.S.C. 1480, 5 U.S.C. 301, 7 CFR 2.23, 7 CFR 2.70.

Subpart A—Section 502 Rural Housing Loan Policies, Procedures, and Authorizations

2. In § 1944.17, paragraph (f) is added to read as follows:

§ 1944.17 Maximum loan amounts.

* * * * *

(f) When a subsequent loan is needed for repairs essential to protect the Government's security interest, the total FmHA indebtedness may exceed the market value of the security by no more than the amount of the subsequent loan plus a reasonable amount for closing costs.

PART 1955—PROPERTY MANAGEMENT

3. The authority citation for Part 1955 continues to read as follows:

Authority: 7 U.S.C. 1989, 42 U.S.C. 1480, 5 U.S.C. 301, 7 CFR 2.23, 7 CFR 2.70.

Subpart B—Management of Property

4. In § 1955.55, paragraph (f) is added to read as follows:

§ 1955.55 Taking abandoned real or chattel property into custody and related actions.

* * * * *

(f) *Off-site procurements.* Circumstances may require off-site procurement action(s) to be taken by FmHA to protect custodial, security or inventory property from damage or destruction and/or protect the Government's investment in the property. Such procurements may include, but are not limited to construction or reconstruction of roads, sewers, drainage work or utility lines. This type work may be accomplished either through FmHA procurement or cooperative agreement. However, if FmHA is obtaining a service or product for itself only, it must be a procurement and any such actions will be in accordance with FmHA Instruction 2024-A (available in any FmHA office). Funding will come from the appropriate insurance fund.

(1) *Conditions for procurement.* Such expenditures may be made only when all of the following conditions are met:

(i) A determination is made that failure to procure work would likely result in a property loss greater than the expenditure;

(ii) There are not other feasible means (including cooperative agreements) to accomplish the same result;

(iii) The recovery of such advance(s) is not authorized by security instruments in the case of security or custodial property (no such limitation exists for inventory property);

(iv) Written documentation supporting subparagraphs (i), (ii) and (iii) has been obtained from the authorized program official;

(v) Approval has been obtained from the appropriate Assistant Administrator.

(2) *Direct procurement action.* Where direct procurement action is contemplated, an opinion must be obtained from the Regional Attorney that:

(i) FmHA has the authority to enter the off-site property to accomplish the contemplated work, or

(ii) A specific legal entity has authority to grant an easement (right-of-way) to FmHA for the contemplated work and such an easement, in a form approved by the Regional Attorney, has been obtained.

(3) *Cooperative agreements.* Cooperative agreements between FmHA and other entities may be made to accomplish the requirement where the principal purpose is to provide money, property, services or items of value to state or local governments or other recipients to accomplish a public purpose. Exhibit C of this subpart (available in any FmHA office) is an example of a typical cooperative agreement. A USDA handbook providing detailed guidance for all parties is available from the USDA—Office of Operations and Finance. Although cooperative agreements are not a contracting action, the authority, responsibility and administration of these agreements will be handled consistent with contracting actions.

(4) *Consideration of maintenance agreements.* Maintenance requirements must be considered in evaluating the economic benefits of off-site procurements. Where feasible, arrangements or agreements should be made with state, local governments or other entities to ensure continued maintenance by dedication or acceptance, letter agreements, or other applicable statutes.

5. Sections 1955.60 and 1955.61 are revised to read as follows:

§ 1955.60 Inventory property subject to redemption by the borrower.

If inventory property is subject to redemption rights, the State Director, with prior approval of OGC, will issue a State Supplement giving guidance concerning the former borrower's rights, whether or not the property may be leased or sold by the Government, payment of taxes, maintenance, and any other items OGC deems necessary to comply with State laws. Routine care and maintenance will be provided according to § 1955.64 of this subpart to preserve and protect the property. Repairs are limited to those essential to prevent further deterioration of the property or to remove a health or safety hazard to the community in accordance with § 1955.64(a) of this subpart unless State law permits full recovery of cost of repairs in which case usual policy on repairs is applicable. If the former borrower with redemption rights has possession of the property or has a right to lease proceeds, FmHA will not rent the property until the redemption period has expired unless the State Director obtains prior authorization from OGC. Further guidance on sale subject to redemption rights is set forth in § 1955.138 of Subpart C of this Part.

§ 1955.61 Eviction of persons occupying inventory real property or dispossession of persons in possession of chattel property.

Advice and assistance will be obtained from OGC where eviction from realty or dispossession of chattel property is necessary. Where OGC has given written authorization, eviction may be effected through State courts rather than Federal courts when the former borrower is involved, or through local courts instead of Federal/State courts when the party occupying/possessing the FmHA property is not the former borrower. In those cases, a State Supplement will be issued to provide explicit instructions. For MFH, eviction of tenants will be handled in accordance with Subpart L of Part 1944 of this chapter and with the terms of the tenant's lease. If no written lease exists, the State Director will obtain advice from OGC.

6. In § 1955.63, paragraph (c) is revised to read as follows:

§ 1955.63 Suitability determination.

* * * * *

(c) *Housing property.* Property which secured housing loans will be classified as "program" or "nonprogram (NP)." After a determination of whether the property is suited for retention in the respective program, the repair policy outlined in § 1955.64(a) of this subpart will be followed. In determining whether a property is suited for retention in the program, items such as size, design, possible health and/or safety hazards and obsolescence due to functional, economic, or locational conditions must carefully be considered. Generally, program property will meet, or can be realistically repaired to meet, the standards for existing housing outlined in Subpart A of Part 1944 of this chapter except the requirements relating to size and/or design features will not be considered provided the property is typical of modest homes in the area. The cost of repairs will generally not be considered in determining suitability. Since houses, sites and locations vary widely throughout the country, discretion and sound judgment must be used in determining suitability. The majority of houses FmHA acquires will be suited for retention and classified as program property. In some instances, property will not be suited for retention in the program and will be classified as "nonprogram (NP)" property. Situations of this type include, but are not limited to:

(1) A dwelling which has been enlarged or improved to the point where it is clearly above modest in size, design and/or cost.

(2) When a determination is made that the property should not have been financed originally.

(3) A dwelling brought into the program as an existing dwelling which met program standards at the time it was originally financed by FmHA but which does not conform to current policies. This includes older and/or larger houses of a type which have proven to create excessive energy and/or maintenance costs to very-low and low-income borrowers.

(4) A dwelling which is obsolete due to location, design, construction or age.

(5) A dwelling which requires major redesign/renovation to be brought to program standards.

* * * * *

7. In § 1955.64, the introductory text and paragraphs (a) introductory text and (a)(1) are revised to read as follows:

§ 1955.64 Securing, maintaining, and repairing inventory property.

When property is acquired, the servicing official shall inspect the property and take the necessary steps to see that it is secured and maintained. "NO TRESPASSING," "FOR SALE" (with Equal Housing Opportunity logo and telephone number of the appropriate contact person) or other appropriate signs may be posted on the property at the discretion of the responsible official. The servicing

official is responsible for initiating actions to assure that the value of the inventory property is preserved. If real property (exclusive of improvements) is unsafe, refer to § 1955.137(e) of Subpart C of Part 1955 of this Part for further guidance. Substantial improvement or repair of property located in a flood or mudslide hazard area is subject to the limitation outlined in Exhibit C, Paragraph 3b (1) and (2) of Subpart G of Part 1940 of this chapter, and § 1955.56 of this subpart.

(a) *Basic repair policy.* After a determination of suitability is made, repairs will be accomplished in accordance with the following provisions. Properties that are listed or are eligible for listing on the National Register of Historic Places, in whole or in part (see § 1955.137(b) of Subpart C of this Part), will be repaired as necessary to protect their historic integrity after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation regarding any repairs. Also, if any property presents a health or safety hazard, except SFH or MFH properties to be sold with "Decent, Safe and Sanitary" (DSS) clauses, necessary steps will be taken to remove the hazard, and if necessary, after seeking advice from appropriate agencies having related expertise or jurisdiction.

(1) *SFH.*—(i) *Program property.* Program property will be repaired, renovated, and/or improved as necessary to meet program standards for existing housing, to enhance buyer appeal, and make the maximum recovery on the Government's investment, with the objective being to sell the property at the earliest time possible. Attention should be given to the interior and exterior of the structure(s), landscaping, driveways, walks, and other site improvements which will enhance marketability. Exceptions to this policy are authorized only when a prospective program applicant has indicated a willingness to buy a specific property "as-is" and make needed repairs with his/her own resources or with a subsequent loan made simultaneously with the credit sale. In areas where severe vandalism is prevalent, the State Director is authorized to waive the repair policy in specific locations when the County Supervisor requests the waiver based upon documentation to support the request. In these cases a subsequent loan for the cost of repairs may be made in conjunction with the credit sale. A "Neighborhood Watch" program or similar effort should be considered to reduce vandalism.

(ii) *Nonprogram (NP) property.* NP property should be cleaned, free of trash (dwelling and lot), and made presentable to enhance marketability. Repairs will generally not be made unless they increase the "as-is" market value by at least the cost of repairs. NP property which does not meet the "Decent, Safe and Sanitary" (DSS) standards outlined in § 1955.103 of Subpart C of Part 1955 of this chapter will be repaired to meet these standards only when the cost of the repairs will increase the "as-is" market value by at least the cost of repairs. However, any NP property which is listed or is eligible for listing on the National Register of Historic Places will be repaired to the extent necessary to protect and prevent deterioration of its historic integrity after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation.

* * * * *

8. In § 1955.66, paragraph (a)(2) introductory text is added and paragraphs (a)(2)(i) and (e)(2) are revised, the title of paragraph (f) is revised, and an additional sentence is added to the end of paragraph (f) as follows:

§ 1955.66 Lease of real property.

* * * * *

(a) * * *

(2) *Inventory property.* Inventory property may be leased under the following conditions. Except for farm property proposed for lease under the Leaseback/buyback Program or the Dwelling Retention Program, any property that is listed or eligible for listing on the National Register of Historic Places may be leased only after the servicing official and the State Historic Preservation Officer determine that the lease will adequately ensure the property's condition and historic character.

(i) *SFH.* SFH inventory will generally not be leased; however, if unusual circumstances indicate leasing may be prudent, the County Supervisor is authorized to approve the lease.

* * * * *

(e) * * *

(2) *SFH property.* The lease amount will be the market rent unless the lessee is a potential program applicant, in which case the lease amount may be set at an amount approximating the monthly payment if a loan were made (reflecting interest credits, if any) calculated on the basis of the price of the house and income of the lessee, plus 1/12 of the estimated real estate taxes, property insurance, and maintenance which would be payable by a homeowner.

* * * * *

(f) *Property containing wetlands or located in a flood plain or mudslide hazard area.* * * * Property containing floodplains and wetlands will be leased subject to the same use restrictions as contained in § 1955.137(a)(1) of Subpart C of this Part.

* * * * *

9. Section 1955.72 is revised to read as follows:

§ 1955.72 Utilization of inventory housing by Federal Emergency Management Agency (FEMA) or under a Memorandum of Understanding Between FmHA and the Department of Health and Human Services (HHS) for transitional housing for the homeless.

(a) *FEMA.* By a Memorandum of Understanding between FmHA and FEMA, inventory housing property not under lease or sales agreement may be made available to shelter victims in an area designated as a major disaster area by the President. See Exhibit A of this subpart (available in any FmHA office). Authority is hereby delegated to the State Director to implement this Memorandum of Understanding; and the State Director may redelegate this authority to County Supervisors or District Directors.

(b) *HHS.* By a Memorandum of Understanding between FmHA and HHS, inventory housing property not under lease or sales agreement may be made available by lease to public bodies and nonprofit organizations to provide transitional housing for the homeless. See Exhibit D of this subpart (available in any FmHA office). Authority is hereby delegated to the State Director to implement this Memorandum of Understanding; and the State Director may redelegate this authority to County Supervisors or District Directors. Copies of all executed leases and/or questions regarding this program should be referred by State Offices to the Single Family Housing Servicing and Property Management (SFH/SPM) Division in the National Office.

§ 1955.80 [Amended]

10. In § 1955.80, paragraphs (a) and (b) are amended by removing the words "1955–D" and inserting in their place the words "2024–A," and removing the words "by use of Form FmHA 120–10."

11. The text after § 1955.100 regarding Exhibits to Subpart B is revised to read as follows (Exhibit B remains unchanged):

Exhibits to Subpart B

All exhibits are available in any FmHA County Office. Exhibit B is also published in the Code of Federal Regulations.

Exhibit A—Memorandum of Understanding Between the Federal Emergency Management Agency and the Farmers Home Administration.

Exhibit B—Notification of Tribe of Availability of Farm Property for Lease or Purchase.

Exhibit C—Cooperative Agreement (Example).

Exhibit D—Fact Sheet—The Federal Interagency Task Force on Food and Shelter for the Homeless.

* * * * *

PART 1965—REAL PROPERTY

12. The authority citation for Part 1965 continues to read as follows:

Authority: 7 U.S.C. 1989, 42 U.S.C. 1480, 5 U.S.C. 301, 7 CFR 2.23, 7 CFR 2.70.

Subpart C—Security Servicing for Single Family Rural Housing Loans

13. In § 1965.104, the second sentence of paragraph (b)(3) is removed and replaced with the following sentence to read as follows:

§ 1965.104 Preservation of security and protection of liens.

* * * * *

(b) * * *

(3) * * * Before making a request for a protective advance, it must be determined that a subsequent loan in accordance with Subpart A of Part 1944 of this chapter, including § 1944.17(f) of that subpart, cannot be made. * * *

* * * * *

14. In § 1965.105, the last sentence of paragraph (b)(2) is replaced with the following two sentences, and paragraph (e)(2) is revised to read as follows:

§ 1965.105 Servicing real estate taxes.

* * * * *

(b) * * *

(2) * * * When taxes are paid by FmHA under these circumstances, the voucher will be processed according to paragraph (e) of this section. The case will be considered a problem case, and if the borrower fails to make scheduled payments including the amortized advance, a decision must be made as to whether liquidation is appropriate.

* * * * *

(e) * * *

(2) Amortization of the advance will be in accordance with § 1951.310 of Subpart G of Part 1951 of this chapter. When a borrower has more than one loan secured by real estate on which taxes are being paid, the advance will be charged to the initial loan or the lowest loan number within the fund code that is still outstanding.

Dated: April 14, 1989

Neal Sox Johnson,

Acting Administrator, Farmers Home Administration.

[FR Doc. 89-11277 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-07-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Rel. No. 34-26790; File No. S 7-626]

Securities Transactions Exempt from Transaction Fees

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending its rule governing transaction fees, to continue to exempt transactions in over-the-counter National Market System securities from the imposition of Section 31 transaction fees.

EFFECTIVE DATE: May 6, 1989.

FOR FURTHER INFORMATION CONTACT: Thomas R. Gira, Esq., 202/272-2827, Room 5204, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Discussion

Section 31 of the Securities Exchange Act of 1934 ("Act") [1] requires every national securities exchange to pay an annual fee to the Commission based on the aggregate dollar amount of the sales of securities (other than bonds, debentures, and other evidences of indebtedness) transacted on that exchange.[2] In addition, Section 31 requires payment of similar fees from broker-dealers for over-the-counter ("OTC") transactions in exchange-traded stocks.[3] The section also provides the Commission with authority to exempt any sale of securities or any class of sales of securities from imposition of the transaction fee.

Pursuant to its exemptive authority, the Commission promulgated Rule 31-1 which provides a number of exemptions from Section 31, including certain transactions in securities quoted over the National Association of Securities Dealers Automated Quotation System ("NASDAQ securities"). As a result, Rule 31-1 exempts from Section 31 certain transactions in OTC securities effected on national securities exchanges. In particular, the rule exempts transactions in NASDAQ securities trading on an exchange pursuant to unlisted trading privileges ("UTP") and transactions in exchange-listed stocks that are not reported under the Consolidated Tape Association ("CTA") reporting plan.[4]

In September 1985, the Commission issued two releases that incidentally could subject certain transactions in OTC securities to Section 31 fees for the first time. First, in order to permit increased competition between market centers and the development of a national market system, the Commission adopted a policy to extend UTP to applicant national securities exchanges in certain OTC securities ("NASDAQ/UTP securities"), provided certain terms and conditions were satisfied. In particular, the Commission's grant of UTP was conditioned on, among other things, the Commission approving a joint plan to consolidate exchange and OTC quotations and transaction reports in OTC securities upon which UTP are granted.[5] Second, the Commission

[1] 15 U.S.C. 78a *et seq.*, as amended (1982).

[2] The fee is equal .00003% of the aggregate dollar value of securities sold.

[3] For transactions otherwise than on a national securities exchange, the fee is to be paid by the broker-dealer on the sale side of the transaction. If, however, there is no broker-dealer on the sale side of the transaction, then the broker-dealer on the buy side is required to pay the fee. Where no broker-dealer is involved in the transaction, no fee is required. *See* Rule 31-1.

[4] Specifically, Rule 31-1(f) exempts the following transactions:

Transactions in NASDAQ securities as defined in 240.11Aa3-1 (Rule 11Aa3-1 under the Act) except for those NASDAQ securities for which transaction reports are collected, processed, and made available pursuant to the plan originally submitted to the Commission pursuant to Rule 17a-15 (subsequently amended and redesignated as Rule 11Aa3-1) under the Act, which plan was declared effective as of May 17, 1974 [the CTA Plan]. The terms and provisions of this paragraph shall remain effective until May 6, 1989. Essentially, the fees are imposed on all listed securities, as well as those relatively few listed securities that are quoted on both NASDAQ and the exchange(s) on which they are listed, but reported pursuant to the CTA Plan. The fees are not imposed on transactions in securities traded principally OTC, including securities which are trading on an exchange either because of UTP or an exchange listing.

[5] *See* Securities Exchange Act Release No. 22412 (September 16, 1985), 50 FR 38640. Thus far, only the Midwest Stock Exchange ("MSE") trades OTC stocks on a UTP basis. The MSE trades 25 of the most actively traded NASDAQ/NMS securities pursuant to an interim plan approved by the Commission with the National Association of

Continued

adopted amendments to Rule 11Aa2-1 ("NMS securities rule") to permit certain OTC securities to be concurrently exchange-listed and designated as NMS securities ("NASDAQ/exchange-listed securities").[6] As with NASDAQ/UTP securities, in order to avoid problems of conflicting reporting plans, only exchange-listed stocks that are not reported under the CTA plan are eligible to be NASDAQ/exchange-listed securities. As a result, transactions in NASDAQ/exchange-listed securities are reported solely under the NASDAQ transaction reporting plan.

The potential effect of these two initiatives would have been to subject certain principally OTC-traded securities to Section 31 fees, even though Section 31 is designed to apply only to exchange-listed securities and OTC transactions in these securities. In particular, under section 12(f)(6) of the Act securities trading otherwise OTC but admitted to UTP on an exchange are deemed to be "registered." [7] Therefore, if construed literally, Section 31 would require payment of fees by the exchange(s) trading a NASDAQ/UTP security and any broker-dealer trading such a security OTC on a principal basis.

Similarly, stocks that were listed on a regional exchange and then received NMS designation would be subject to Section 31, *i.e.*, the OTC trades in such securities would be subject to Section 31 transaction fees as well as the exchange transactions.

Therefore, in May 1986, the Commission amended Rule 31-1 to exempt NASDAQ/NMS Securities from section 31 by adding subsection f.[8] The amendment to Rule 31-1 reflects the Commission's belief that it is preferable to address the application of Section 31 fees to the OTC market in a uniform and orderly manner, rather than through the automatic application of section 31 as a result of granting UTP to NASDAQ securities or permitting exchange-listed, non-CTA-reported securities to be concurrently designated as NASDAQ/NMS securities.[9] Subsection f, as originally promulgated, was to be effective until May 6, 1988.[10] In May 1988, the Commission extended the effectiveness of Rule 31-1(f) for an additional year.[11] In order to ensure a uniform application of Section 31 fees to the OTC market, the Commission again is extending the effectiveness of subsection f.

When subsection f was originally added to Rule 31-1 in 1986, the Commission found that the exemption was "consistent with the public interest, equal regulation of markets and broker-dealers, and the development of a national market system" because it permitted the orderly introduction of Section 31 fees to the OTC market.[12] Accordingly, the Commission finds that an extension of the effectiveness of subsection f is also consistent with the purposes of the Act because to do otherwise would subject certain OTC securities to Section 31 fees and not others.

II. Effect on Competition and Regulatory Flexibility Act Considerations

Section 23(a)(2) of the Act [13] requires the Commission, in adopting rules under the Act, to consider the anti-competitive effects of such rules, if any, and to balance the anti-competitive impacts of such rules, if any, against the regulatory benefits gained in terms of furthering the purposes of the Act. As noted above, the exemption in Rule 31-1(f) applies to only a limited segment of the OTC market.[14] Specifically, the exemption only applies to those NASDAQ/NMS securities that are subject to either UTP or a concurrent exchange listing. As a result, there are some exchange transactions to which Section 31 does not apply. The Commission, however, does not believe this distinction between exchange transactions will have a significant impact on competition because the trading volume in the NASDAQ/NMS securities attributable to exchanges has been minimal and the Commission cannot predict that ultimately there will be substantial exchange trading in the subject NASDAQ/NMS securities.[15] Moreover, without subsection f all OTC securities will not be treated equally for purposes of Section 31. Therefore, the Commission finds that the extension of Rule 31-1(f) will have at most a minimal competitive impact and that it will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, including, in particular, Sections 11A, 12(f)(6) and 31.

The Regulatory Flexibility Act [16] is not applicable to the revision of Rule 31-l(f) to extend its effectiveness. The Regulatory Flexibility Act's flexibility analysis requirements are limited to rulemaking for which the Commission would be required by the Administrative Procedure Act ("APA") to publish general notice of proposed rulemaking.[17] Due to the nature of the

Securities Dealers, Inc. ("NASD") governing the collection, consolidation and dissemination of quotation and transaction information for these stocks. *See* Securities Exchange Act Release Nos. 24406 (April 29, 1987), 52 FR 17495, and 24407 (April 29, 1987), 52 FR 17349.

[6] *See* Securities Exchange Act Release No. 22413 (September 16, 1985), 50 FR 38515. As mentioned earlier, before June 1987, only OTC securities could be designated as NMS securities. Therefore, if a security previously was listed on an exchange and the issuer sought to have its security designated as an NMS security, the stock would have to be delisted.

[7] Section 12(f)(6), in pertinent part, provides: "Any security for which unlisted trading privileges are continued or extended pursuant to [subsection f] shall be deemed to be registered on a national securities exchange . . ."

[8] *See* Securities Exchange Act Release No. 23229 (May 21, 1986), 51 FR 18578. The Commission amended the rule again in June 1987 when NMS designation effectively was extended to reported listed securities, to limit the exemption to only NASDAQ/NMS securities.

[9] Specifically, without the exemption, the application of section 31 would depend entirely on exchange decisions on whether to obtain UTP in NASDAQ/NMS securities or to report a security under the CTA plan; as well as on issuer decisions to retain an exchange listing despite the stock being designated an NASDAQ/NMS security. In addition, absent the exemption, once there was exchange trading of an NASDAQ/NMS stock, all OTC broker-dealers who traded the affected NASDAQ security automatically would be subject to section 31 fees, even if there were little or no actual exchange trading.

[10] *See* Securities Exchange Act Release No. 23229 (May 21, 1986), 51 FR 18578, 18579 ("Adopting Release"). In 1986, only OTC securities could be designated as NMS securities.

[11] *See* Securities Exchange Act Release No. 25671 (May 6, 1988), 53 FR 17180.

[12] Adopting Release, *supra* note 5, at 51 FR 18579.

[13] 15 U.S.C. 78w(a)(2).

[14] Even though subsection f exempts all transactions in NASDAQ securities reported under the NASDAQ transaction reporting plan, this exemption, as it applies to NASDAQ securities not subject to exchange trading, is redundant because Section 31 on its face does not apply to these transactions.

[15] The Commission is aware that the volume of trading in OTC securities on the MSE pursuant to UTP only has been about 1% of the total NASDAQ volume in those securities.

[16] 5 U.S.C. 601-612.

[17] 5 U.S.C. 603(a).

The Commission did prepare a Final Regulatory Flexibility Analysis ("FRFA") regarding subsection f of Rule 31-1 at the time of its original adoption. That FRFA noted that Rule 31-1(f) would exempt from Section 31 of the Act exchanges and broker-dealers engaging in transactions in NASDAQ/NMS securities subject to unlisted trading privileges or to a concurrent exchange listing. The FRFA noted that the principal effect of the exemption would be to relieve exchanges and broker-dealers from payment of fees to which they otherwise would be subject. The FRFA stated that, in order to determine the amount of the fee owed under section 31 for transactions in NASDAQ/NMS securities, market participants would need to separately calculate dollar volume in NMS securities and dollar volume in non-NMS securities.

A copy of the prior FRFA may be obtained by contacting Thomas R. Gira, 202/272-2827, Room 5204, Division of Market Regulation, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Commission's revision of Rule 31-1, APA rulemaking procedures are not applicable.[18]

Although the APA states that an agency must provide general notice of proposed rulemaking and an opportunity for comment, these requirements do not apply if such agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest."[19] In addition, although the APA generally imposes a 30-day delayed effective date requirement, this requirement does not apply if a rule grants an exemption or relieves a restriction.[20]

The Commission finds for good cause that it is unnecessary, impracticable, and contrary to the public interest to provide notice and an opportunity for public comment. Notice and prior comment are unnecessary since extending the effectiveness of Rule 31-1(f) maintains the status quo, and Rule 31-1(f) was subject to public comment at the time it was originally proposed.[21] Further, subsection f simply grants an exemption from Section 31; extending its effectiveness imposes no regulatory or financial burden or obligation on anyone. Notice and prior comment are impracticable because the exemption is due to expire on May 6, 1989. Assessing fees for a short period between then and a subsequent adoption date would be unwarrantably confusing and burdensome for the persons affected. Moreover, a lapse in the effectiveness of subsection f would be contrary to the public interest because it would result in the unequal regulation of markets and broker-dealers and hinder the development of a national market system.

III. Statutory Basis and Text of Proposed Amendments

In accordance with the following, 17 CFR Part 240 is amended as follows:

[18] 5 U.S.C. 553.

[19] 5 U.S.C. 553(b)(B).

[20] The APA (§ 553) provides, in pertinent part:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction[.]

Thus, because Rule 31-1(f) grants an exemption to broker-dealers from the payment of transaction fees on NASDAQ/NMS securities, the Commission is not required to publish the revision of Rule 31-1(f) 30 days before its effective date.

[21] *See* Adopting Release, *supra* note 5, 51 FR at 18578.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read as follows:

Authority: Section 23, 48 Stat. 901, as amended; 15 U.S.C. 78w. * * * Section 240.31-1 is also authorized under Section 31, 48 Stat. 904, as amended (15 U.S.C. 78ee).

§ 240.31-1 [Amended]

2. Section 240.31-1 is amended by deleting the last sentence of paragraph (f), which reads: "The terms and provisions of this paragraph shall remain effective until May 6, 1989."

By the Commission.

Dated: May 5, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-11412 Filed 5-11-89; 8:45 am]

BILLING CODE 8010-01-M

POSTAL SERVICE

39 CFR Part 232

Inspection of Items Entering or Leaving Postal Property; Unauthorized Possession of Controlled Substances; Nondiscrimination

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule amends regulations concerning inspection of items brought onto or taken off of postal property. It adds possession of a controlled substance to the list of prohibited actions on that property.

This brings postal regulations on this subject into full harmony with existing state and federal laws prohibiting the unauthorized possession of controlled substances. Finally, it amends postal regulations against discrimination by adding prohibitions against discrimination based on age, reprisal, or physical or mental handicap.

EFFECTIVE DATE: June 12, 1989.

FOR FURTHER INFORMATION CONTACT: H.J. Bauman, (202) 268-4415.

SUPPLEMENTARY INFORMATION: On August 8, 1988, the Postal Service published for comment in the **Federal Register** proposed amendments to its rules concerning the inspection of items entering or leaving postal property, unauthorized possession of controlled substances, and nondiscrimination. 53 FR 29750. Interested persons were invited to submit written comments concerning the proposed regulations by September 7, 1988. The Postal Service received one comment from the public.

The commenter was concerned that the proposed language authorizing inspection of "containers" would permit the examination of items brought onto postal premises for mailing. That was not the intent of the proposal. Accordingly, to make the intention specific, a sentence is being added to § 232.1(b)(1) saying that items brought directly to a postal facility's customer mailing acceptance area and deposited in the mail are not subject to inspection, except as provided in section 115 of the Domestic Mail Manual. Section 115 of the Domestic Mail Manual, which deals with mail security, generally prohibits opening and inspection of mail, with certain well-defined exceptions.

To clarify the final rule, we are also adopting certain minor and editorial changes as follows:

(1) Proposed § 232.1(b)(1) provided that "a full search of a person may accompany an arrest." In order to show the reason for the search and the order in which the events occur, the sentence is revised to read as follows: "A person arrested for violation of this section may be searched incident to the arrest."

(2) Proposed § 232.1(b)(2) provided (as did preexisting § 232.1(b)) that properties must be closed to the public after normal "working" hours. Working hours in most postal facilities extend beyond normal business hours. Accordingly, the word "working" is changed to "business", so that properties are closed to the public after normal business hours, which was the original intent of the regulation.

(3) Proposed § 232.1(g) would have prohibited the possession, sale, or use on postal premises of any "controlled substance" (except one that is medically approved). The exception for "medically approved" controlled substances, which was also in preexisting § 232.1(g), was intended to permit the possession, sale, or use of such substances when permitted by law. Accordingly, to clarify this provision and extend it to its original intended application, controlled substances will be prohibited "except when permitted by law". In addition to continuing the exception for substances which are "medically approved", this language would apply to other situations for which an exception would apply, such as when, for law enforcement purposes, postal inspectors may have controlled substances in their possession while on postal premises.

(4) Proposed § 232.1(g) also carried forward the preexisting absolute prohibition on the sale or use of any alcoholic beverage on postal premises. The Postal Service is changing this prohibition to allow exceptions for

official functions. This change will conform the regulation with existing practice, which permits exceptions to the rule for official functions if authorized by the Postmaster General. This exception is also consistent with the procedure followed by the General Services Administration with regard to the use of intoxicants on United States Government-owned or leased premises. See 41 CFR 105-735.219 (1988).

(5) Proposed § 232.1(m) added the words "age (at least 40 years of age)" to the list of prohibited bases for discrimination. The language is being changed to read: "age (persons 40 years of age or older are protected)". This is to clarify that only persons who are age 40 or older are in the protected class, that is, only such persons could claim that their age was the reason they were excluded from using or discriminated against in their use of a public facility.

Proposed § 232.1(m) also added the word "reprisal" to the list of prohibitions. In order to define the intended meaning of the word, we are adding the following parenthetical phrase after the word reprisal: "(discrimination against a person for having filed or for having participated in the processing of an EEO complaint—29 CFR 1613.261-.262)".

Except as explained above, the changes are being adopted as proposed. Accordingly, 39 CFR Part 232 is amended as follows:

List of Subjects in 39 CFR Part 232

Law enforcement, Postal Service.

PART 232—[AMENDED]

1. The authority citation for Part 232 is revised to read as set forth below:

Authority: 39 U.S.C. 401, 403(b)(3), 404(a)(7); 40 U.S.C. 318, 318a, 318b, 318c; sec. 609, Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. 100-440; 18 U.S.C. 13, 3061; 21 U.S.C. 802, 844.

2. In § 232.1, paragraphs (b), (g) and (m) are revised to read as follows:

§ 232.1 Conduct on postal property.

* * * * *

(b) *Inspection, recording presence.* (1) Purses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection. However, items brought directly to a postal facility's customer mailing acceptance area and deposited in the mail are not subject to inspection, except as provided by section 115 of the Domestic Mail Manual. A person arrested for violation of this section may be searched incident to that arrest.

(2) Except as otherwise ordered, properties must be closed to the public after normal business hours. Properties also may be closed to the public in emergency situations and at such other times as may be necessary for the orderly conduct of business. Admission to properties during periods when such properties are closed to the public may be limited to authorized individuals who may be required to sign the register and display identification documents when requested by security force personnel or other authorized individuals.

* * * * *

(g) *Alcoholic beverages and drugs.* A person under the influence of an alcoholic beverage or any drug which has been defined as a "controlled substance" may not enter postal property or operate a motor vehicle on postal property. The possession, sale, or use of any "controlled substance" (except when permitted by law) or the sale or use of any alcoholic beverage (except as authorized by the Postmaster General or designee) on postal premises is prohibited. The term "controlled substance" is defined in section 802 of title 21 U.S.C.

* * * * *

(m) *Nondiscrimination.* There must be no discrimination by segregation or otherwise against any person or persons because of race, color, religion, national origin, sex, age (persons 40 years of age or older are protected), reprisal (discrimination against a person for having filed or for having participated in the processing of an EEO complaint—29 CFR 1613.261-262), or physical or mental handicap, in furnishing, or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided on postal property.

* * * * *

Fred Eggleston,

Assistant General Counsel, Legislative Division.

[FR Doc. 89-11439 Filed 5-11-89; 8:45 am]

BILLING CODE 7710-12-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8253]

RIN 1545-AK62

Limitations on Passive Activity Losses and Credits—Definition of Activity

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the definition of "activity" for purposes of applying the limitations on passive activity losses and passive activity credits and amends previously issued temporary regulations relating to the limitations. Changes to the applicable tax law were made by the Tax Reform Act of 1986, the Revenue Act of 1987, and the Technical and Miscellaneous Revenue Act of 1988. The temporary regulations affect taxpayers subject to the limitations on passive activity losses and passive activity credits and provide them with the guidance needed to comply with the law. The text of the temporary regulations set forth in this document also serves as the text of the proposed regulations for the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register.**

EFFECTIVE DATE: These regulations are effective for taxable years beginning after December 31, 1986, except for §§ 1.469-2T(f) (3) through (7), which are effective for taxable years beginning after December 31, 1987.

FOR FURTHER INFORMATION CONTACT: Robert Stoddart or Michael J. Grace at 202-566-4751 (not a toll-free number), or at Internal Revenue Service, 1111 Constitution Avenue NW., Room 4429, Washington, DC 20224 (Attn: CC:CORP:T:R (PS-001-89)).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

This regulation is being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the requirements for collecting information contained in this regulation have been reviewed and, pending receipt and evaluation of public comments, approved for use through January 31, 1991, by the Office of Management and Budget (OMB) under control number 1545-1037. The estimated annual burden per respondent for making a written election varies from 5 minutes to 15 minutes, depending on individual circumstances, with an estimated average of 6 minutes.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require more or less time, depending on their circumstances.

For further information concerning this collection of information, and where to submit comments on this collection of

information, the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-reference notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Issuance of Proposed Regulation and Submission to Small Business Administration

The rules contained in this document are also being issued as proposed regulations by the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, a copy of the rules will be submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Background

Temporary regulations under section 469 were published in the **Federal Register** for February 25, 1988 (53 FR 5686, T.D. 8175). Those regulations added §§ 1.469–0T, 1.469–1T, 1.469–2T, 1.469–3T, 1.469–5T, and 1.469–11T to Title 26 of the Code of Federal Regulations, and indicated that the definition of activity would be contained in § 1.469–4T. This document adds rules for identifying activities in § 1.469–4T and amends §§ 1.469–0T, 1.469–1T, 1.469–2T, 1.469–3T, 1.469–5T, and 1.469–11T in certain respects.

The temporary regulations reflect the amendment of the Internal Revenue Code by sections 501 and 502 of the Tax Reform Act of 1986 (Pub. L. 99–514), which added section 469, and the amendment of section 469 by section 10212 of the Revenue Act of 1987 (Pub. L. 100–203) and sections 1005(a) and 2004(g) of the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. 100–647). Section 469 disallows the passive activity loss and the passive activity credit for the taxable year. Section 469(l)(1) provides that the Secretary of the Treasury or his delegate shall prescribe such regulations as may be necessary or appropriate to carry out provisions of section 469, including regulations which specify what constitutes an activity.

Definition of Activity

I. Description of Provisions

A. Scope and Structure of § 1.469–4T

Section 1.469–4T provides rules under which endeavors to which the passive loss and credit limitations apply (business and rental operations) are treated as one or more activities for purposes of those limitations. In general, these rules are divided into three groups: (i) rules that identify the business and rental operations that constitute an undertaking (the undertaking rules); (ii) rules that identify the undertaking or undertakings that constitute an activity (the activity rules); and (iii) rules that apply only under certain special circumstances (the special rules).

B. Undertaking Rules

The undertaking is generally the smallest unit that can constitute an activity, and an undertaking may include diverse business and rental operations. The basic undertaking rule identifies the business and rental operations that constitute an undertaking by reference to their location and ownership. Under this rule, business and rental operations that are conducted at the same location and are owned by the same person are generally treated as part of the same undertaking. Conversely, business and rental operations generally constitute separate undertakings to the extent that they are conducted at different locations or are not owned by the same person.

In some circumstances the undertaking in which business and rental operations are included does not depend on the location at which the operations are conducted. Operations that are not conducted at any fixed place of business or that are conducted at the customer's place of business are treated as part of the undertaking with which the operations are most closely associated. In addition, operations that are conducted at a location but do not relate to the production of property at that location or to the transaction of business with customers at that location are treated, in effect, as part of the undertaking or undertakings that the operations support.

The basic undertaking rule is also modified if the undertaking determined under that rule includes both rental and nonrental operations. In such cases, the rental operations and the nonrental operations generally must be treated as separate undertakings. This rule does not apply, however, if more than 80 percent of the income of the undertaking determined under the basic rule is attributable to one class of operations (*i.e.*, rental or nonrental) or if the rental operations would not be treated as part of a rental activity because of the exceptions contained in § 1.469–1T(e)(3)(ii). For purposes of this rule, short-term rentals of real property (*e.g.*, hotel-room rentals) are generally treated as nonrental operations. The regulations also treat oil and gas wells that are subject to the working-interest exception in § 1.469–1T(e)(4) as separate undertakings.

C. Activity Rules

The basic activity rule treats each undertaking in which a taxpayer owns an interest as a separate activity of the taxpayer. In the case of trade or business undertakings, professional service undertakings, and rental real estate undertakings, additional rules may either require or permit the aggregation of two or more undertakings into a single activity.

Trade or business undertakings include all nonrental undertakings other than oil and gas undertakings described above and professional service undertakings decribed below. An aggregation rule treats trade or business undertakings that are both similar and controlled by the same interests as part of the same activity. This rule is, however, generally inapplicable to small interests held by passive investors in such undertakings, except to the extent such interests are held through the same passthrough entity. Undertakings are similar for purposes of this rule if more than half (by value) of their operations are in the same line of business (as defined in a revenue procedure that the Service is issuing in conjunction with these regulations) or if the undertakings are vertically integrated. All the facts and circumstances are taken into account in determining whether undertakings are controlled by the same interests. If, however, each member of a group of five or fewer persons owns a substantial interest in each of the undertakings, the undertakings may be rebuttably presumed to be controlled by the same interests.

Trade or business undertakings (including undertakings that are aggregated under the rules described above) are also subject to a second aggregation rule. Under this rule, undertakings that constitute an integrated business and are controlled by the same interests must be treated as part of the same activity.

Broader aggregation rules apply to professional service undertakings (*i.e.*, undertakings that predominantly involve the provision of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts or consulting). In general, professional service undertakings that are either similar, related, or controlled by the same interests must be treated as part of the same activity. The rules for determining whether trade or business undertakings are controlled by the same interests also apply with respect to professional

service undertakings. Professional service undertakings are similar, however, if more than 20 percent (by value) of their operations are in the same field, and two professional service undertakings are related if one of the undertakings derives more than 20 percent of its gross income from persons who are customers of the other undertaking.

The rules for aggregating rental real estate undertakings are generally elective. They permit taxpayers to treat any combination of rental real estate undertakings as a single activity. Taxpayers may also divide their rental real estate undertakings and then treat portions of the undertakings as separate activities or recombine the portions into activities that include parts of different undertakings. The fragmentation of rental real estate into separate activities is limited by two consistency requirements. Taxpayers may not fragment their rental real estate in a manner that is inconsistent with their treatment of such property in prior taxable years or with the treatment of such property by the passthrough entity through which it is held. There are no comparable limitations on the aggregation of rental real estate into a single activity. A coordination rule provides, however, that a rental real estate undertaking must be treated as a separate activity if income or gain from the undertaking is subject to recharacterization under § 1.469–2T(f)(3) (relating to the rental of nondepreciable property).

Another elective rule permits taxpayers to treat a nonrental undertaking as a separate activity even if the undertaking would be treated as part of a larger activity under the aggregation rules applicable to the undertaking. This elective rule is limited by consistency requirements similar to those that apply to rental real estate operations. Moreover, in cases in which a taxpayer elects to treat a nonrental undertaking as a separate activity, the taxpayer's level of participation (*i.e.*, material, significant, or otherwise) in the separate activity is the same as the taxpayer's level of participation in the larger activity in which the undertaking would be included but for the election.

D. Special Rules

Special rules apply to the business and rental operations of consolidated groups of corporations and publicly traded partnerships. Under these rules, a consolidated group is treated as one taxpayer in determining its activities and those of its members, and business and rental operations owned through a publicly traded partnership cannot be aggregated with operations that are not owned through the partnership.

There is also a special rule for taxable years ending before August 10, 1989. In those years, taxpayers may organize business and rental operations into activities under any reasonable method. A taxpayer will also be permitted to use any reasonable method to allocate disallowed deductions and credits among activities for the first taxable year in which the taxpayer's activities are determined under the general rules of § 1.469–4T.

II. Significant Policy Issues

A. Definition of Undertaking

Under the regulations, an activity of a taxpayer generally consists of either a single undertaking or a combination of two or more undertakings. Thus, the definition of undertaking should be broad enough to provide a useful intermediate step in determining a taxpayer's activities, but not so broad that unrelated business and rental operations are inappropriately combined in the same activity. Moreover, an undertaking should be defined with such precision that the business and rental operations that constitute an activity can be determined with reasonable certainty. The Service recognizes that no single definition of undertaking can reconcile these objectives in all cases. It believes, however, that a definition that strikes a reasonable balance among these competing objectives is essential to carry out the purposes of section 469 and to comply with section 469(l)(1), which directs the service to prescribe regulations that specify what constitutes an activity.

Location and ownership are the primary factors used to identify the business and rental operations that constitute an undertaking. Thus, the number of a taxpayer's undertakings is generally limited to the number of locations at which the taxpayer conducts business directly plus the number of locations at which business is conducted by passthrough entities in which the taxpayer owns an interest. In most cases, the number of undertakings should be small enough to avoid the need for extensive application of the aggregation rules contained in the regulations. In fact, for the large number of taxpayers who conduct all their business operations at a single location, either directly or through a single passthrough entity, the determination that such operations constitute a single undertaking is generally the only analysis that the regulations require.

The use of location and ownership as the primary factors in determining undertakings also contributes to certainty in the determination of activities. While some uncertainty is likely in the case of operations that are included in an undertaking without regard to the location at which the operations are conducted (*i.e.*, operations that are not conducted at a fixed place of business, operations that are conducted at the customer's place of business, and support operations), the Service contemplates that reasonable methods will be used in determining the undertaking with which such operations are associated and that any reasonable method will be respected. The Service invites public comment regarding the desirability of detailed rules for determining the undertakings with which such operations are associated.

The Service recognizes that unrelated business operations may be treated as part of a single undertaking under these rules. In the typical case, however, operations that are conducted at the same location and are owned by the same person constitute an integrated and interrelated economic unit. Moreover, identification of the exceptional case in which such operations do not constitute an integrated and interrelated economic unit and might appropriately be treated as multiple undertakings would require additional analysis that would greatly undermine the certainty that these regulations are intended to provide. In addition, the accurate measurement of gain or loss from, and participation in, such multiple undertakings would generally require unduly burdensome allocations of income, expenses, and participation among the undertakings. For these reasons, the regulations do not provide an exception to the basic undertaking rule for those few cases in which, based on all the facts and circumstances, the operations conducted at a single location might appropriately be treated as multiple undertakings.

B. Rental Undertaking

All rental activities are passive, but other activities are passive only if the taxpayer does not materially participate. Because of this difference in treatment, it is inappropriate in most cases to combine rental operations and nonrental operations in a single activity. In the absence of a special rule, however, the basic undertaking rule would often treat rental operations and nonrental operations that are conducted at the same location as part of the same undertaking. To prevent this, the regulations provide in such cases that

the rental operations and the nonrental operations are generally treated as two separate undertakings.

In some cases, however, it is appropriate to treat rental operations and nonrental operations as part of the same activity. For example, operations that are incidental to other operations should be treated as part of the same activity even if they are not in the same class (*i.e.*, rental or nonrental) as such other operations. Although all the facts and circumstances should be taken into account in determining whether operations in one class are incidental to operations in the other class, one of the most significant factors is the substantiality of the operations in each class relative to those in the other class. Moreover, even though it is generally more appropriate to separate rental and nonrental operations, the separation of those operations increases accounting burdens because of the need to allocate income, expenses, and participation between the rental and nonrental undertakings. As a result, it is difficult to justify treating rental and nonrental operations that are conducted at the same location as separate undertakings unless substantial operations are included in each undertaking. For these reasons, the rule separating rental and nonrental operations conducted at the same location does not apply if more than 80 percent of the aggregate income from the operations is attributable to one class of operations.

C. Aggregation of Nonrental Undertakings

The purpose of the aggregation rules applicable to nonrental undertakings is to identify undertakings that constitute an integrated and interrelated economic unit. This purpose suggests that all the facts and circumstances should be taken into account in determining whether undertakings are aggregated into a single activity. On the other hand, a rule requiring consideration of all relevant facts and circumstances would necessitate difficult and time-consuming analyses of the relationships between undertakings and would also introduce substantial uncertainty into the identification of activities. Accordingly, the regulations generally limit the relevant factors to the two that the Service believes are most significant (similarity and control) and provide specific rules for taking those factors into account.

The first of these factors, similarity, involves either common lines of business or different stages in the production or distribution of the same product or group of products. The function of this factor is to ascertain whether the nature of the businesses in which the undertakings are engaged is such that there can be meaningful interactions among undertakings, whether in the form of economies of scale, transactions between undertakings, or otherwise. Such interactions are an essential characteristic of an integrated and interrelated economic unit and do not typically occur between businesses that are conducted at different locations unless the businesses are similar within the meaning of the regulations.

Businesses that, by their nature, could constitute an integrated and interrelated economic unit may, nevertheless, be competitors (if they involve a common line of business) or adversarial in their dealings (if they involve different stages in production or distribution) unless they serve and are coordinated by common interests. Conversely, businesses that are commonly controlled are typically integrated if the nature of the businesses is such that integration would result in economies of scale or other efficiencies. Accordingly, the second factor that must be taken into account under the regulations is control of the undertakings.

The rules for determining whether undertakings are similar and are controlled by the same interests further limit the need to consider all relevant facts and circumstances. The regulations provide bright-line tests for determining whether undertakings are similar. Under these tests, the only relevant factors are the line of business (if any) from which more than 50 percent of an undertaking's gross income is derived and whether the undertaking provides more than 50 percent (by value) of its property and services to related undertakings or obtains more than 50 percent (by value) of its property and services from a related undertaking. Moreover, the lines of business used to determine similarity are generally adapted from the Standard Industrial Classification (SIC) of the United States, and thus are consistent with an established method of distinguishing and categorizing business operations. Similarly, the regulations simplify and minimize the uncertainty in determinations of common control by providing a rebuttable presumption under which undertakings are generally presumed to be controlled by the same interests if more than 50 percent of the interests in the undertakings are owned by the members of a group of five or fewer persons.

The Service recognizes that unrelated business operations may be treated as part of the same activity under these rules. This raises essentially the same issue as treating unrelated business operations as part of the same undertaking, and the considerations taken into account in that context are equally applicable here. Accordingly, the regulations do not provide an exception to the aggregation rules for those few cases in which, based on all the facts and circumstances, similar and commonly-controlled undertakings might appropriately be treated as multiple activities.

The aggregation rules are generally inapplicable to small interests held by passive investors in the undertakings, except to the extent such interests are held through the same passthrough entity. The purpose of this exception is not to ascertain more accurately whether undertakings constitute an integrated and interrelated business activity, but rather to simplify the determination of activities for the taxpayers to whom it applies. In general, such taxpayers may accept a passthrough entity's identification and aggregation of undertakings and need not engage in further analysis to determine whether undertakings held through the entity should be aggregated with undertakings held directly or through other passthrough entities.

In some cases, businesses that are not similar within the meaning of the regulations nonetheless constitute an integrated business if all the facts and circumstances are taken into account. The Service believes that a rule requiring such businesses to be treated as a single activity, if applied after the rule aggregating similar and commonly controlled undertakings, would not affect a large number of taxpayers. Moreover, even though such a rule requires consideration of all relevant facts and circumstances, this should not be a substantial burden if the only analysis required is of the relationships among a few large groups of operations. Accordingly, the regulations provide that one or more undertakings (or groups of undertakings that have been aggregated because of their similarity) are treated as a single activity if the undertakings (or groups of undertakings) are controlled by the same interests and, based on all the facts and circumstances, their operations constitute a single integrated business.

Special aggregation rules are provided for professional service undertakings. These rules are necessary, in part, because of the material participation rule applicable to personal service activities. Thus, the rules do not permit the aggregation of professional service activities and other activities. In addition, the rules are significantly

broader than those applicable to other nonrental undertakings. The Service believes that broader aggregation rules are appropriate in this context because all professional services share certain similarities and it is increasingly common for professional-service firms to provide services in more than one field. Morever, a professional-service firm's success in one field is more likely to be attributable to expertise and goodwill developed in another field than is the case with other nonrental businesses.

D. Rental Real Estate Undertakings

The treatment of a taxpayer's nonrental operations as one or more activities significantly affects the computation of the taxpayer's passive activity loss and credit, primarily because material and significant participation are measured on an activity-by-activity basis and because certain rules that recharacterize income associated with nonrental operations also apply on an activity-by-activity basis. Thus, to prevent avoidance of the passive loss rules by inappropriately grouping operations into activities that do not constitute integrated and interrelated economic units, taxpayers are required to conform to precise rules for identifying the operations that are included in a nonrental activity.

The organization of rental operations into activities does not provide comparable opportunities for avoidance of the passive loss rules because the character of the income or loss from rental operations is generally not affected by the taxpayer's participation in the activity in which the operations are included and the rules recharacterizing income from rental operations generally apply on a property-by-property basis. A taxpayer's participation is relevant in computing the $25,000 offset for rental real estate activities. The purpose of the offset, however, it to provide targeted relief to moderate income taxpayers, and its amount and the taxpayers to which it applies are limited accordingly. Thus, the Service does not believe it is necessary to provide rules in these regulations that further restrict the availability of the offset.

Because specific rules similar to those applicable to nonrental operations are not necessary in the case of rental operations, the regulations generally permit taxpayers to organize their rental real estate operations into activities in any manner they find convenient or advantageous. Taxpayers are not permitted, however, to fragment their rental real estate operations into separate activities to a greater extent than in preceding taxable years or to a greater extent than such operations are fragmented by the passthrough entity through which they are held. The first limitation prevents taxpayers from treating operations as an activity in cases in which their records are not likely to contain sufficient detail to permit them to compute the suspended loss from the activity. Similarly, the second limitation prevents taxpayers from treating operations as an activity in cases in which the accounting information provided to them by the passthrough entity is unlikely to be detailed enough to permit them to compute the net income or loss from the activity. A third limitation provides that a rental real estate undertaking must be treated as a separate activity if income from the undertaking is subject to recharacterization under § 1.469–2T(f)(3). This limitation is necessary to maintain the integrity of the recharacterization rule.

The rules described above apply only to rental operations involving real property. The Service invites public comment regarding the desirability of providing similar flexibility with respect to rental operations involving personal property.

E. Election to Treat Nonrental Undertakings as Separate Activities

Although a nonrental undertaking may, with other nonrental undertakings, constitute an integrated and interrelated economic unit, the synergistic effects resulting from the conduct of the undertaking as part of an integrated business generally cease when there is a disposition of the undertaking. Thus, the activity that remains after such a disposition is fundamentally different from the activity conducted before the disposition. As a result, the disposition of an undertaking will often be an appropriate time to measure economic income or loss. Moreover, an undertaking generally consists of identifiable operations that are conducted at a single location, and a disposition of such operations should, in most cases, permit the accurate measurement of the economic income or loss from the portion of a business that is conducted at the location.

For the reasons described above, the Service believes that an undertaking may constitute an appropriate unit for measuring gain or loss even in cases in which it is part of a larger integrated business. Accordingly, the regulations permit taxpayers to elect to treat a nonrental undertaking as a separate activity (other than for purposes of measuring participation) even though under the aggregation rules the undertaking would be treated as part of a larger activity. This election is not available, however, if the taxpayer treated the undertaking as part of a larger activity in a preceding taxable year or if the passthrough entity through which the undertaking is held treats it as part of a larger activity. The purpose of these exceptions is the same as the purpose of the similar limitations that apply to the election to treat rental real estate operations as separate activities.

In some cases, an undertaking may be conducted in a manner that enhances the value of other undertakings to the detriment of its own value. In such cases, the economic income or loss from an undertaking cannot be accurately measured at the time of its disposition. Accordingly, the Service is considering a rule that would provide in such cases that a disposition of a taxpayer's interest in such an undertaking is not treated as a disposition of the taxpayer's entire interest in an activity for purposes of section 469(g). If adopted, this rule would be contained in the regulations to be issued under § 1.469–6T (relating to the treatment of losses upon certain dispositions of passive and former passive activities).

Amendments Made to Existing Regulations

This document also amends portions of the existing regulations under section 469 to coordinate those regulations with the definition of activity contained in § 1.469–4T and to make certain clarifying and corrective changes to the existing regulations. The significant changes made to the existing regulations by these amendments are described below.

I. Section 1.469–1T

The determination of whether an activity is a rental activity under § 1.469–1T(e)(3) generally requires the computation of an average period of customer use for the activity. The average period of customer use, as defined in § 1.469–1T(e)(3)(iii), is not weighted to reflect differences in the rental value of the activity's property. Thus, property that produces an insignificant amount of an activity's rental income might significantly affect the activity's average period of customer use. Therefore, this document amends the definition of average period of customer use to take into account the amount of income generated by an item of property.

This document also amends the rule contained in § 1.4469–1T(f)(4) (relating to the allocation of disallowed deductions and credits among activities)

to reflect the possibility that the composition of an activity may change from year to year.

II. Section 1.469–2T

This document amends § 1.469–2T (c) and (d) to provide rules for characterizing the gain and loss from the sale of property held in a dealing activity at the time of the sale. For purposes of characterizing the gain or loss from the sale of any such property that was used predominantly in one or more nondealing activities and was not acquired for the principal purpose of dealing in such property, the rules provide that holding the property in the dealing activity is treated as the use of the property in the last nondealing activity in which such property was used before its sale. In all other cases, the rules provide that the property is treated as used in the dealing activity, and treat such property as used in a dealing activity for any period during which it is simultaneously offered for sale to customers and used in a nondealing activity. These rules replace the provision contained in § 1.469–1T(e)(3)(vi)(D) of the existing regulations. Under that provision, certain rentals of property were treated as incidental to an activity of dealing in such property rather than as part of a rental activity.

The Service has received numerous comments regarding the income-recharacterization rule contained in § 1.469–2T(f)(5), relating to the treatment of net income from certain property rented incidental to a developent activity. Some commentators have argued that there are a substantial number of cases in which the gain on the dispositon of property that is used in a rental activity for less than 24 months after its development is predominantly attributable to its use in a rental activity rather than to the development of the property. Other commentators have argued that there should be no special recharacterization rule with respect to development activities. After careful consideration, it has been determined that § 1.469–2T(f)(5) should apply only if the use of an item of property in an activity involving the rental of such property commenced less than 12 months prior to its sale (or contracting for its sale). Accordingly, this document amends the existing regulations to provide for this result.

III. Section 1.469–5T

Under § 1.469–4T, the business and rental operations that constitute an activity may change from year to year. The existing regulations do not address how the material participation tests that are based on participation in prior years will apply in cases in which such changes occur. Accordingly, this document amends § 1.469–5T to provide that, for purposes of the material participation tests that are based on participation in prior years, a taxpayer is treated as materially participating in an activity for a prior taxable year if the activity includes an undertaking involving substantially the same operations as an undertaking that was included in an activity in which the taxpayer materially participated during such prior taxable year.

Special Analyses

These rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required.

Drafting Information

The principal author of these regulations is Michael J. Grace, Office of the Assistant Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations on matters of both substance and style.

List of Subjects

26 CFR 1.441–1 through 1.483–2

Accounting, Deferred compensation plans, Income taxes.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, Title 26, Chapter 1, Parts 1 and 602 of the Code of Federal Regulations are amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for Part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805. * * * Section 1.469–4T also issued under 26 U.S.C. 469(l)(1).

Par. 2. Section 1.469–OT is revised to read as follows:

§ 1.469–OT Table of contents (temporary).

This section lists the captions that appear in the temporary regulations under section 469.

§ 1.469–1T General rules (temporary).

(a) Passive activity loss and credit disallowed.
(1) In general.
(2) Exceptions.
(b) Taxpayers to whom these rules apply.
(c) Cross references.
(1) Definition of passive activity.
(2) Passive activity loss.
(3) Passive activity credit.
(4) Effect of rules for other purposes.
(5) Special rule for oil and gas working interests.
(6) Treatment of disallowed losses and credits.
(7) Corporations subject to section 469.
(8) Consolidated groups.
(9) Joint returns.
(10) Material participation.
(11) Effective data and transition rules.
(12) Future regulations.
(d) Effect of section 469 and the regulations thereunder for other purposes.
(1) Treatment of items of passive activity income and gain.
(2) Coordination with sections 613A (d) and 1211.
(3) Treatment of passive activity losses.
(e) Definition of "passive activity."
(1) In general.
(2) Trade or business activity.
(3) Rental activity.
(i) In general.
(ii) Exceptions.
(iii) Average period of customer use.
(A) In general.
(B) Average use factor.
(C) Average period of customer use for class of property.
(D) Period of customer use.
(E) Class of property.
(F) Gross rental income and daily rent.
(iv) Significant personal services.
(A) In general.
(B) Excluded services.
(v) Extraordinary personal services.
(vi) Rental of property incidental to a nonrental activity of the taxpayer.
(A) In general.
(B) Property held for investment.
(C) Property used in a trade or business.
(D) Lodging rented for convenience of employer.
(E) Unadjusted basis.
(vii) Property made available for use in a nonrental activity conducted by a partnership, S corporation, or joint venture in which the taxpayer owns an interest.
(viii) Examples.
(4) Special rule for oil and gas working interests.
(i) In general.
(ii) Exception for deductions attributable to a period during which liability is limited.
(A) In general.
(B) Coordination with rules governing the identification of disallowed passive activity deductions.
(C) Meaning of certain terms.
(*1*) Allocable deductions.
(*2*) Disqualified deductions.
(*3*) Net loss.
(*4*) Ratable portion.
(iii) Examples.
(iv) Definition of "working interest."
(v) Entitles that limit liability.
(A) General rule.
(B) Other limitations disregarded.

(C) Examples.
(vi) Cross reference to special rule for income from certain oil or gas properties.
(5) Rental of dwelling unit.
(6) Activity of trading personal property.
(i) In general.
(ii) Personal property.
(iii) Example.
(f) Treatment of disallowed passive activity losses and credits.
(1) Scope of this paragraph.
(2) Identification of disallowed passive activity deductions.
(i) Allocation of disallowed passive activity loss among activities.
(A) General rule.
(B) Loss from an activity.
(C) Significant participation passive activities.
(D) Examples.
(ii) Allocation with loss activities.
(A) In general.
(B) Excluded deductions.
(iii) Separately identified deductions.
(3) Identification of disallowed credits from passive activities.
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(ii) Coordination rule.
(iii) Separately identified credits.
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(ii) Operations continued through C corporations or similar entities.
(iii) Examples.
(g) Application of these rules to C corporations.
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(2) Definitions.
(3) Participation of corporations.
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(ii) Significant participation.
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(4) Modified computation of passive activity loss in the case of closely held corporations.
(i) In general.
(ii) Net active income.
(iii) Examples.
(5) Allowance of passive activity credit of closely held corporations to extent of net active income tax liability.
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(ii) Net active income tax liability.
(h) Special rules for affiliated group filing consolidated return.
(1) In general.
(2) Definitions.
(3) Disallowance of consolidated group's passive activity loss or credit.
(4) Status and participation of members.
(i) Determination by reference to status and participation of group.
(ii) Determination of status and participation of consolidated group.
(5) Modification of rules for identifying disallowed passive activity deductions and credits.
(i) Identification of disallowed deductions.
(ii) Ratable portion of disallowed passive activity loss.
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(6) Transactions between members of a consolidated group.
(i) Scope.
(ii) Recharacterization of gain or loss from intercompany transactions other than deferred intercompany transactions.
(A) In general.
(B) Recharacterization of gain or loss as portfolio items.
(iii) Deferred intercompany transactions.
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(C) Restoration of deferred gain or loss of dispositions.
(D) Certain recharacterized items treated as portfolio items.
(E) Property involved in deferred intercompany transaction.
(iv) Definitions.
(A) Deferred intercompany transactions.
(B) Directly related.
(C) Intercompany transaction.
(D) Purchasing member.
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(7) Disposition of stock of a member of an affiliated group.
(8) Dispositions of property used in multiple activities.
(i) [Reserved]
(j) Spouses filing joint return.
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(i) Identification of disallowed deductions and credits.
(ii) Treatment of deductions disallowed under sections 704(d), 1366(d), and 465.
(iii) Treatment of losses from working interests.
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§ 1.469–2T Passive activity loss (temporary).

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(B) Dispositions of partnership interests and S corporation stock.
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(iii) Disposition of substantially appreciated property formerly used in nonpassive activity.
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(F) Coordination with section 163(d).
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(ii) Gross income derived in the ordinary course of a trade or business.
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(B) Royalties derived in the ordinary course of the trade or business of licensing intangible property.
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(4) Items of personal service income specifically excluded.
(i) In general.
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(i) In general.
(ii) Positive section 481 adjustments.
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(6) Gross income from certain oil or gas properties.
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(ii) Gross and net passive income from the property.
(iii) Property.
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(7) Other items specifically excluded.
(d) Passive activity deductions.
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(4) Clearly and directly allocable expenses.
(5) Treatment of loss from disposition.
(i) In general.
(ii) Disposition of property used in more than one activity in 12-month period preceding disposition.
(iii) Other applicable rules.
(A) Applicability of rules in paragraph (c)(2).
(B) Dispositions of partnership interests and S corporation stock.
(6) Coordination with other limitations on deductions that apply before section 469.
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(ii) Proration of deductions disallowed under basis limitations.
(A) Deductions disallowed under section 704 (d).
(B) Deductions disallowed under section 1366 (d).
(iii) Proration of deductions disallowed under at-risk limitation.
(iv) Coordination of basis and at-risk limitations.
(v) Separately identified items of deduction and loss.
(7) Deductions from section 481 adjustment.
(i) In general.

(ii) Negative section 481 adjustments.
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(8) Taxable year in which item arises.
(e) Special rules for partners and S corporation shareholders.
(1) In general.
(2) Payments under sections 707(a), 707(c), and 736(b).
(i) Section 707(a).
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(iii) Payments in liquidation of a partner's interest in partnership property.
(A) In general.
(B) Payments in liquidation of a partner's interest in unrealized receivables and goodwill under section 736(a).
(3) Sale or exchange of interest in passthrough entity.
(i) Application of this paragraph (e)(3).
(ii) General rule.
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(iii) Treatment of gain allocated to certain passive activities as not from a passive activity.
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(ii) Significant participation passive activity.
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(viii) Example.
(5) Net income from certain property rented incidental to development activity.
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(iii) Services performed for the purpose of enhancing the value of property.
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(iv) Capital expenditures.
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(8) Limitation on recharacterized income.
(9) Meaning of certain terms.
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§ 1.469–3T Passive activity credit (temporary).

(a) Computation of passive activity credit.
(b) Credits subject to section 469.
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(2) Treatment of credits attributable to qualified progress expenditures.
(3) Special rule for partners and S corporation shareholders.
(4) Exception for pre-1987 credits.
(c) Taxable year to which credit is attributable.
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(2) Regular tax liability.
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(2) Scope and structure of § 1.469–4T.
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(ii) Basic undertaking rule.
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(ii) Aggregation of trade or business undertakings.
(A) Trade or business undertakings.
(B) Similar, commonly-controlled undertakings treated as a single activity.
(C) Integrated businesses treated as a single activity.
(iii) Aggregation of professional service undertakings.
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(4) Examples.
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(f) Certain trade or business undertakings treated as part of the same activity.
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(i) In general.
(ii) Trade or business undertaking.
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(i) In general.
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(iii) Vertically-integrated undertakings.
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(1) Applicability.
(i) In general.
(ii) Trade or business activity.
(2) Treatment as a single activity.
(3) Facts and circumstances tests.
(4) Examples.
(h) Certain professional service undertakings treated as a single activity.
(1) Applicability.
(i) In general.
(ii) Professional service undertaking.
(2) Treatment as a single activity.
(i) Undertakings controlled by the same interests.
(ii) Undertakings involving significant similar or significant related services.
(iii) Coordination rule.
(3) Significant similar or significant related services.
(4) Examples.
(i) [Reserved]
(j) Control by the same interests and ownership percentage.
(1) In general.
(2) Presumption.
(i) In general.

(ii) Common-ownership group.
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(3) Ownership percentage.
(i) In general.
(ii) Passthrough entities.
(iii) Attribution rules.
(A) In general.
(B) Determination of common-ownership percentage.
(C) Related person.
(4) Special rule for trade or business activities.
(5) Examples.
(k) Identification of rental real estate activities.
(1) Applicability.
(i) In general.
(ii) Rental real estate undertaking.
(2) Identification of activities.
(i) Multiple undertakings treated as a single activity or multiple activities by taxpayer.
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(iii) Single undertaking treated as multiple undertakings.
(3) Treatment in succeeding taxable years.
(4) Applicable return of passthrough entity.
(5) Evidence of treatment required.
(6) Coordination rule for rental of nondepreciable property.
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(8) Examples.
(l) [Reserved]
(m) Consolidated groups.
(1) In general.
(2) Examples.
(n) Publicly traded partnerships.
(o) Elective treatment of undertakings as separate activities.
(1) Applicability.
(2) Undertakings treated as separate activities.
(3) Multiple undertakings treated as a single activity by passthrough entity.
(4) Multiple undertakings treated as a single activity for a preceding taxable year.
(5) Applicable return of passthrough entity.
(6) Participation.
(7) Election.
(i) In general.
(ii) Written statement.
(8) Examples.
(p) Special rule for taxable years ending before August 10, 1989.
(1) In general.
(2) Unreasonable methods.
(3) Allocation of disallowed deductions in succeeding taxable year.

§ 1.469–5T Material participation (temporary).

(a) In general.
(b) Facts and circumstances.
(1) In general. [Reserved]
(2) Certain participation insufficient to constitute material participation under this paragraph (b).
(i) Participation satisfying standards not contained in section 469.
(ii) Certain management activities.
(iii) Participation less than 100 hours.
(c) Significant participation activity.
(1) In general.
(2) Significant participation.
(d) Personal service activity.
(e) Treatment of limited partners.
(1) General rule.
(2) Exceptions.
(3) Limited partnership interest.
(i) In general.
(ii) Limited partner holding general partner interest.
(f) Participation.
(1) In general.
(2) Exceptions.
(i) Certain work not customarily done by owners.
(ii) Participation as an investor.
(A) In general.
(B) Work done in individual's capacity as an investor.
(3) Participation of spouse.
(4) Methods of proof.
(g) Material participation of trusts and estates. [Reserved]
(h) Miscellaneous rules.
(1) Participation of corporations.
(2) Treatment of certain retired farmers and surviving spouses of retired or disabled farmers.
(3) Coordination with rules governing the treatment of passthrough entities.
(i) [Reserved]
(j) Material participation for preceding taxable years.
(1) In general.
(2) Material participation for taxable years beginning before January 1, 1987.
(k) Examples.

§ 1.469–6T Treatment of losses upon certain dispositions (temporary). [Reserved]

§ 1.469–7T Treatment of self-charged items of income and expense (temporary). [Reserved]

§ 1.469–8T Application of section 469 to trusts, estates, and their beneficiaries (temporary). [Reserved]

§ 1.469–9T Treatment of income, deductions, and credits from certain rental real estate activities (temporary). [Reserved]

§ 1.469–10T Application of section 469 to publicly traded partnerships (temporary). [Reserved]

§ 1.469–11T Effective date and transition rules (temporary).

(a) Effective date.
(1) In general.
(2) Application of certain income recharacterization rules.
(i) In general.
(ii) Property rented to a nonpassive activity.
(3) Qualified low-income housing projects.
(4) Effect of events occurring in years prior to 1987.
(5) Examples.
(b) Transitional rule for pre-enactment loss and pre-enactment credit.
(1) In general.
(2) Applicable percentage.
(3) Pre-enactment loss.
(4) Pre-enactment credit.
(5) Examples.
(c) Definition of pre-enactment interest.
(1) General rule.
(2) Qualified interest.
(i) In general.
(ii) Stock in a C corporation.
(3) Pre-enactment activity.
(i) In general.
(ii) Character before 1987 irrelevant.
(4) Examples.
(5) Effect of changes in a taxpayer's interest in a pre-enactment activity.
(i) In general.
(ii) Partnership terminations under section 708(b)(1)(B).
(iii) Examples.
(6) Special rule for beneficiaries of trusts or estates.
(i) In general.
(ii) Interests distributed to beneficiaries.
(7) Written binding contract.
(i) In general.
(ii) Special rule for contract of partnership or S corporation.
(iii) Application of rule to partnership agreements.

§ 1.469–1T [Amended]

Par. 3. Section 1.469–1T is amended as follows:

1. Paragraph (d)(2) is amended by revising the heading and first sentence to read as follows:

(d) * * *

(2) *Coordination with sections 613A(d) and 1211.* A passive activity deduction that is not disallowed for the taxable year under section 469 and the regulations thereunder may nonetheless be disallowed for the taxable year under section 613A(d) or 1211.

* * * * *

2. Paragraph (e)(2) is revised to read as follows:

(e) * * *

(2) *Trade or business activity.* An activity (within the meaning of § 1.469–4T) is a trade or business activity for a taxable year if and only if such activity—

(i) Is not a rental activity for such taxable year; and

(ii) Involves the conduct during such taxable year of business or rental operations (within the meaning of § 1.469–4T(b)(2)(ii)) that are not treated under paragraph (e)(3)(vi)(B) of this section as incidental to an activity of holding property for investment.

* * * * *

3. Paragraph (e)(3)(iii) is revised to read as follows:

(e) * * *

(3) * * *

(iii) *Average period of customer use*—(A) *In general.* For purposes of this paragraph (e)(3), the average period of customer use for property held in connection with an activity (the "activity's average period of customer use") is the sum of the average use

factors for each class of property held in connection with the activity.

(B) *Average use factor.* The average use factor for a class of property held in connection with an activity is the average period of customer use for such class of property multiplied by the fraction obtained by dividing—

(*1*) The activity's gross rental income attributable to such class of property; by

(*2*) The activity's gross rental income.

(C) *Average period of customer use for class of property.* In determining an activity's average period of customer use for a taxable year, the average period of customer use for a class of property held in connection with an activity is determined by dividing—

(*1*) The aggregate number of days in all periods of customer use for property in such class (taking into account only periods that end during such taxable year or that include the last day of such taxable year); by

(*2*) The number of such periods of customer use.

(D) *Period of customer use.* Each period during which a customer has a continuous or recurring right to use an item of property held in connection with the activity (without regard to whether the customer uses the property for the entire period or whether such right to use the property is pursuant to a single agreement or to renewals thereof) is treated for purposes of this paragraph (e)(3)(iii) as a separate period of customer use. The duration of a period of customer use that includes the last day of a taxable year may be determined on the basis of reasonable estimates.

(E) *Class of property.* Taxpayers may organize property into classes for purposes of this paragraph (e)(3)(iii) using any method under which items of property for which the daily rent differs significantly are not included in the same class.

(F) *Gross rental income and daily rent.* In determining an activity's average period of customer use for a taxable year—

(*1*) The activity's gross rental income is the gross income from the activity for such taxable year taking into account only income that is attributable to amounts paid for the use of property;

(*2*) The activity's gross rental income attributable to a class of property is the gross income from the activity for such taxable year taking into account only income that is attributable to amounts paid for the use of property in such class; and

(*3*) The daily rent for items of property may be determined on any basis that reasonably reflects differences during the taxable year in the amounts ordinarily paid for one day's use of such items of property.

* * * * *

4. Paragraph (e)(3)(vi) is amended by removing paragraph (e)(3)(vi)(D) and by redesignating paragraph (e)(3)(vi)(E) and (F) as paragraph (e)(3)(vi)(D) and (E).

5. Paragraph (e)(4)(iv) is revised to read as follows:

(e) * * *

(4) * * *

(iv) *Definition of "working interest."* For purposes of section 469 and the regulations thereunder, the term "working interest" means a working or operating mineral interest in any tract or parcel of land (within the meaning of § 1.612–4(a)).

* * * * *

6. Paragraph (e)(5) is revised to read as follows:

(e) * * *

(5) *Rental of dwelling unit.* An activity involving the rental of a dwelling unit is not a passive activity of a taxpayer for any taxable year in which section 280A (c)(5) applies to the taxpayer's use of such dwelling unit.

* * * * *

7. Paragraph (f)(4) is revised to read as follows:

(f) * * *

(4) *Carryover of disallowed deductions and credits*—(i) *In general.* If any deductions or credits from an activity of a taxpayer (the loss activity) are disallowed for a taxable year under paragraph (f)(2) or (f)(3) of this section—

(A) The disallowed deductions or credits shall be allocated among the taxpayer's activities for the succeeding taxable year in a manner that reasonably reflects the extent to which each such activity continues the business and rental operations that constituted the loss activity; and

(B) The disallowed deductions or credits allocated to an activity under paragraph (f)(4)(i)(A) of this section shall be treated as deductions or credits from such activity for the succeeding taxable year.

(ii) *Operations continued through C corporations or similar entities.* (A) If a taxpayer continues part or all of the business and rental operations that constitute a loss activity through a C corporation or similar entity, the taxpayer's interest in such entity shall be treated for purposes of this paragraph (f)(4) as an interest in a passive activity that continues such operations. An entity is similar to a C corporation for this purpose if the owners of interests in the entity derive only portfolio income (within the meaning of § 1.469–2T(c)(3)(i)) from such interests.

(B) If, after the application of this paragraph (f)(4)(ii), an interest in a C corporation or similar entity is a loss activity for a taxable year, such interest shall be treated for purposes of applying this paragraph (f)(4) in the succeeding taxable year as an interest in a passive activity that continues the business and rental operations of such loss activity.

(iii) *Examples.* The following examples illustrate the application of this paragraph (f)(4). In each example, the taxpayer is an individual whose taxable year is the calendar year.

Example (1). (i) The taxpayer owns interests in a convenience store and an apartment building. In each taxable year, the taxpayer's interests in the convenience store and the apartment building are treated under § 1.469–4T as interests in two separate passive activities of the taxpayer. A $5,000 loss from the convenience-store activity and a $3,000 loss from the apartment-building activity are disallowed under paragraph (f)(2) of this section for 1989.

(ii) Under paragraph (f)(2) of this section, the $5,000 loss from the convenience-store activity is allocated among the passive activity deductions from that activity for 1989, and the $3,000 loss from the apartment-building activity is treated similarly. In 1990, the business and rental operations that constituted the convenience-store activity are continued in a single activity, and the business and rental operations that constituted the apartment-building activity are similarly continued in a separate activity. Thus, the disallowed deductions from the convenience-store activity for 1989 must be allocated under paragraph (f)(4)(i)(A) of this section to the taxpayer's convenience-store activity in 1990. Similarly, the disallowed deductions from the apartment-building activity for 1989 must be allocated to the taxpayer's apartment-building activity in 1990. Under paragraph (f)(4)(i)(b) of this section, the disallowed deductions allocated to the convenience-store activity in 1990 are treated as deductions from that activity for 1990, and the disallowed deductions allocated to the apartment-building activity for 1990 are treated as deductions from the apartment-building activity for 1990.

Example (2). (i) In 1991, the taxpayer acquires a restaurant and a catering service. In 1991 and 1992, the restaurant and the catering service are conducted at the same location, and the taxpayer's interests in the restaurant and catering service are treated under § 1.469–4T as an interest in a single passive activity of the taxpayer. A $10,000 loss from the activity is disallowed under paragraph (f)(2) of this section for 1992. In 1993, the restaurant and the catering service are conducted at different locations, and the taxpayer's interests in the restaurant and the catering service are treated under § 1.469–4T as interests in two separate passive activities of the taxpayer.

(ii) Under paragraph (f)(2) of this section, the $10,000 loss from the restaurant and catering activity is allocated among the passive activity deductions from that activity

for 1992. In 1993, the business and rental operations that constituted the restaurant and catering activity are continued, but are treated as two separate activities under § 1.469–4T. Thus, the disallowed deductions from the restaurant and catering activity for 1992 must be allocated under paragraph (f)(4)(i)(A) of this section between the restaurant activity and the catering activity in 1993 in a manner reasonably reflects the extent to which each of the activities continues the operations of the restaurant and catering activity. Under paragraph (f)(4)(i)(B) of this section, the disallowed deductions allocated to the restaurant activity in 1993 are treated as deductions from the restaurant activity for 1993, and the disallowed deductions allocated to the catering activity in 1993 are treated as deductions from the catering activity for 1993.

Example (3). (i) The facts are the same as in example (2). In addition, a $20,000 loss from the activity was disallowed under paragraph (f)(2) of this section for 1991, and the gross income and deductions (including deductions that were disallowed for 1991 under paragraph (f)(2) of this section) from the restaurant and catering service for 1991 and 1992 are as follows:

	Restaurant	Catering service
1991:		
Gross income	$20,000	$60,000
Deductions	40,000	60,000
Net income (loss)	(20,000)	
1992:		
Gross income	40,000	50,000
Deductions	[1]30,000	[2] 70,000
Net income (loss)	10,000	(20,000)

[1] Includes $8,000 of deductions that were disallowed for 1991 ($20,000×$40,000/$100,000).
[2] Includes $12,000 of deductions that were disallowed for 1991 ($20,000×$60,000/$100,000).

(ii) Under paragraph (f)(4)(i)(A) of this section, the disallowed deductions from the restaurant and catering operations must be allocated among the taxpayer's activities for the succeeding year in a manner that reasonably reflects the extent to which such activities continue the restaurant and catering operations. The remainder of this example describes a number of allocation methods that will ordinarily satisfy the requirement of paragraph (f)(4)(i)(A) of this section. One or more of the allocation methods described in this example may, however, be unreasonable in certain cases. In addition, the description of specific allocation methods in this example does not preclude the use of other reasonable allocation methods for purposes of paragraph (f)(4)(i)(A) of this section.

(iii) Ordinarily, an allocation of disallowed deductions from the restaurant operations to the restaurant activity and disallowed deductions from the catering operations to the catering activity would satisfy the requirement of paragraph (f)(4)(i)(A) of this section. Under paragraph (f)(2)(ii) of this section, a ratable portion of each deduction from the restaurant and catering activity is disallowed for 1992. Thus, $3,000 of the 1992 deductions from the restaurant operations are disallowed ($10,000×$30,000/$100,000), and $7,000 of the 1992 deductions from the catering operations are disallowed ($10,000 × $70,000/$100,000). Thus, the taxpayer can ordinarily treat $3,000 of the disallowed deductions as deductions from the restaurant activity for 1993, and $7,000 of the disallowed deductions as deductions from the catering activity for 1993.

(iv) Ordinarily, an allocation of disallowed deductions between the restaurant and catering activities in proportion to the losses from the restaurant operations and the catering operations for 1992 would also satisfy the requirement of paragraph (f)(4)(i)(A) of this section. If the restaurant operations and the catering operations had been treated as separate activities in 1992, the restaurant activity would have had net income of $10,000 and the catering activity would have had a $20,000 loss. Thus, the taxpayer can ordinarily treat all $10,000 of disallowed deductions as deductions from the catering activity for 1993.

(v) Ordinarily, an allocation of disallowed deductions between the restaurant and catering activities in proportion to the losses from the restaurant operations and catering operations for 1992 (determined as if the restaurant operations and the catering operations had been separate activities for all taxable years) would also satisfy the requirement of paragraph (f)(4)(i)(A) of this section. If the restaurant operations and the catering operations had been treated as separate activities for all taxable years, the entire $20,000 loss from the restaurant operations in 1991 would have been allocated to the restaurant activity in 1992, and the gross income and deductions from such separate activities for 1992 would be as follows:

	Restaurant	Catering service
Gross income	$40,000	$50,000
Deductions	42,000	58,000
Net income (loss)	(2,000)	(8,000)

Thus, the taxpayer can ordinarily treat $2,000 of the disallowed deductions as deductions from the restaurant activity for 1993, and $8,000 of the disallowed deductions as deductions from the catering activity for 1993.

Example (4). (i) The taxpayer is a partner in a law partnership that acquires a building in December 1988 for use in the partnership's law practice. In taxable year 1989, four floors that are not needed in the law practice are leased to tenants; in taxable year 1990, two floors are leased to tenants; in taxable years after 1990, only one floor is leased to tenants. Under § 1.469–4T(d), the law practice and the rental operations with respect to the leased property are treated as a trade or business activity and a separate rental activity for taxable years 1989 and 1990 and as a single trade or business activity for taxable years after 1990. The trade or business activity is not a passive activity of the taxpayer. The rental activity, however, is a passive activity. Under paragraph (f)(2) of this section, a $12,000 loss from the rental activity is disallowed for 1989, and a $9,000 loss from rental activity is disallowed for 1990.

(ii) Under paragraph (f)(2) of this section, the $12,000 loss from the rental activity for 1989 is allocated among the passive activity deductions from that activity for 1989. In 1990, the business and rental operations that constituted the rental activity are continued in two separate activities. Only the business and rental operations with respect to two floors of the building are continued in the rental activity, and the other two floors (*i.e.*, the floors that were leased to tenants in 1989, but not in 1990) are used in the taxpayer's law-practice activity. Thus, the disallowed deductions from the rental activity for 1989 must be allocated under paragraph (f)(4)(i)(A) of this section between the rental activity and the law-practice activity in a manner that reasonably reflects the exent to which each of the activities continues the operations with respect to the four floors that were leased to tenants in 1989. In these circumstances, the requirement of paragraph (f)(4)(i)(A) of this section would ordinarily be satisfied by any of the allocation methods illustrated in example (3) or by an allocation of 50 percent of the disallowed deductions ($6,000) to each activity. Under paragraph (f)(4)(i)(B) of this section, the disallowed deductions allocated to the rental activity in 1990 are treated as deductions from the rental activity for 1990, and the disallowed deductions allocated to the law-practice activity in 1990 are treated as deductions from the law-practice activity for 1990.

(iii) Under paragraph (f)(2) of this section, the $9,000 loss from the rental activity for 1990 is allocated among the passive activity deductions from that activity for 1990. In 1991, the business and rental operations that constituted the rental activity are continued in the taxpayer's law-practice activity. Thus, the disallowed deductions from the rental activity for 1990 must be allocated under paragraph (f)(4)(i)(A) of this section to the taxpayer's law-practice activity in 1991. Under paragraph (f)(4)(i)(B) of this section, the disallowed deductions allocated to the law-practice activity are treated as deductions from the law-practice activity for 1991.

(iv) Rules relating to former passive activities will be contained in paragraph (k) of this section. Under those rules, any disallowed deductions from the rental activity that are treated as deductions from the law-practice activity will be treated as unused deductions that are allocable to a former passive activity.

Example (5). (i) The taxpayer owns stock in a corporation that is an S corporation for the taxpayer's 1991 taxable year and a C corporation thereafter. The only activity of the corporation is a rental activity. For 1991, the taxpayer's pro rata share of the corporation's loss from the rental activity is $5,000, and the entire loss is disallowed under paragraph (f)(2) of this section.

(ii) Under paragraph (f)(2) of this section, the taxpayer's $5,000 loss from the rental activity is allocated among the taxpayer's deductions from that activity for 1991. In 1992, the business and rental operations that

constituted the rental activity are continued through a C corporation, and the taxpayer's interest in the C corporation is treated under paragraph (f)(4)(ii)(A) of this section as a passive activity that continues such operations (the C corporation activity). Thus, the disallowed deductions from the rental activity for 1991 must be allocated under paragraph (f)(4)(i)(A) of this section to the taxpayer's C corporation activity in 1992, and are treated under paragraph (f)(4)(i)(B) of this section as deductions from the C corporation activity for 1992.

(iii) Treating the taxpayer's interest in the C corporation as an interest in a passive activity that continues the operations of the rental activity does not change the character of the taxpayer's dividend income from the C corporation. Thus, the taxpayer's dividend income is portfolio income (within the meaning of § 1.469-2T(c)(3)(i)) and is not included in passive activity gross income. Accordingly, the taxpayer's loss from the C corporation activity for 1992 is $5,000.

Example (6). (i) The facts are the same as in example (5), except that the taxpayer has income from other passive activities for 1992, and only 60 percent of the taxpayer's loss from the C corporation activity ($3,000) is disallowed for 1992 under paragraph (f)(2) of this section.

(ii) Under paragraph (f)(2) of this section, the $3,000 disallowed loss from the C corporation activity is allocated among the passive activity deductions from that activity for 1992. In effect, therefore, 60 percent of each disallowed deduction from the rental activity for 1991 is again disallowed for 1992.

(iii) Under paragraph (f)(4)(ii)(B) of this section, the taxpayer's interest in the C corporation is treated for years after 1992 as an interest in a passive activity that continues the business and rental operations of the C corporation activity. Thus, the disallowed deductions from the C corporation activity for 1992 must be allocated under paragraph (f)(4)(i)(A) of this section to the taxpayer's C corporation activity in 1993, and are treated under paragraph (f)(4)(i)(B) of this section as deductions from that activity for 1993.

* * * * *

8. Paragraph (g)(4)(ii)(C) is amended by removing "§ 1.469-2T(c)(2)(iii)(E)" and adding in its place "§ 1.469-2T(c)(2)(iii)(F)".

9. Paragraph (h)(4) is amended by removing the word "material" from the captions of paragraphs (h)(4) and (h)(4)(ii) and by adding the words "or significantly" immediately after the word "materially" in paragraph (h)(4)(ii).

§ 1.469-2T [Amended]

Par. 4. Section 1.469-2T is amended as follows:

1. Paragraphs (c)(2)(iii)(D) through (c)(2)(iii)(F) are redesignated as paragraphs (c)(2)(iii)(E) through (c)(2)(iii)(G) and the following new paragraph (c)(2)(iii)(D) is added:

(c) * * *

(2) * * *

(iii) * * *

(D) *Investment property.* For purposes of this paragraph (c)(2)(iii), an interest in property shall be treated as an interest in property used in an activity other than a passive activity and as an interest in property held for investment for any period during which such interest is held through a C corporation or similar entity. An entity is similar to a C corporation for this purpose if the owners of interests in the entity derive only portfolio income (within the meaning of paragraph (c)(3)(i) of this section) from such interests.

* * * * *

2. Paragraph (c)(2)(iii)(G) (as redesignated by this Treasury decision) is revised to read as follows:

(c) * * *

(2) * * *

(iii) * * *

(G) *Examples.* The following examples illustrate the application of this paragraph (c)(2)(iii):

Example (1). A acquires a building on January 1, 1987, and uses the building in a trade or business activity in which A materially participates until March 31, 1998. On April 1, 1998, A leases the building to B. On December 31, 1999, A sells the building. At the time of the sale, A's interest in the building is substantially appreciated (within the meaning of paragraph (c)(2)(iii)(C) of this section). Assuming A's lease of the building to B constitutes a rental activity (within the meaning of § 1.469-1T(e)(3)), the building is used in a passive activity for 21 months (April 1, 1998, through December 31, 1999). Thus, the building was not used in a passive activity for the entire 24-month period ending on the date of the sale. In addition, the 21-month period during which the building was used in a passive activity is less than 20 percent of A's holding period for the building (13 years). Therefore, the gain from the sale is treated under this paragraph (c)(2)(iii) as not from a passive activity.

Example (2). (i) A, an individual, is a stockholder of corporation X. X is a C corporation until December 31, 1990, and is an S corporation thereafter. X acquires a building on January 1, 1990, and sells the building on March 1, 1991. At the time of the sale, A's interest in the building held through X is substantially appreciated (within the meaning of paragraph (c)(2)(iii)(C) of this section). The building is leased to various tenants at all times during the period in which it is held by X. Assume that the lease of the building would constitute a rental activity (within the meaning of § 1.469-1T(e)(3)) with respect to a person that holds the building directly or through an S corporation.

(ii) Paragraph (c)(2)(iii)(D) of this section provides that an interest in property is treated for purposes of this paragraph (c)(2)(iii) as used in an activity other than a passive activity and as held for investment for any period during which such interest is held through a C corporation. Thus, for purposes of determining the character of A's gain from the sale of the building, A's interest in the building is treated as an interest in property held for investment for the period from January 1, 1990 to December 31, 1990, and as an interest in property used in a passive activity for the period from January 1, 1991 to February 28, 1991.

(iii) A's interest in the building was not used in a passive activity for the entire 24-month period ending on the date of the sale. In addition, the 2-month period during which A's interest in the building was used in a passive activity is less than 20 percent of the period during which A held an interest in the building (14 months). Therefore, the gain from the sale is treated under this paragraph (c)(2)(iii) as not from a passive activity.

(iv) Under paragraph (c)(2)(iii)(F) of this section, gain that is treated as nonpassive under this paragraph (c)(2)(iii) is treated as portfolio income (within the meaning of paragraph (c)(3)(i) of this section) if the gain is from the disposition of an interest in property that was held for investment for more than 50 percent of the period during which the taxpayer held such interest in activities other than passive activities. In this case, A's interest in the building was treated as held for investment for the entire period during which it was used in activities other than passive activities (*i.e.*, the 12-month period from January 1, 1990 to December 31, 1990). Accordingly, A's gain from the sale is treated under this paragraph (c)(2)(iii) as portfolio income.

* * * * *

3. New paragraphs (c)(2)(iv) and (c)(2)(v) are added to read as follows:

(c) * * *

(2) * * *

(iv) *Taxable acquisitions.* If a taxpayer acquires an interest in property in a transaction other than a nonrecognition transaction (within the meaning of section 7701(a)(45)), the ownership and use of such interest in property before such transaction shall not be taken into account for purposes of applying this paragraph (c)(2) to any subsequent disposition of such interest in property by the taxpayer. For example, if a taxpayer is a partner in a partnership that owns an interest in property and the taxpayer acquires such interest in property from the partnership in a fully taxable sale or exchange, such interest shall be treated, in applying this paragraph (c)(2) to any subsequent disposition of such interest, as an interest in property that was not held by the taxpayer until the date on which such interest was acquired from the partnership and that was not used before such date in any activity of the taxpayer.

(v) *Property held for sale to customers*—(A) *Sale incidental to another activity*—(*1*)—*Applicability*—(*i*) *In general.* This paragraph (c)(2)(v)(A) applies to the disposition of a taxpayer's interest in property if and only if—

(*A*) At the time of the disposition, the taxpayer holds the interest in property in an activity that involves holding similar property that is treated for purposes of section 1221(1) as property held primarily for sale to customers in the ordinary course of a trade or business (a "dealing activity");

(*B*) One or more other activities of the taxpayer do not involve holding similar property for sale to customers in the ordinary course of a trade or business ("nondealing activities") and the interest in property was used in such activity or activities for more than 80 percent of the period during which the taxpayer held such interest in property; and

(*C*) The interest in property was not acquired and held by the taxpayer for the principal purpose of selling such interest to customers in the ordinary course of a trade or business.

(*ii*) *Principal purpose.* For purposes of this paragraph (c)(2)(v)(A), a taxpayer is rebuttably presumed to have acquired and held an interest in property for the principal purpose of selling such interest to customers in the ordinary course of a trade or business if—

(*A*) The period during which the interest in property was used in nondealing activities of the taxpayer does not exceed the lesser of 24 months or 20 percent of the recovery period (within the meaning of section 168) applicable to such property; or

(*B*) The interest in property was simultaneously offered for sale to customers and used in a nondealing activity of the taxpayer for more than 25 percent of the period during which such interest in property was used in nondealing activities of the taxpayer.

For purposes of the preceding sentence, an interest in property shall not be considered to be offered for sale to customers solely because a lessee of the property has been granted an option to purchase the property.

(*2*) *Dealing activity not taken into account.* If this paragraph (c)(2)(v)(A) applies to the disposition of a taxpayer's interest in property, holding such interest in the dealing activity shall, for purposes of this paragraph (c)(2), be treated as the use of such interest in the last nondealing activity of the taxpayer in which such interest in property was used prior to its disposition.

(B) *Use in a nondealing activity incidental to sale.* If paragraph (c)(2)(v)(A) of this section does not apply to the disposition of a taxpayer's interest in property that is held in a dealing activity of the taxpayer at the time of disposition, the use of such interest in property in a nondealing activity of the taxpayer for any period during which such interest in property is also offered for sale to customers shall, for purposes of this paragraph (c)(2), be treated as the use of such interest in property in the dealing activity of the taxpayer.

(C) *Examples.* The following examples illustrate the application of this paragraph (c)(2)(v):

Examples (1). (i) The taxpayer acquires a residential apartment building on January 1, 1987, and uses the building in a rental activity. In January 1990, the taxpayer converts the apartments into condominium units. After the conversion, the taxpayer holds the condominium units for sale to customers in the ordinary course of a trade or business of dealing in such property. (Assume that these dealing operations are treated as a separate activity under § 1.469–4T, and that the taxpayer materially participates in this activity.) In addition, the taxpayer continues to use the units in the rental activity until they are sold. The units are first held for sale on January 1, 1990, and the last unit is sold on December 31, 1990.

(ii) This paragraph (c)(2)(v) provides that holding an interest in property in a dealing activity (the marketing of the property) is treated for purposes of this paragraph (c)(2) as the use of such interest in a nondealing activity if the marketing of the property is incidental to such use. Under paragraph (c)(2)(v)(A)(*2*) of this section, such interests in property are treated as used in the last nondealing activity in which they were used prior to their disposition. In addition, paragraph (c)(2)(v)(A)(*1*) of this section provides rules for determining whether the marketing of the property is incidental to the use of an interest in property in a nondealing activity. Under these rules, the marketing of the property is treated as incidental to such use if (a) the interest in property was used in nondealing activities for more than 80 percent of the taxpayer's holding period in the property (the holding period requirement) and (b) the taxpayer did not acquire and hold the interest in property for the principal purpose of selling it to customers in the ordinary course of a trade or business (a dealing purpose).

(iii) In this case, the apartments were used in a rental activity for the entire period during which they were held by the taxpayer. Thus, the apartments were used in a nondealing activity for more than 80 percent of the taxpayer's holding period in the property, and the marketing of the property satisfies the holding period requirement.

(iv) Paragraph (c)(2)(v)(A)(*1*)(*ii*) of this section provides that a taxpayer is rebuttably presumed to have a dealing purpose unless the interest in property was used in nondealing activities for more than 24 months or 20 percent of the property's recovery period (whichever is less). The same presumption applies if the interest in property was offered for sale to customers during more than 25 percent of the period in which the interest was held in nondealing activities. In this case, the taxpayer used each apartment in a nondealing activity (the rental activity) for a period of 36 to 48 months (*i.e.*, from January 1, 1987, to the date of sale in the period from January through December 1990). Thus, the apartments were used in nondealing activities for more than 24 months, and the first of the rebuttable presumptions described above does not apply. In addition, the apartments were offered for sale to customers for up to 12 months (depending on the month in which the apartment was sold) during the period in which the apartments were used in a nondealing activity. The percentage obtained by dividing the period during which an apartment was held for sale to customers by the period during which the apartment was used in nondealing activities ranges from zero in the case of apartments sold on January 1, 1990, to 25 percent (*i.e.*, 12 months/48 months) in the case of apartments sold on December 31, 1990. Thus, no apartment was offered for sale to customers during more than 25 percent of the period in which it was used in nonrental activities, and the second rebuttable presumption does not apply.

(v) Because neither of the rebuttable presumptions in paragraph (c)(2)(v)(A)(*1*)(*ii*) of this section applies in this case, the taxpayer will not be treated as having a dealing purpose unless other facts and circumstances establish that the taxpayer acquired and held the apartments for the principal purpose of selling the apartments to customers in the ordinary course of a trade or business. Assume that none of the facts and circumstances suggest that the taxpayer had such a purpose. If that is the case, the taxpayer does not have a dealing purpose.

(vi) The marketing of the property satisfies the holding period requirement, and the taxpayer does not have a dealing purpose. Thus, holding the apartments in the taxpayer's dealing activity is treated for purposes of this paragraph (c)(2) as the use of the apartments in a nondealing activity. In this case, the rental activity is the only nondealing activity in which the apartments were used prior to their disposition. Thus, the apartments are treated under paragraph (c)(2)(v)(A)(*2*) of this section as interests in property that were used only in the rental activity for the entire period during which the taxpayer held such interests. Accordingly, the rules in paragraph (c)(2) (ii) and (iii) of this section do not apply, and all gain from the sale of the apartments is treated as passive activity gross income.

Example (2). (i) The facts are the same as in example (1), except that the taxpayer converts the apartments into condominum units on July 1, 1987, and the first unit is sold on January 1, 1988.

(ii) In this case, all of the apartments were simultaneously offered for sale to customers and used in a nondealing activity of the taxpayer for more than 25 percent of the period during which the apartments were used in nondealing activities. Thus, the taxpayer is rebuttably presumed to have acquired the apartments (including apartments that are used in the rental activity for at least 24 months) for the principal purpose of selling them to customers in the ordinary course of a trade or business. Assume that the facts and circumstances do not rebut this presumption. If that is the case, the taxpayer has a dealing purpose, and

paragraph (c)(2)(v)(A) of this section does not apply to the disposition of the apartments.

(iii) Paragraph (c)(2)(v)(B) of this section does not apply to the disposition of a taxpayer's interest in property that is held in a dealing activity of the taxpayer at the time of the disposition, the use of the interest in property in any nondealing activity of the taxpayer for any period during which the interest is also offered for sale to customers is treated as incidental to the use of the interest in the dealing activity. Accordingly, for purposes of applying the rules of this paragraph (c)(2) to the disposition of the apartments, the rental of the apartments after July 1, 1987, is treated as the use of the apartments in the taxpayer's dealing activity.

Example (3). (i) The facts are the same as in example (1), except that the last unit is sold in 1991.

(ii) The treatment of apartments sold in 1990 is the same as in example (1). The apartments sold in 1991, however, were simultaneously offered for sale to customers and used in a nondealing activity for more than 25 percent of the period during which such apartments were used in nondealing activities. (For example, an apartment that is sold on January 31, 1991, has been offered for sale for 13 months or 26.1 percent of the 49-month period during which it was used in nondealing activities.) Thus, the taxpayer is rebuttably presumed to have acquired the apartments sold in 1991 for the principal purpose of selling them to customers in the ordinary course of a trade or business. Assume that the facts and circumstances do not rebut this presumption. In that case, the marketing of the apartments sold in 1991 does not satisfy the principal purpose requirements, and paragraph (c)(2)(v)(A) of this section does not apply to the disposition of those apartments. Accordingly, for purposes of applying the rules of this paragraph (c)(2) to the disposition of the apartments sold in 1991, the rental of the apartments after January 1, 1990, is treated, under paragraph (c)(2)(v)(B) of this section, as the use of the apartments in the taxpayer's dealing activity.

4. Paragraph (c)(6) (i), (ii), and (iii) is revised to read as follows:

(c) * * *

(6) *Gross income from certain oil or gas properties*—(i) *In general.* Notwithstanding any other provision of the regulations under section 469, passive activity gross income for any taxable year does not include an amount of the taxpayer's gross passive income for such year from—

(A) An oil or gas property that includes an oil or gas well if, for any prior taxpayer year beginning after December 31, 1986, any of the taxpayer's loss from the well was treated, solely by reason of § 1.469-1T(e)(4) (relating to a special rule for losses from oil and gas working interests), and not by reason of the taxpayer's material participation in the activity, as a loss that is not from a passive activity; or

(B) Any property the basis of which is determined in whole or in part by reference to the basis of property described in paragraph (c)(6)(i)(A) of this section; equal to the taxpayer's net passive income from such property for the taxable year.

(ii) *Gross and net passive income from the property.* For purposes of this paragraph (c)(6)—

(A) The taxpayers's gross passive income for any taxable year from any property described in paragraph (a)(6)(i) of this section is any passive activity gross income for such year (determined without regard to this paragraph (c)(6) and paragraph (f) of this section) from such property;

(B) The taxpayer's net passive income for any taxable year from any property described in paragraph (c)(6)(i) of this section is the excess, if any, of—

(*1*) The taxpayer's gross passive income for the taxable year from such property; over

(*2*) Any passive activity deductions for the taxable year (including any deduction treated as a deduction for such year under § 1.469-1T(f)(4)) that are reasonably allocable to such income; and

(C) If any oil or gas well or other item of property (the item) is included in two or more properties described in paragraph (c)(6)(i) of this section (the properties), the taxpayer shall allocate the passive activity gross income (determined without regard to this paragraph (c)(6) and paragraph (f) of this section) from such item and the passive activity deductions reasonably allocable to such item among such properties.

(iii) *Property.* For purposes of paragraph (c)(6)(i)(A) of this section, the term "property" does not have the meaning given such term by section 614(a) or the regulations thereunder, and an oil or gas property that includes an oil or gas well is—

(A) The well; and

(B) Any other item of property (including any oil or gas well) the value of which is directly enhanced by any drilling, logging, seismic testing, or other activities the costs of which were taken into account in determining the amount of the taxpayer's income or loss from the well.

* * * * *

5. Paragraph (c)(6)(iv) is amended by removing the phrase "net income" in the last sentences of examples (1) and (2), and adding the phrase "net passive income" in its place.

6. Paragraph (d)(1), *Example,* is amended by removing "sections 469 and 1211" and adding "sections 469, 613A(d), and 1211" each place the former occurs.

7. Paragraph (d)(2)(ix) is amended by adding "section 613A(d)," immediately before "section 1212(a)(1)(B)".

8. Paragraph (d)(5)(iii)(A) is revised to read as follows:

(d) * * *

(5) * * *

(iii) * * *

(A) *Applicability of rules in paragraph (c)(2).* For purposes of this paragraph (d)(5), a taxpayer's interests in property used in an activity and the amounts allocated to such interests shall be determined under paragraph (c)(2)(i)(C) of this section. In addition, the rules contained in paragraph (c)(2) (iv) and (v) of this section shall apply in determining for purposes of this paragraph (d)(5) the activity (or activities) in which an interest in property is used at the time of its disposition and during the 12-month period ending on the date of its disposition.

* * * * *

(9) Paragraph (d)(6)(v)(E) is revised to read as follows:

(d) * * *

(6) * * *

(v) * * *

(E) Are taken into account under section 613A(d) (relating to limitations on certain depletion deductions), section 1211 (relating to the limitation on capital losses), or section 1231 (relating to property used in a trade or business and involuntary conversions); or

* * * * *

10. Paragraph (d)(8) is amended by removing the phrase "sections 469 and 1211" and adding the following in its place: "sections 469, 613A(d), and 1211".

11. Paragraphs (e)(2) (ii) and (iii) are revised to read as follows:

(e) * * *

(2) * * *

(ii) *Section 707(c).* Except as provided in paragraph (e)(2)(iii)(B) of this section, any payment to a partner for services or the use of capital that is described in section 707(c) (including any payment described in section 736(a)(2)) (relating to guaranteed payments made in liquidation of the interest of a retiring or deceased partner) shall be characterized as a payment for services or as the payment of interest, respectively, and not as a distributive share of partnership income.

(iii) *Payments in liquidation of a partner's interest in partnership property*—(A) *In general.* If any gain or loss is taken into account by a retiring partner (or any other person that owns (directly or indirectly) an interest in such partner if such partner is a passthrough entity) or a deceased

partner's successor in interest as a result of a payment to which section 736(b) (relating to payments made in exchange for a retired or deceased partner's interest in partnership property) applies, such gain or loss shall be treated as passive activity gross income or a passive activity deduction only to the extent that such gain or loss would have been passive activity gross income or a passive activity deduction of such retiring or deceased partner (or such other person) if it had been recognized at the time the liquidation of such partner's interest commenced.

(B) *Payments in liquidation of a partner's interest in unrealized receivables and goodwill under section 736(a).* (*1*) If a payment is made in liquidation of a retiring or deceased partner's interest, such payment is described in section 736(a), and any income—

(*i*) Is taken into account by the retiring partner (or any other person that owns (directly or indirectly) an interest in such partner if such partner is a passthrough entity) or the deceased partner's successor in interest as a result of such payment; and

(*ii*) Is attributable to the portion (if any of the payment that is allocable to the unrealized receivables (within the meaning of section 751(c)) and goodwill of the partnership;

the percentage of such income that is treated as passive activity gross income shall not exceed the percentage of passive activity gross income that would be included in the gross income that such retiring or deceased partner (or such other person) would have recognized if such unrealized receivables and goodwill had been sold at the time that the liquidation of such partner's interest commenced.

(*2*) For purposes of this paragraph (e)(2)(iii)(B), the portion (if any) of a payment under section 736(a) that is allocable to unrealized receivables and goodwill of a partnership shall be determined in accordance with the principles employed under § 1.736–1(b) for determining the portion of a payment made under section 736 that is treated as a distribution under section 736(b).

* * * * *

12. Paragraph (e)(3)(iii)(B) is revised to read as follows:

(e) * * *

(3) * * *

(iii) * * *

(B) An amount of gain that would have been treated as gain that is not from a passive activity under paragraph (c)(2)(iii) (relating to substantially appreciated property formerly used in a nonpassive activity), (c)(6) (relating to certain oil or gas properties), (f)(5) (relating to certain property rented incidental to development), (f)(6) (relating to property rented to a nonpassive activity), or (f)(7) (relating to certain interests in a passthrough entity engaged in the trade or business of licensing intangible property) of this section would have been allocated to such holder (or such other person) with respect to such interest if all of the property used in such passive activity had been sold immediately prior to the disposition for its fair market value on the applicable valuation date (within the meaning of paragraph (e)(3)(ii)(D)(*1*) of this section; and

* * * * *

13. Paragraph (f)(5)(i) is amended by removing the phrase "used in a rental activity for such year", by removing "24" and adding "12" in its place, and by removing the phrase ", but without regard to paragraph (e) thereof" from the parenthetical immediately following the words "materially participated".

14. Paragraph (f)(5)(ii) is amended by adding the following phrase immediately after the word "when": "the performance of the services described in paragraph (f)(5)(i)(C) of this section is complete, and".

15. Paragraph (f)(5)(iii)(C) is amended by removing the parenthetical phrase and adding the following in its place: "(but only if, as of the time the taxpayer acquires an interest in the property, a substantial portion of the property is not leased)".

16. Paragraph (f)(5)(iv), *Example,* is revised to read as follows:

(f) * * *

(5) * * *

(iv) * * *

Example. (i) A, a calendar year individual, is a partner in calendar year partnership P, which develops commercial real estate. In 1988, P acquires an interest in undeveloped land, and arranges for the financing and construction of an office building on the land. Construction is completed in February 1990, and substantially all of the building is held out for rent and is in a state of readiness for rental beginning on March 1, 1990.

(ii) P holds the building for rent for the remainder of 1990 and all of 1991, and sells the building on January 15, 1992, pursuant to a contract entered into on January 15, 1991. P did not hold the building (or any other buildings) for sale to customers in the ordinary course of P's trade or business (see paragraph (c)(2)(v) of this section). A's distributive share of P's taxable losses from the rental of the building is $50,000 for 1990 and $30,000 for 1991. All of A's losses from the rental of the building are disallowed under § 1.469–1T(a)(1)(i). A's distributive share of the gain recognized by P on the sale of the building is $150,000. A has no other gross income or deductions from the activity of renting the building.

(iii) For purposes of paragraph (f)(5)(i)(C) of this section, in 1988, 1989, and 1990, the real estate development activity that A holds through P involves the performance of services for the purpose of enhancing the value of the building. In 1992, the building is sold, and the date on which the use of the building in the rental activity commenced (March 1, 1990) was less than 12 months before the date on which a binding contract for such sale was entered into (January 15, 1991). Accordingly, if A materially participated in the real estate development activity in 1988, 1989, or 1990 (without regard to whether A materially participated in the activity in more than one of those years), an amount of A's gross rental activity income for 1992 from the building equal to A's net rental activity income for 1992 from such building ($150,000–$80,000 of previously disallowed deductions = $70,000) is treated under this paragraph (f)(5) as gross income that is not from a passive activity.

17. Paragraph (f)(6) is amended by removing the phrase "used in a rental activity for such year" and by removing the phrase ", but without regard to paragraph (e) thereof" from the parenthetical immediately following the words "materially participates".

18. Paragraph (f)(9)(iii) is revised to read as follows:

(f) * * *

(9) * * *

(iii) The gross rental activity income for a taxable year from an item of property is any passive activity gross income (determined without regard to paragraph (f) (2) through (6) of this section) that—

(A) Is income for such year from the rental or disposition of such item of property; and

(B) In the case of income from the disposition of such item of property, is income from an activity that involved the rental of such item of property during the 12-month period ending on the date of the disposition (see paragraph (c)(2)(ii) of this section); and

* * * * *

19. Paragraph (f)(9)(iv)(B) is amended by removing the phrase "the use of such item of property in the rental activity" and adding in its place the words "such income".

20. Paragraph (f)(10) is revised to read as follows:

(f) * * *

(10) *Coordination with section 163(d).* Gross income that is treated as not from a passive activity under paragraph (f) (3), (4), or (7) of this section shall be treated as income described in section 469(e)(1)(A) and paragraph (c)(3)(i) of this section except in determining whether—

(i) Any property is treated for purposes of section 469(e)(1)(A)(ii)(I)

and paragraph (c)(3)(i)(C) of this section as property that produces income of a type described in paragraph (c)(3)(i)(A) of this section;

(ii) Any property is treated for purposes of section 469(e)(1)(A)(ii)(II) and paragraph (c)(3)(i)(D) of this section as property held for investment;

(iii) An expense (other than interest expense) is treated for purposes of section 469(e)(1)(A)(i)(II) and paragraph (d)(4) of this section as clearly and directly allocable to portfolio income (within the meaning of paragraph (c)(3)(i) of this section); and

(iv) Interest expense is allocated under § 1.163–8T to an investment expenditure (within the meaning of § 1.163–8T(b)(3)) or to a passive activity expenditure (within the meaning of § 1.163–8T(b)(4)).

* * * * *

Par. 5. Section 1.469–3T is amended as follows:

1. Paragraph (e) is revised.

2. Paragraph (f) is redesignated as paragraph (g), and a new paragraph (f) is added.

3. The revised provisions read as follows:

§ 1.469–3T Passive activity credit (temporary).

* * * * *

(e) *Coordination with section 38(b).* Any credit described in section 38(b) (1) through (5) is taken into account in computing the current year business credit for the first taxable year in which such credit is subject to section 469 and is not disallowed by section 469 and the regulations thereunder.

(f) *Coordination with section 47.* In the case of any cessation described in section 47(a) (1), (3), or (5) or any change in use described in section 47(a) (2) or (4), the credits allocable to the taxpayer's activities under § 1.469–1T(f)(4) shall be adjusted by reason of such cessation (or change in use).

* * * * *

Par. 6. The text of § 1.469–4T is added to read as follows:

§ 1.469–4T Definition of activity (temporary).

(a) *Overview*—(1) *Purpose and effect of overview.* This paragraph (a) contains a general description of the rules contained in this section and is intended solely as an aid to readers. The provisions of this paragraph (a) are not a substitute for the more detailed rules contained in the remainder of this section and cannot be relied upon in cases in which those rules qualify the general description contained in this paragraph (a).

(2) *Scope and structure of § 1.469–4T.* This section provides rules under which a taxpayer's business and rental operations are treated as one or more activities for purposes of section 469 and the regulations thereunder. (See paragraph (b)(2)(ii) of this section for the definition of business and rental operations.) In general, these rules are divided into three groups:

(i) Rules that identify the business and rental operations that constitute an undertaking (the undertaking rules).

(ii) Rules that identify the undertaking or undertakings that constitute an activity (the activity rules).

(iii) Rules that apply only under certain special circumstances (the special rules).

(3) *Undertaking rules*—(i) *In general.* The undertaking is generally the smallest unit that can constitute an activity. (See paragraph (b)(1) of this section for the general rule and paragraph (k)(2)(iii) of this section for a special rule that permits taxpayers to treat a single rental real estate undertaking as multiple activities.) An undertaking may include diverse business and rental operations.

(ii) *Basic undertaking rule.* The basic undertaking rule identifies the business and rental operations that constitute an undertaking by reference to their location and ownership. Under this rule, business and rental operations that are conducted at the same location and are owned by the same person are generally treated as part of the same undertaking. Conversely, business and rental operations generally constitute separate undertakings to the extent that they are conducted at different locations or are not owned by the same person. (See paragraph (c)(2)(i) of this section.)

(iii) *Circumstances in which location is disregarded.* In some circumstances, the undertaking in which business and rental operations are included does not depend on the location at which the operations are conducted. Operations that are not conducted at any fixed place of business or that are conducted at the customer's place of business are treated as part of the undertaking with which the operations are most closely associated (see paragraph (c)(2)(iii)(C) of this section). In addition, operations that are conducted at a location but do not relate to the production of property at that location or to the transaction of business with customers at that location are treated, in effect, as part of the undertaking or undertakings that the operations support (see paragraph (c)(2)(ii) of this section).

(iv) *Rental undertakings.* The basic undertaking rule is also modified if the undertaking determined under that rule includes both rental and nonrental operations. In such cases, the rental operations and the nonrental operations generally must be treated as separate undertakings (see paragraph (d)(1) of this section). This rule does not apply if more than 80 percent of the income of the undertaking determined under the basic rule is attributable to one class of operations (*i.e.*, rental or nonrental) or if the rental operations would not be treated as part of a rental activity because of the exceptions contained in § 1.469–1T(e)(3)(ii) (see paragraph (d)(2) of this section). In applying the rental undertaking rules, short-term rentals of real property (*e.g.*, hotel-room rentals) are generally treated as nonrental operations (see paragraph (d)(3)(ii) of this section).

(v) *Oil and gas wells.* Another exception to the basic undertaking rule treats oil and gas wells that are subject to the working-interest exception in § 1.469–1T(e)(4) as separate undertakings (see paragraph (e) of this section).

(4) *Activity rules*—(i) *In general.* The basic activity rule treats each undertaking in which a taxpayer owns an interest as a separate activity of the taxpayer (see paragraph (b)(1) of this section). In the case of trade or business undertakings, professional service undertakings, and rental real estate undertakings, additional rules may either require or permit the aggregation of two or more undertakings into a single activity.

(ii) *Aggregation of trade or business undertakings*—(A) *Trade or business undertakings.* Trade or business undertakings include all nonrental undertakings other than oil and gas undertakings described in paragraph (a)(3)(v) of this section and professional service undertakings described in paragraph (a)(4)(iii) of this section (see paragraph (f)(1)(ii) of this section).

(B) *Similar, commonly-controlled undertakings treated as a single activity.* An aggregation rule treats trade or business undertakings that are both similar and controlled by the same interests as part of the same activity. This rule is, however, generally inapplicable to small interests held by passive investors in such undertakings, except to the extent such interests are held through the same passthrough entity. (See paragraph (f)(2) of this section.) Undertakings are similar for purposes of this rule if more than half (by value) of their operations are in the same line of business (as defined in a revenue procedure issued pursuant to paragraph (f)(4)(iv) of this section) or if the undertakings are vertically

integrated (see paragraph (f)(4)(iii) of this section). All the facts and circumstances are taken into account in determining whether undertakings are controlled by the same interests for purposes of the aggregation rule (see paragraph (j)(1) of this section). If, however, each member of a group of five or fewer persons owns a substantial interest in each of the undertakings, the undertakings may be rebuttably presumed to be controlled by the same interests (see paragraph (j) (2) and (3) of this section).

(C) *Integrated businesses treated as a single activity.* Trade or business undertakings (including undertakings that have been aggregated because of their similarity and common control) are subject to a second aggregation rule. Under this rule undertakings that constitute an integrated business and are controlled by the same interests must be treated as part of the same activity. (See paragraph (g) of this section.)

(iii) *Aggregation of professional service undertakings.* Professional service undertakings are nonrental undertakings that predominantly involve the provision of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, or consulting (see paragraph (h)(1)(ii) of this section). In general, professional service undertakings that are either similar, related, or controlled by the same interests must be treated as part of the same activity (see paragraph (h)(2) of this section). The rules for determining whether trade or business undertakings are controlled by the same interests also apply with respect to professional service undertakings. Professional service undertakings are similar, however, if more than 20 percent (by value) of their operations are in the same field, and two professional service undertakings are related if one of the undertakings derives more than 20 percent of its gross income from persons who are customers of the other undertaking (see paragraph (h)(3) of this section).

(iv) *Rules for rental real estate*—(A) *Taxpayers permitted to determine rental real estate activities.* The rules for aggregating rental real estate undertakings are generally elective. They permit taxpayers to treat any combination of rental real estate undertakings as a single activity. Taxpayers may also divide their rental real estate undertakings and then treat portions of the undertakings as separate activities or recombine the portions into activities that include parts of different undertakings. (See paragraph (k)(2) (i) and (iii) of this section.)

(B) *Limitations on fragmentation and aggregation of rental real estate.* Taxpayers may not fragment their rental real estate in a manner that is inconsistent with their treatment of such property in prior taxable years or with the treatment of such property by the passthrough entity through which it is held (see paragraph (k) (2)(ii) and (3) of this section). There are no comparable limitations on the aggregation of rental real estate into a single activity. If however, the income or gain from a rental real estate undertaking is subject to recharacterization under § 1.469–2T(f)(3) (relating to the rental of nondepreciable property), a coordination rule provides that the undertaking must be treated as a separate activity (see paragraph (k)(6) of this section.)

(v) *Election to treat nonrental undertakings as separate activities.* Another elective rule permits taxpayers to treat a nonrental undertaking as a separate activity even if the undertaking would be treated as part of a larger activity under the aggregation rules applicable to the undertaking (see paragraph (o)(2) of this section). This elective rule is limited by consistency requirements similar to those that apply to rental real estate operations (see paragraph (o) (3) and (4) of this section). Moreover, in cases in which a taxpayer elects to treat a nonrental undertaking as a separate activity, the taxpayer's level of participation (*i.e.*, material, significant, or otherwise) in the separate activity is the same as the taxpayer's level of participation in the larger activity in which the undertaking would be included but for the election (see paragraph (o)(6) of this section).

(5) *Special rules*—(i) *Consolidated groups and publicly traded partnerships.* Special rules apply to the business and rental operations of consolidated groups of corporations and publicly traded partnerships. Under these rules, a consolidated group is treated as one taxpayer in determining its activities and those of its members (see paragraph (m) of this section), and business and rental operations owned through a publicly traded partnership cannot be aggregated with operations that are not owned through the partnership (see paragraph (n) of this section).

(ii) *Transitional rule.* A special rule applies for taxable years ending before August 10, 1989. In those years, taxpayers may organize business and rental operations into activities under any reasonable method (see paragraph (p)(1) of this section). A taxpayer will also be permitted to use any reasonable method to allocate disallowed deductions and credits among activities for the first taxable year in which the taxpayer's activities are determined under the general rules of § 1.469–4T (see paragraph (p)(3) of this section).

(b) *General rule and definitions of general application*—(1) *General rule.* Except as otherwise provided in this section, each undertaking in which a taxpayer owns an interest shall be treated as a separate activity of the taxpayer. See paragraphs (f), (g), and (h) of this section for rules requiring certain nonrental undertakings to be treated as part of the same activity and paragraph (k) of this section for rules identifying the rental real estate undertakings (or portions thereof) that are included in an activity.

(2) *Definitions of general application.* The following definitions set forth the meaning of certain terms for purposes of this section:

(i) *Passthrough entity.* The term "passthrough entity" means a partnership, S corporation, estate, or trust.

(ii) *Business and rental operations*—(A) *In general.* Except as provided in paragraph (b)(2)(ii)(B) of this section, the term "business and rental operations" means all endeavors that are engaged in for profit or the production of income and satisfy one or more of the following conditions for the taxable year:

(*1*) Such endeavors involve the conduct of a trade or business (within the meaning of section 162) or are conducted in anticipation of such endeavors becoming a trade or business;

(*2*) Such endeavors involve making tangible property available for use by customers; or

(*3*) Research or experimental expenditures paid or incurred with respect to such endeavors are deductible under section 174 (or would be deductible if the taxpayer adopted the method described in section 174(a)).

(B) *Operations conducted through nonpassthrough entities.* For purposes of applying section 469 and the regulations thereunder, a taxpayer's activities do not include operations that a taxpayer conducts through one or more entities (other than passthrough entities). The following example illustrates the operation of this paragraph (b)(2)(ii)(B):

Example. (i) A, an individual, owns stock of X, a closely held corporation (within the meaning of § 1.469–1T(g)(2)(ii) that is directly engaged in the conduct of a real estate development business. A participates in X's real estate development business, but does not own any interest in the business other than through ownership of the stock of X.

(ii) X is subject to section 469 (see § 1.469–1T(b)(5)) and does not hold the real estate development business through another entity. Accordingly, for purposes of section 469 and the regulations thereunder, the operations of X's real estate development business are treated as part of X's activities.

(iii) A is also subject to section 469 (see § 1.469–1T(b)(1)), but A's only interest in the real estate development business is held through X. X is a C corporation and therefore is not a passthrough entity. Thus, for purposes of section 469 and the regulations thereunder, A's activities do not include the operations of X's real estate development business. Accordingly, A's participation in X's busines is not participation in an activity of A, and is not taken into account in determining whether A materially participates (within the meaning of § 1.469–5T) or significantly participates (within the meaning of § 1.469–1T(c)(2)) in any activity. (See, however, § 1.469–1T(g)(3) for rules under which a shareholder's participation is taken into account for purposes of determining whether a corporation materially or significantly participates in an activity.

(c) *Undertaking*—(1) *In general.* Except as otherwise provided in paragraphs (d), (e), and (k)(2)(iii) of this section, business and rental operations that constitute a separate source of income production shall be treated as a single undertaking that is separate from other undertakings.

(2) *Operations treated as a separate source of income production*—(i) *In general.* Except as otherwise provided in this paragraph (c)(2), business and rental operations shall be treated for purposes of this paragraph (c) as a separate source of income production if and only if—

(A) Such operations are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (within the meaning of paragraph (c)(2)(v) of this section); and

(B) Income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) owned by such person are conducted at such location.

(ii) *Treatment of support operations*—(A) *In general.* For purposes of section 469 and the regulations thereunder—

(*1*) The support operations conducted at a location shall not be treated as part of an undertaking under paragraph (c)(2)(i) of this section; and

(*2*) The income and expenses that are attributable to such operations and are reasonably allocable to an undertaking conducted at a different location shall be taken into account in determining the income or loss from the activity or activities that include such undertaking.

(B) *Support operations.* For purposes of this paragraph (c)(2), the business and rental operations conducted at a location are treated as support operations to the extent that—

(*1*) Such operations and an undertaking that is conducted at a different location are owned by the same person (within the meaning of paragraph (c)(2)(v) of this section);

(*2*) Such operations involve the provision of property or services to such undertaking; and

(*3*) Such operations are not income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section).

(iii) *Location.* For purposes of this paragraph (c)(2)—

(A) The term "location" means, with respect to any business and rental operations, a fixed place of business at which such operations are regularly conducted;

(B) Business and rental operations are conducted at the same location if they are conducted in the same physical structure or within close proximity of one another;

(C) Business and rental operations that are not conducted at a fixed place of business or that are conducted on the customer's premises shall be treated as operations that are conducted at the location (other than the customer's premises) with which they are most closely associated;

(D) All the facts and circumstances (including, in particular, the factors listed in paragraph (c)(3) of this section) are taken into account in determining the location with which business and rental operations are most closely associated; and

(E) Oil and gas operations that are conducted for the development of a common reservoir are conducted within close proximity of one another.

(iv) *Income-producing operations.* For purposes of this paragraph (c)(2), the term "income-producing operations" means business and rental operations that are conducted at a location and relate to (or are conducted in reasonable anticipation of)—

(A) The production of property at such location;

(B) The sale of property to customers at such location;

(C) The performance of services for customers at such location;

(D) Transactions in which customers take physical possession at such location of property that is made available for their use; or

(E) Any other transactions that involve the presence of customers at such location.

(v) *Ownership by the same person.* For purposes of this paragraph (c)(2), business and rental operations are owned by the same person if and only if one person (within the meaning of section 7701(a)(1)) is the direct owner of such operations.

(3) *Facts and circumstances determinations.* In determining whether a location is the location with which business and rental operations are most closely associated for purposes of paragraph (c)(2)(iii)(D) of this section, the following relationships between operations that are conducted at such location and other operations are generally the most significant:

(i) The extent to which other persons conduct similar operations at one location;

(ii) Whether such operations are treated as a unit in the primary accounting records reflecting the results of such operations;

(iii) The extent to which other persons treat similar operations as a unit in the primary accounting records reflecting the results of such similar operations;

(iv) The extent to which such operations involve products or services that are commonly provided together;

(v) The extent to which such operations serve the same customers;

(vi) The extent to which the same personnel, facilities, or equipment are used to conduct such operations;

(vii) The extent to which such operations are conducted in coordination with or reliance upon each other;

(viii) The extent to which the conduct of any such operations is incidental to the conduct of the remainder of such operations;

(ix) The extent to which such operations depend on each other for their economic success; and

(x) Whether such operations are conducted under the same trade name.

(4) *Examples.* The following examples illustrate the application of this paragraph (c). In each example that does not state otherwise, the taxpayer is an individual and the facts, analysis, and conclusion relate to a single taxable year.

Example (1). The taxpayer is the sole owner of a department store and a restaurant and conducts both businesses in the same building. Thus, the department store and restaurant operations are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). In addition, the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the location (*i.e.*, property is sold to customers and services are performed for customers on the premises of the department store). Accordingly, the department store and restaurant operations are treated as a

separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section).

Example (2). (i) The facts are the same as in example (1), except that the taxpayer is also the sole owner of an automotive center that services automobiles and sells tires, batteries, motor oil, and accessories. The taxpayer operates the automotive center in a separate structure in the shopping mall in which the department store is located. Although the automotive center operations and the department store and restaurant operations are not conducted in the same physical structure, they are conducted within close proximity (within the meaning of paragraph (c)(2)(iii)(B) of this section) of one another. Thus, the department store, restaurant, and automotive center operations are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section).

(ii) As in example (1), the operations conducted at the same location are owned by the same person, and the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the location. Accordingly, the department store, restaurant, and automotive center operations are treated as a separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section).

Example (3). (i) The facts are the same as in example (2), except that the automotive center is located several blocks from the shopping mall. As in example (1), the department store and restaurant operations are treating as a single undertaking that is separate from other undertakings. Because, however, the automotive center operations are not conducted within close proximity (within the meaning of paragraph (c)(2)(iii)(B) of this section) of the department store and restaurant operations, all of the taxpayer's operations are not conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section).

(ii) All of the automotive center operations are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). In addition, the taxpayer conducts income producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the location (*i.e.*, property is sold to customers and services are performed for customers on the premises of the automotive center). Accordingly, the automotive center operations are also treated as a separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section). See, however, paragraph (g) of this section for rules under which certain trade or business activities are treated as a single activity.

Example (4). The taxpayer is the sole owner of a building and rents residential, office, and retail space in the building to various tenants. The taxpayer manages these rental operations from an office located in the building. The rental operations are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). In addition, the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the location (*i.e.*, customers take physical possession in the building of property made available for their use). Accordingly, the rental operations are treated as a separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section). See paragraph (d) of this section for rules for determining whether this undertaking is a rental undertaking and paragraph (k) of this section for rules for identifying rental real estate activities.

Example (5). (i) The facts are the same as in example (4), except that the taxpayer also uses the rental office in the building ("Building #1") to manage rental operations in another building ("Building #2") that the taxpayer owns. The rental operations conducted in Building #2 are treated as a separate source of income production under paragraph (c)(2) of this section and as a single undertaking that is separate from other undertakings (the "Building #2 undertaking") under paragraph (c)(1) of this section.

(ii) The operations conducted at the rental office in Building #1 and the Building #2 undertaking are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). In addition, the operations conducted at the rental office with respect to the Building #2 undertaking relate to transactions in which customers take physical possession at another location of property that is made available for their use (*i.e.*, the operations are not income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section)). Thus, to the extent the operations conducted at the rental office involve the management of the Building #2 undertaking, they are support operations (within the meaning of paragraph (c)(2)(ii)(B) of this section) with respect to the Building #2 undertaking.

(iii) Paragraph (c)(2)(ii)(A)(*1*) of this section provides that support operations are not treated as part of an undertaking under paragraph (c)(2)(i) of this section. Therefore, the support operations conducted at the rental office are not treated as part of the undertaking that consists of the rental operations conducted in Building #1 (the "Building #1 undertaking"). Paragraph (c)(2)(ii)(A)(*2*) of this section provides that the income and expenses that are attributable to support operations and are reasonably allocable to an undertaking conducted at a different location shall be taken into account in determining the income or loss from the activity that includes such undertaking. Accordingly, the income and expenses of the rental office that are reasonably allocable to the Building #2 undertaking are taken into account in determining the income or loss from the activity or activities that include the Building #2 undertaking. See paragraph (k) of this section for rules for identifying rental real estate activities.

(iv) Rental office operations that involve the management of rental operations conducted in Building #1 are not support operations (within the meaning of paragraph (c)(2)(ii)(B) of this section) because they relate to an undertaking that is conducted at the same location (the "Building #1 undertaking"). Thus, the rules for support operations in paragraph (c)(2)(ii)(A) of this section do not apply to such operations, and they are treated as part of the Building #1 undertaking.

Example (6). (i) The taxpayer conducts business and rental operations at eleven different locations (within the meaning of paragraph (c)(2)(iii) of this section). At ten of the locations the taxpayer owns grocery stores, and at the eleventh location the taxpayer owns a warehouse that receives goods and supplies them to the taxpayer's stores. The operations of each store are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). In addition, the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at each location (*i.e.*, property is sold to customers on the store premises, and customers take physical possession on the store premises of property made available for their use). Accordingly, the operations of each of the ten grocery stores are treated as a separate source of income production (see paragraph (c)(2) of this section), and each store is treated as a single undertaking (a "grocery store undertaking") that is separate from other undertakings (see paragraph (c)(1) of this section). The operations conducted at the warehouse, however, do not include any income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section). Accordingly, the warehouse operations do not satisfy the requirements of paragraph (c)(2)(i) of this section and are not treated as a separate undertaking under paragraph (c)(1) of this section.

(ii) The warehouse operations and the grocery store undertakings are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations), the operations conducted at the warehouse involve the provision of property to the grocery store undertakings, and the warehouse operations are not income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section). Thus, the warehouse operations are support operations (within the meaning of paragraph (c)(2)(ii)(B) of this section) with respect to the grocery store undertakings. Paragraph (c)(2)(ii)(A)(*2*) of this section provides that the income and expenses that are attributable to support operations and are reasonably allocable to an undertaking conducted at a different location shall be taken into account in determining the income or loss from the activity or activities that include such undertaking. Accordingly, the income and expenses of the warehouse operations that are reasonably allocable to a grocery store undertaking are taken into account in determining the income or loss

from the activity or activities that include such undertaking. See paragraph (f) of this section for rules under which certain similar, commonly-controlled undertakings are treated as a single activity.

Example (7). (i) The facts are the same as in example (6), except that the warehouse operations also include the sale of goods to grocery stores that the taxpayer does not own ("other grocery stores"). Because of these sales, the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the warehouse. The warehouse operations are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). Accordingly, prior to the application of the rules for support operations in paragraph (c)(2)(ii) of this section, the warehouse operations are treated as a separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking (the "separate warehouse undertaking") that is separate from other undertakings (see paragraph (c)(1) of this section).

(ii) As in example (6), the warehouse operations that involve supplying goods to the taxpayer's grocery store undertakings are support operations with respect to those undertakings. Therefore, those operations are not treated as part of the separate warehouse undertaking (see paragraph (c)(2)(ii)(A)(*1*) of this section), and the income and expenses of such operations are taken into account, as in example (6), in determining the income or loss from the activity or activities that include the taxpayer's grocery store undertakings.

Example (8). (i) A partnership is formed to acquire real property and construct a building on the property. The partnership hires brokers to locate a suitable parcel of land, lawyers to negotiate zoning variances, easements, and building permits, and architects and engineers to design the improvements. After the architects and engineers have designed the improvements and other preliminaries have been completed, the partnership hires a general contractor who hires subcontractors and oversees construction. During the construction process and after construction has been completed, the partnership leases out space in the building. The partnership then operates the building as a rental property. The operations of acquiring the real property, negotiating contracts, overseeing the designing and construction of the improvements, leasing up the building, and operating the building are conducted at an office (the "management office") that is not at the same location (within the meaning of paragraph (c)(2)(iii) of this section) as the building.

(ii) The operations conducted at the building site (*e.g.*, excavating the land, pouring the concrete for the foundation, erecting the frame of the building, completing the exterior of the building, and building out the interior of the building) are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the partnership is the direct owner of the operations). In addition, the partnership conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the location (*i.e.*, during the construction period property (the building) is produced at the building site, and during the rental period customers take physical possession in the building of property made available for their use). Accordingly, the operations conducted at the building site are treated as a separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section).

(iii) The operations conducted at the management office and the undertaking conducted at the building site are owned by the same person (*i.e.*, the partnership is the direct owner of the operations). In addition, the operations conducted at the management office relate to transactions in which customers take physical possession at another location of property that is made available for their use (*i.e.*, the operations are not income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section)). Thus, to the extent the operations conducted at the management office involve the provision of services to the undertaking conducted at the building site, they are support operations (within the meaning of paragraph (c)(2)(ii)(B) of this section) with respect to such undertaking.

(iv) Paragraph (c)(2)(ii)(A)(*2*) of this section provides that the income and expenses of support operations that are reasonably allocable to an undertaking conducted at a different location shall be taken into account in determining the income or loss from the activity that includes such undertaking. Accordingly, the income and expenses of the management office that are reasonably allocable to the undertaking conducted at the building site are taken into account in determining the income or loss from the activity or activities that include such undertaking.

(v) Until the building is first held out for rent and is in a state of readiness for rental, the undertaking conducted at the building site is a trade or business undertaking (within the meaning of paragraph (f)(1)(ii) of this section). See paragraph (d) of this section for rules for determining whether the undertaking is a rental undertaking for periods after the building is first held out for rent and is in a state or readiness for rental and paragraph (k) of this section for rules for identifying rental real estate activities.

Example (9). The taxpayer owns 15 oil wells pursuant to a single working interest (within the meaning of § 1.469–1T (e)(4)(iv). All of the wells are drilled and operated for the development of a common reservoir. Thus, all of the wells are at the same location (see paragraph (c)(2)(iii)(E) of this section). All of the wells are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations), and the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the location (*i.e.*, oil wells are drilled in reasonable anticipation of producing oil at the location). Accordingly, the operations of the wells are treated as a separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section). See paragraph (e) of this section for rules under which certain oil and gas operations are treated as multiple undertakings even if they would be part of the same undertaking under the rules of this paragraph (c).

Example (10). (i) Partnership X owns an automobile dealership and partnership Y owns an automobile repair shop. The dealership and repair shop operations are conducted in the same physical structure. Individuals A, B, and C are the only partners in partnerships X and Y, and each of the partners owns a one-third interest in both partnerships.

(ii) The dealership operations and the repair-shop operations are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section), but are owned by different persons (*i.e.*, X is the direct owner of the dealership operations, and Y is the direct owner of the repair-shop operations). Moreover, indirect ownership of the operations is not taken into account under paragraph (c)(2)(v) of this section. Thus, it is irrelevant that the two partnerships are owned by the same persons in identical proportions. Accordingly, the dealership and repair-shop operations are not treated as part of the same source of income production (see paragraph (c)(2) of this section) or as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section). See, however, paragraph (g) of this section for rules under which certain trade or business activities are treated as a single activity.

Example (11). (i) The taxpayer owns and operates a delivery service. The business consists of a central office, retail establishments, and messengers who transport packages from one place to another. Customers may bring their packages to a retail establishment for delivery elsewhere or, by calling the central office, may have packages picked up at their homes or offices. The central office dispatches messengers and coordinates all pickups and deliveries. Customers may pay for deliveries when they drop off or pick up packages at a retail establishment, or the central office will bill the customer for services rendered. In addition, many packages are routed through the central office.

(ii) The operations conducted at the central office are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). The operations actually conducted at the central office, however, do not include any income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section).

(iii) Under paragraph (c)(2)(iii) (C) and (D) of this section, business and rental operations that are not conducted at a fixed place of business or that are conducted on the customer's premises are treated as operations that are conducted at the location (other than the customer's premises) with which they are

most closely associated, and all the facts and circumstances are taken into account in determining the location with which business and rental operations are most closely associated. The facts and circumstances in this case (including the facts that the central office dispatches messengers, coordinates all pickups and deliveries, and is the transshipment point for many packages) establish that the operations of delivering packages from one location to another are most closely associated with the central office. Thus, the delivery operations are treated as operations that are conducted at the central office, and the deliveries are treated as income-producing operations (*i.e.*, the performance of services for customers) that the taxpayer conducts at the central office. Accordingly, the operations conducted at the central office are treated as a separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section).

(iv) The operations conducted at each retail establishment are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). At each retail establishment, the taxpayer's operations include transactions that involve the presence of customers at the establishment. Thus, the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv)(E) of this section) at the retail establishments. Accordingly, the operations of each retail establishment are treated as a separate source of income production (see paragraph (c)(2) of this section) and as a single undertaking that is separate from other undertakings (see paragraph (c)(1) of this section). See, however, paragraph (f) of this section for rules under which certain similar, commonly-controlled undertakings are treated as a single activity.

Example (12). (i) The taxpayer is the sole owner of a saw mill and a lumber yard. The taxpayer's business operations consist of converting timber into lumber and other wood products and selling the resulting products. The timber is processed at the saw mill, and the resulting products are transported to the lumber yard where they are sold. The saw mill and the lumber yard are at different locations (within the meaning of paragraph (c)(2)(iii) of this section). The transportation operations are managed at the saw mill.

(ii) The operations conducted at the saw mill are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). In addition, the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the location (*i.e.*, lumber is produced at the mill). Similarly, the selling operations at the lumber yard are conducted at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are owned by the same person (*i.e.*, the taxpayer is the direct owner of the operations). In addition, the taxpayer conducts income-producing operations (within the meaning of paragraph (c)(2)(iv) of this section) at the location (*i.e.*, lumber is sold to customers at the lumber yard). Thus, the milling operations and the selling operations are treated as separate sources of income production (see paragraph (c)(2) of this section) and as separate undertakings (see paragraph (c)(1) of this section).

(iii) The operations conducted at the mill involve the provision of property to the lumber-yard undertaking. Nonetheless, the milling operations are income-producing operations because they relate to the production of property at the mill, and an undertaking's income-producing operations are not treated as support operations (see paragraph (c)(2)(ii)(B)(*3*) of this section). Accordingly, the milling operations are not support operations with respect to the lumber-yard undertaking. See, however, paragraph (f) of this section for rules under which certain vertically-integrated undertakings are treated as part of the same activity.

(iv) The operations of transporting finished products from the saw mill to the lumber yard are not conducted at a fixed location. Under paragraphs (c)(2)(iii) (C) and (D) of this section, business and rental operations that are not conducted at a fixed place of business or that are conducted on the customer's premises are treated as operations that are conducted at the location (other than the customer's premises) with which they are most closely associated, and all the facts and circumstances are taken into account in determining the location with which business and rental operations are most closely associated. The facts and circumstances in this case (including the fact that the transportation operations are managed at the saw mill) establish that the transportation operations are most closely associated with the saw mill. Thus, the transportation operations are treated as operations that are conducted at the mill and as part of the undertaking that consists of the milling operations.

(d) *Rental undertaking*—(1) *In general.* This paragraph (d) applies to operations that are treated, under paragraph (c) of this section and before the application of paragraph (d)(1)(i) of this section, as a single undertaking that is separate from other undertakings (a "paragraph (c) undertaking"). For purposes of this section—

(i) A paragraph (c) undertaking's rental operations and its operations other than rental operations shall be treated, except as otherwise provided in paragraph (d)(2) of this section, as two separate undertakings;

(ii) The income and expenses that are reasonably allocable to an undertaking (determined after the application of paragraph (d)(1)(i) of this section) shall be taken into account in determining the income or loss from the activity or activities that include such undertaking; and

(iii) An undertaking (determined after the application of paragraph (d)(1)(i) of this section) shall be treated as a rental undertaking if and only if such undertaking, considered as a separate activity, would constitute a rental activity (within the meaning of § 1.469–1T(e)(3)).

(2) *Exceptions.* Paragraph (d)(1)(i) of this section shall not apply to a paragraph (c) undertaking for any taxable year in which—

(i) The rental operations of the paragraph (c) undertaking, considered as a separate activity, would not constitute a rental activity (within the meaning of § 1.469–1T(e)(3));

(ii) Less than 20 percent of the gross income of the paragraph (c) undertaking is attributable to rental operations; or

(iii) Less than 20 percent of the gross income of the paragraph (c) undertaking is attributable to operations other than rental operations.

(3) *Rental operations.* For purposes of this paragraph (d), a paragraph (c) undertaking's rental operations are determined under the following rules:

(i) *General rule.* Except as otherwise provided in paragraph (d)(3) (ii) or (iii) of this section, a paragraph (c) undertaking's rental operations are all of the undertaking's business and rental operations that involve making tangible property available for use by customers and the provision of property and services in connection therewith.

(ii) *Real property provided for short-term use.* A paragraph (c) undertaking's operations that involve making short-term real property available for use by customers and the provision of property and services in connection therewith shall not be treated as rental operations if such operations, considered as a separate activity, would not constitute a rental activity. An item of property is treated as short-term real property for this purpose if and only if such item is real property that the paragraph (c) undertaking makes available for use by customers and the average period of customer use (within the meaning of § 1.469–1T(e)(3)(iii)) for all of the paragraph (c) undertaking's real property of the same type as such item is 30 days or less.

(iii) *Property made available to licensees.* A paragraph (c) undertaking's operations that involve making tangible property available during defined business hours for nonexclusive use by various customers shall not be treated as rental operations. (See § 1.469–1T(e)(3)(ii)(E).)

(4) *Examples.* The following examples illustrate the application of this paragraph (d). In each example that

does not state otherwise, the taxpayer is an individual and the facts, analysis, and conclusions relate to a single taxable year.

Example (1). The taxpayer owns a building in which the taxpayer rents office space to tenants and operates a parking garage that is used by tenants and other persons. (Assume that, under paragraph (c)(1) of this section, the operations conducted in the building are treated as a single paragraph (c) undertaking.) The taxpayer's tenants typically occupy an office for at least one year, and the services provided to tenants are those customarily provided in office buildings. Some persons (including tenants) rent spaces in the parking garage on a monthly or annual basis. In general, however, spaces are rented on an hourly or daily basis, and the average period for which all customers (including tenants) use the parking garage is less than 24 hours. The paragraph (c) undertaking derives 75 percent of its gross income from office-space rentals and 25 percent of its gross income from the parking garage. The operations conducted in the building are not incidental to any other activity of the taxpayer (within the meaning of § 1.469–1T(e)(3)(vi)).

(ii) The parking spaces are real property and the average period of customer use (within the meaning of § 1.469–1T(e)(3)(iii)) for the parking spaces is 30 days or less. Thus, the parking spaces are short-term real properties (within the meaning of paragraph (d)(3)(ii) of this section). (For this purpose, individual parking spaces that are rented on a monthly or annual basis are, nevertheless, short-term real properties because all the parking spaces are property of the same type, and the average rental period taking all parking spaces into account is 30 days or less.) In addition, the parking-garage operations involve making short-term real properties available for use by customers and the provision of property and services in connection therewith.

(iii) Paragraph (d)(3) (i) and (ii) of this section provides, in effect, that a paragraph (c) undertaking's operations that involve making short-term real properties available for use by customers and the provision of property and services in connection therewith are treated as rental operations if and only if the operations, considered as a separate activity, would constitute a rental activity (within the meaning of § 1.469–1T(e)(3)). In this case, the parking-garage operations, if considered as a separate activity, would not constitute a rental activity because the average period of customer use for the parking spaces is seven days or less (see § 1.469–1T(e)(3)(ii)(A)). Accordingly, the parking-garage operations are not treated as rental operations.

(iv) The paragraph (c) undertaking's remaining operations involve the provision of tangible property (the office spaces) for use by customers and the provision of property and services in connection therewith. The average period of customer use for the office spaces exceeds 30 days. Thus, the office spaces are not short-term real properties, and the undertaking's operations involving the rental of office spaces are rental operations.

(v) Paragraph (d)(1)(i) of this section provides, with certain exceptions, that a paragraph (c) undertaking's rental operations and its operations other than rental operations are treated as two separate undertakings. In this case, at least 20 percent of the paragraph (c) undertaking's gross income is attributable to rental operations (the office-space operations) and at least 20 percent is attributable to operations other than rental operations (the parking-garage operations). Thus, the exceptions in paragraph (d)(2) (ii) and (iii) of this section do not apply. In addition, the average period of customer use for the office spaces exceeds 30 days, extraordinary personal services (within the meaning of § 1.469–1T(e)(3)(v)) are not provided, and the rental of the office spaces is not treated as incidental to a nonrental activity under § 1.469–1T(e)(3)(vi) (relating to incidental rentals that are not treated as a rental activity). Thus, the rental operations, if considered as a separate activity, would constitute a rental activity, and the exception in paragraph (d)(2)(i) of this section does not apply. Accordingly, the rental operations and the parking-garage operations are treated as two separate undertakings (the "office-space undertaking" and the "parking-garage undertaking").

(vi) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking if and only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the office-space undertaking, if considered as a separate activity, would constitute a rental activity (see (v) above), and the parking-garage undertaking, if considered as a separate activity, would not constitute a rental activity (see (iii) above). Accordingly, the office-space undertaking is treated as a rental undertaking, and the parking-garage undertaking is not.

Example (2). (i) The taxpayer owns a building in which the taxpayer rents apartments to tenants and operates a restaurant. (Assume that, under paragraph (c)(1) of this section, the operations conducted in the building are treated as a single paragraph (c) undertaking.) The taxpayer's tenants typically occupy an apartment for at least one year, and the services provided to tenants are those customarily provided in residential apartment buildings. The paragraph (c) undertaking derives 85 percent of its gross income from apartment rentals and 15 percent of its gross income from the restaurant. The operations conducted in the building are not incidental to any other activity of the taxpayer (within the meaning of § 1.469–1T(e)(3)(vi)).

(ii) The operations with respect to apartments (the "apartment operations") involve the provision of tangible property (the apartments) for use by customers and the provision of property and services in connection therewith. In addition, the apartments are not short-term real properties (within the meaning of paragraph (d)(3)(ii) of this section) because the average period of customer use (within the meaning of § 1.469–1T(e)(3)(iii)) for the apartments exceeds 30 days. Accordingly, the apartment operations are rental operations (within the meaning of paragraph (d)(3) of this section). The restaurant operations do not involve the provision of tangible property for use by customers or the provision of property or services in connection therewith. Thus, the restaurant operations are not rental operations.

(iii) Paragraph (d)(1)(i) of this section provides, with certain exceptions, that a paragraph (c) undertaking's rental operations and its operations other than rental operations are treated as two separate undertakings. In this case, however, the exception in paragraph (d)(2)(iii) of this section applies because less than 20 percent of the paragraph (c) undertaking's gross income is attributable to operations other than rental operations (the restaurant operations). Accordingly, the rental operations and the restaurant operations are not treated as two separate undertakings under paragraph (d)(1)(i) of this section.

(iv) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking if and only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the undertaking (determined after the application of paragraph (d)(1)(i) of this section) includes both the apartment operations and the restaurant operations, and the gross income of this undertaking represents amounts paid principally for the use of tangible property (the apartments). Moreover, the average period of customer use for the apartments exceeds 30 days, extraordinary personal services (within the meaning of § 1.469–1T(e)(3)(v)) are not provided, and the rental of the apartments is not treated as incidental to a nonrental activity under § 1.469–1T(e)(3)(vi) (relating to incidental rentals that are not treated as a rental activity). Thus, the undertaking, if considered as a separate activity, would constitute a rental activity. Accordingly, the undertaking is treated as a rental undertaking.

Example (3). (i) The taxpayer owns a building in which the taxpayer rents hotel rooms, meeting rooms, and parking spaces to customers, rents space to various retailers, and operates a restaurant and health club. (Assume that, under paragraph (c)(1) of this section, the operations conducted in the building are treated as a single paragraph (c) undertaking.) Although some customers occupy hotel rooms for extended periods (including some customers who reside in the hotel), customers use hotel rooms for an average period of two days and meeting rooms for an average period of one day. The services provided to persons using the hotel rooms and meeting rooms are those customarily provided in hotels (including wake-up calls, valet services, and delivery of food and beverages to rooms). Some customers rent spaces in the parking garage on a monthly or annual basis. In general, however, parking spaces are rented on an hourly or daily basis, and the average period for which customers use the parking garage is less than 24 hours. Retail tenants typically

occupy their space for at least one year, and the services provided to retail tenants are those customarily provided in commercial buildings. The paragraph (c) undertaking derives 45 percent of its gross income from renting hotel rooms, meeting rooms, and parking spaces, 35 percent of its gross income from renting retail space, and 20 percent of its gross income from the restaurant and health club. The operations conducted in the building are not incidental to any other activity of the taxpayer (within the meaning of § 1.469–1T(e)(3)(vi)).

(ii) The parking spaces, hotel rooms, and meeting rooms are real property of three different types, but the average period of customer use (within the meaning of § 1.469–1T (e)(3)(iii)) for property of each type is 30 days or less. Thus, the parking spaces, hotel rooms, and meeting rooms are short-term real properties. (For this purpose, individual parking spaces or hotel rooms that are rented for extended periods are, nevertheless, short-term real properties if the average rental period for all parking spaces is 30 days or less and the average rental period for all hotel rooms is 30 days or less.) In addition, the parking garage operations, the operations with respect to hotel rooms (the "hotel-room operations"), and the operations with respect to meeting rooms (the "meeting-room operations") involve making short-term real properties available for use by customers and the provision of property and services in connection therewith.

(iii) Paragraph (d)(3) (i) and (ii) of this section provides, in effect, that a paragraph (c) undertaking's operations that involve making short-term real properties available for use by customers and the provision of property and services in connection therewith are treated as rental operations if and only if the operations, considered as a separate activity, would constitute a rental activity (within the meaning of § 1.469–1T (e)(3)). In this case the parking-garage, hotel-room and meeting-room operations, if considered as separate activities, would not constitute rental activities because the average period of customer use for parking spaces, hotel rooms, and meeting rooms does not exceed seven days (see § 1.469–1T (e)(3)(ii)(A)). Accordingly, the parking-garage, hotel-room, and meeting-room operations are not treated as rental operations.

(iv) The operations with respect to retail space in the building (the "retail-space operations") involve the provision of tangible property (the retail spaces) for use by customers and the provision of property and services in connection therewith. In addition, the retail spaces are not short-term real properties (within the meaning of paragraph (d)(3)(ii) of this section) because the average period of customer use (within the meaning of § 1.469–1T (e)(3)(iii)) for the retail spaces exceeds 30 days. Accordingly, the retail-space operations are rental operations.

(v) The health-club operations involve making tangible property available for use by customers, but the property is customarily made available during defined business hours for nonexclusive use by various customers. Accordingly, the health-club operations are not rental operations (see paragraph (d)(3)(iii) of this seciton). The restaurant operations do not involve the provision of tangible property for use by customers or the provision of property or services in connection therewith. Accordingly, the restaurant operations also are not rental operations.

(vi) Paragraph (d)(1)(i) of this section provides, with certain exceptions, that a paragraph (c) undertaking's rental operations and its operations other than rental operations are treated as two separate undertakings. In this case, at least 20 percent of the paragraph (c) undertaking's gross income is attributable to rental operations (35 percent of the paragraph (c) undertaking's gross income is from the retail-space operations) and at least 20 percent is attributable to operations other than rental operations (45 percent from the hotel-room, meeting-room and parking-garage operations and 20 percent from the restaurant and health-club operations). Thus, the exceptions in paragraph (d)(2) (ii) and (iii) of this section do not apply. In addition, the average period of customer use for the retail space exceeds 30 days, extraordinary personal services (within the meaning of § 1.469–1T (e)(3)(v)) are not provided, and the rental of the retail space is not treated as incidental to a nonrental activity under § 1.469–1T (e)(3)(vi) (relating to incidental rentals that are not treated as a rental activity). Thus, the retail-space operations, if considered as a separate activity, would constitute a rental activity, and the exception in paragraph (d)(2)(i) of this section does not apply. Accordingly, the retail-space operations are treated as an undertaking (the "retail-space undertaking") and all the other operations conducted in the building (*i.e.*, renting hotel and meeting rooms and parking spaces and operating the restaurant and health club) are treated as a separate undertaking (the "hotel undertaking").

(vii) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking if and only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the retail-space undertaking, if considered as a separate activity, would constitute a rental activity (see (iv) above). Accordingly, the retail-space undertaking is treated as a rental undertaking. The hotel undertaking, if considered as a separate activity, would not constitute a rental activity because all tangible property provided for the use of customers in the hotel undertaking is either property for which the average period of customer use is seven days or less (see § 1.469–1T (e)(3)(ii)(A)) or property customarily made available during defined business hours for nonexclusive use by various customers (see § 1.469–1T (e)(3)(ii)(E)). Accordingly, the hotel undertaking is not treated as a rental undertaking.

Example (4). (i) A law partnership owns a ten-story building. The partnership uses eight floors of the building in its law practice and leases two floors to one or more tenants. (Assume that, under paragraph (c)(1) of this section, the operations conducted in the building are treated as a single paragraph (c) undertaking.) Tenants typically occupy space on the two rented floors for at least one year, and the services provided to tenants are those customarily provided in office buildings. The paragraph (c) undertaking derives 90 percent of its gross income from rendering legal services and 10 percent of its gross income from renting space. The operations conducted in the building are not incidental to any other activity of the taxpayer (within the meaning of § 1.469–1T (e)(3)(vi)).

(ii) The operations with respect to the office space leased to tenants (the "office-space operations") involve the provision of tangible property (the office space) for use by customers and the provision of property and services in connection therewith. In addition, the office spaces are not short-term real properties (within the meaning of paragraph (d)(3)(ii) of this section) because the average period of customer use (within the meaning of § 1.469–1T(e)(3)(iii)) for the office space exceeds 30 days. Accordingly, the office-space operations are rental operations (within the meaning of paragraph (d)(3) of this section).

(iii) The operations that involve the performance of legal services (the "law-practice operations") do not involve the provision of tangible property for use by customers or the provision of property or services in connection therewith. Accordingly, the law-practice operations are not rental operations.

(iv) Paragraph (d)(1)(i) of this section provides, with certain exceptions, that a paragraph (c) undertaking's rental operations and its operations other than rental operations are treated as two separate undertakings. In this case, however, the exception in paragraph (d)(2)(ii) of this section applies because less than 20 percent of the paragraph (c) undertaking's gross income is attributable to rental operations (the office-space operations). Accordingly, the law-practice operations and the office-space operations are not treated as two separate undertakings under paragraph (d)(1)(i) of this section.

(v) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the undertaking (determined after the application of paragraph (d)(1)(i) of this section) includes both the law-practice operations and the office-space operations, and the gross income of this undertaking does not represent amounts paid principally for the use of tangible property. Thus, the undertaking, if considered as a separate activity, would not constitute a rental activity. Accordingly, the undertaking is not treated as a rental undertaking.

Example (5). (i) The facts are the same as in example (4), except that the building is owned by a separate partnership (the "real estate partnership"), which leases eight floors of the building to the law partnership for use in its law practice and two floors to one or more other tenants. The law partnership and

real estate partnership are owned by the same individuals in identical proportions.

(ii) The operations conducted in the building are owned by two different persons (*i.e.*, the law partnership and the real estate partnership). (See paragraph (c)(2)(v) of this section.) Thus, the operations conducted in the building are not treated as a single undertaking under paragraph (c)(1) of this section. Instead, each partnership's share of such operations is treated as a separate paragraph (c) undertaking (the "law-practice undertaking" and the "office-space undertaking").

(iii) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking if and only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the office-space undertaking, if considered as a separate activity, would constitute a rental activity because all of the undertaking's gross income (including rents paid by the law partnership) represents amounts paid principally for the use of tangible property (the office space), the average period of customer use for the office space exceeds 30 days, extraordinary personal services (within the meaning of § 1.469–1T(e)(3)(v)) are not provided, and the rental of the office space is not treated as incidental to a nonrental activity under § 1.469–1T(e)(3)(vi) (relating to incidental rentals that are not treated as a rental activity). Accordingly, the office-space undertaking is treated as a rental undertaking. See, however, § 1.469–2T(f)(6) (relating to certain rentals of property to a trade or business activity in which the taxpayer materially participates).

(iv) The law-practice undertaking, if considered as a separate activity, would not constitute a rental activity because none of the undertaking's gross income represents amounts paid principally for the use of tangible property. Accordingly, the law-practice undertaking is not treated as a rental undertaking.

Example (6). (i) The taxpayer owns a building in which the taxpayer operates a nursing home and a medical clinic. (Assume that, under paragraph (c)(1) of this section, the operations conducted in the building are treated as a single paragraph (c) undertaking.) The nursing-home operations consist of renting apartments in the nursing home to elderly and handicapped persons and providing medical care, meals, and social activities. (Assume that these services are extraordinary personal services (within the meaning of § 1.469–1T(e)(3)(v)). The medical clinic provides medical care to nursing-home residents and other individuals. Nursing-home residents typically occupy an apartment for at least one year. The paragraph (c) undertaking derives 55 percent of its gross income from nursing-home operations (including the provision of medical services to nursing-home residents) and 45 percent of its gross income from medical-clinic operations. The operations conducted in the building are not incidental to any other activity of the taxpayer (within the meaning of § 1.469–1T(e)(3)(vi)).

(ii) The paragraph (c) undertaking's nursing-home operations involve the provision of tangible property (the apartments) for use by customers and the provision of property and services in connection therewith. In addition, the apartments are not short-term real properties (within the meaning of paragraph (d)(3)(ii) of this section) because the average period of customer use (within the meaning of § 1.469–1T(e)(3)(iii)) for the apartments exceeds 30 days. Accordingly, the nursing-home operations are rental operations (within the meaning of paragraph (d)(3) of this section). The medical-clinic operations do not involve the provision of tangible property for use by customers or the provision of property or services in connection therewith. Thus, the medical-clinic operations are not rental operations.

(iii) Paragraph (d)(1)(i) of this section provides, with certain exceptions, that a paragraph (c) undertaking's rental operations and its operations other than rental operations are treated as two separate undertakings. In this case, however, the nursing-home operations, if considered as a separate activity, would not constitute a rental activity because extraordinary personal services are provided in connection with making nursing-home apartments available for use by customers (see § 1.469–T(e)(3)(ii)(C)). Thus, the exception in paragraph (d)(2)(i) of this section applies, and the nursing-home operations and the medical-clinic operations are not treated as two separate undertakings under paragraph (d)(1)(i) of this section.

(iv) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the nursing-home operations, if considered as a separate activity, would not constitute a rental activity (see (iii) above). Thus, an undertaking that includes no rental operations other than the nursing-home operations would not, if considered as a separate activity, constitute a rental activity. Accordingly, the undertaking is not treated as a rental undertaking.

Example (7). (i) The taxpayer rents and sells videocassettes. (Assumes that, under paragraph (c)(1) of this section, the videocassette operations are treated as a single paragraph (c) undertaking.) Renters of videocassettes typically keep the videocassettes for one or two days, and do not receive any other property or services in connection with videocassette rentals. The paragraph (c) undertaking derives 70 percent of its gross income from renting videocassettes and 30 percent of its gross income from selling videocassettes. The videocassette operations are not incidental to any other activity of the taxpayer (within the meaning of § 1.469–1T(e)(3)(vi)).

(ii) The rental of videocassettes involves the provision of tangible property (the videocassettes) for use by customers. In addition, the special rules for short-term real properties contained in paragraph (d)(3)(ii) of this section do not apply in this case because the videocassettes are not real property. Thus, the operations that involve videocassette rentals are rental operations (within the meaning of paragraph (d)(3) of this section). The sale of videocassettes does not involve the provision of tangible property for use by customers or the provision of property or services in connection therewith. Thus, the operations that involve videocassette sales are not rental operations.

(iii) Paragraph (d)(1)(i) of this section provides, with certain exceptions, that a paragraph (c) undertaking's rental operations and its operations other than rental operations are treated as two separate undertakings. In this case, however, the rental operations, if considered as a separate activity, would not constitute a rental activity because the average period of customer use for rented videocassettes does not exceed seven days (see § 1.469–1T(e)(3)(ii)(A)). Accordingly, the exception in paragraph (d)(2)(i) of this section applies, and the videocassette-rental operations and videocassette-sales operations are not treated as two separate undertakings under paragraph (d)(1)(i) of this section.

(iv) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the videocassette-rental operations, if considered as a separate activity, would not constitute a rental activity (see (iii) above). Thus, an undertaking that includes no rental operations other than the videocassette-rental operations would not, if considered as a separate activity, constitute a rental activity. Accordingly, the undertaking is not treated as a rental undertaking.

Example (8). (i) The taxpayer owns a building in which the taxpayer sells, leases, and services automobiles. (Assume that, under paragraph (c)(1) of this section, the operations conducted in the building are treated as a single paragraph (c) undertaking.) The minimum lease term for any leased automobile is 31 days, and the services provided to lessees (including periodic oil changes, lubrication, and routine services and repairs) are those customarily provided in long-term automobile leases. The paragraph (c) undertaking derives 75 percent of its gross income from selling automobiles, 15 percent of its gross income from servicing automobiles other than leased automobiles, and 10 percent of its gross income from leasing automobiles. The taxpayer's automobile operations are not incidental to any other activity of the taxpayer (within the meaning of § 1.469–1T(e)(3)(vi)).

(ii) The paragraph (c) undertaking's automobile-leasing operations involve the provision of tangible property (the automobiles) for use by customers and the provision of services in connection therewith. In addition, the special rules for short-term real properties contained in paragraph (d)(3)(ii) of this section do not apply in this case because the automobiles are not real property. Accordingly, the automobile-leasing operations are rental operations (within the meaning of paragraph (d)(3) of this section). The paragraph (c) undertaking's automobile-

sales operations and servicing operations for automobiles other than leased automobiles (the "selling-and-servicing operations") do not involve the provision of tangible property for use by customers or the provision of property or services in connection therewith. Thus, the selling-and-servicing operations are not rental operations.

(iii) Paragraph (d)(1)(i) of this section provides, with certain exceptions, that a paragraph (c) undertaking's rental operations and its operations other than rental operations are treated as two separate undertakings. In this case, however, the exception in paragraph (d)(2)(ii) of this section applies because less than 20 percent of the paragraph (c) undertaking's gross income is attributable to rental operations (the "automobile-leasing operations"). Accordingly, the rental operations and the selling-and-servicing operations are not treated as two separate undertakings under paragraph (d)(1)(i) of this section.

(iv) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the undertaking (determined after the application of paragraph (d)(1)(i) of this section) includes both the selling-and-servicing operations and the automobile-leasing operations, and the gross income of the undertaking does not represent amounts paid principally for the use of tangible property. Thus, the undertaking, if considered as a separate activity, would not constitute a rental activity. Accordingly, the undertaking is not treated as a rental undertaking.

Example (9). (i) The facts are the same as in example (8), except that the paragraph (c) undertaking derives 60 percent of its gross income from selling automobiles, 15 percent of its gross income from servicing automobiles other than leased automobiles, and 25 percent of its gross income from leasing automobiles.

(ii) Paragraph (d)(1)(i) of this section provides, with certain exceptions, that a paragraph (c) undertaking's rental operations and its operations other than rental operations are treated as two separate undertakings. In this case, more than 20 percent of the paragraph (c) undertaking's gross income is attributable to rental operations (the automobile-leasing operations), and more than 20 percent is attributable to operations other than rental operations (the selling-and-servicing operations). Thus, the exceptions in paragraph (d)(2) (ii) and (iii) of this section do not apply. In addition, the average period of customer use for leased automobiles exceeds 30 days, extraordinary personal services (within the meaning of § 1.469–1T(e)(3)(v)) are not provided, and the leasing of the automobiles is not treated as incidental to a nonrental activity under § 1.469–1T(e)(3)(vi) (relating to incidental rentals that are not treated as a rental activity). Thus, the leasing operations, if considered as a separate activity, would constitute a rental activity, and the exception in paragraph (d)(2)(i) of this section does not apply. Accordingly, the rental operations and the selling-and-servicing operations are treated as two separate undertakings (the "automobile-leasing undertaking" and the "automobile selling-and-servicing undertaking").

(iii) Paragraph (d)(1)(iii) of this section provides that an undertaking (determined after the application of paragraph (d)(1)(i) of this section) is treated as a rental undertaking if and only if the undertaking, considered as a separate activity, would constitute a rental activity. In this case, the automobile-leasing undertaking would, if considered as a separate activity, constitute a rental activity, and the automobile selling-and-servicing undertaking would not, if considered as a separate activity, constitute a rental activity (see example (8) and (ii) above). Accordingly, the automobile-leasing undertaking is treated as a rental undertaking, and the automobile selling-and-servicing undertaking is not.

(e) *Special rules for certain oil and gas operations*—(1) *Wells treated as nonpassive under § 1.469–1T(e)(4)(i).* An oil or gas well shall be treated as an undertaking that is separate from other undertakings in determining the activities of a taxpayer for a taxable year if the following conditions are satisfied:

(i) The well is drilled or operated pursuant to a working interest (within the meaning of § 1.469–1T(e)(4)(iv)) and at any time during such taxable year the taxpayer holds such working interest either—

(A) Directly; or

(B) Through an entity that does not limit the liability of the taxpayer with respect to the drilling or operation of such well pursuant to such working interest; and

(ii) The taxpayer would not be treated as materially participating (within the meaning of § 1.469–5T) for the taxable year in the activity in which such well would be included if the taxpayer's activities were determined without regard to this paragraph (e).

(2) *Business and rental operations that constitute an undertaking.* In any case in which an oil or gas well is treated under this paragraph (e) as an undertaking that is separate from other undertakings, the business and rental operations that constitute such undertaking are the business and rental operations that are attributable to such well.

(3) *Examples.* The following examples illustrate the application of this paragraph (e). In each example, the taxpayer is an individual whose taxable year is the calendar year.

Example (1). During 1989, A directly owns an undivided interest in a working interest (within the meaning of § 1.469–1T(e)(4)(iv)) in two oil wells. A does not participate in the activity in which the wells would be included if A's activities were determined without regard to this paragraph (e). Under paragraph (e)(1) of this section, each well is treated as a separate undertaking in determining A's activities for 1989 because A holds the working interest directly and would not be treated as materially participating for 1989 in the activity in which the wells would be included if A's activities were determined without regard to this paragraph (e). The aggregation rules in paragraph (f) of this section do not apply to these undertakings (see paragraph (f)(1)(ii)(B) of this section). Thus, each of the undertakings is treated as a separate activity under paragraph (b)(1) of this section. The result is the same even if A has net income from one or both wells for 1989 and even if the wells would otherwise be treated as part of the same undertaking under paragraph (c) of this section. The result would also be the same if A held the working interest through an entity, such as a general partnership, that does not limit A's liability with respect to the drilling or operation of the wells pursuant to the working interest.

Example (2). (i) During 1989, B is a general partner in a partnership that owns a working interest (within the meaning of § 1.469–1T(e)(4)(iv)) in an oil well. B does not own any interest in the well other than through the partnership. At the end of 1989, however, B's partnership interest is converted into a limited partnership interest, and during 1990 B holds the working interest only as a limited partner. B does not participate in the activity in which the well would be included if B's activities were determined without regard to this paragraph (e).

(ii) Under paragraph (e)(1) of this section, the well is treated as a separate undertaking in determining B's activities for 1989 because B holds the working interest during 1989 through an entity that does not limit B's liability with respect to the drilling or operation of the well pursuant to the working interest, and B would not be treated as materially participating for 1989 in the activity in which the well would be included if B's activities were determined without regard to this paragraph (e). Throughout 1990, however, B's liability with respect to the drilling and operation of the well is limited by the entity through which B holds the working interest (*i.e.*, the limited partnership). Accordingly, paragraph (e)(1) of this section does not apply to the well in 1990, and the well may be included under paragraph (c) of this section in an undertaking that includes other operations.

Example (3). The facts are the same as in example (2), except that B's partnership interest is converted into a limited partnership interest at the end of November 1989. An oil or gas well may be treated as a separate undertaking under paragraph (e)(1) of this section if at any time during the taxable year the taxpayer holds a working interest in the well directly or through an entity that does not limit the taxpayer's liability with respect to the drilling or operation of the well pursuant to the working interest (see § 1.469–1T(e)(4)(i)). Thus, although B's liability with respect to the drilling and operation of the well is limited during December 1989, the result in both 1989 and 1990 is the same as in example (2). In

1989, however, disqualified deductions and a ratable portion of the gross income from the well may be treated under § 1.469-1T(e)(4)(ii) as passive activity deductions and passive activity gross income, respectively.

(f) *Certain trade or business undertakings treated as part of the same activity*—(1) *Applicability*—(i) *In general.* This paragraph (f) applies to a taxpayer's interests in trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section).

(ii) *Trade or business undertaking.* For purposes of this paragraph (f), the term "trade or business undertaking" means any undertaking in which a taxpayer has an interest, other than—

(A) A rental undertaking (within the meaning of paragraph (d) of this section);

(B) An oil or gas well treated as an undertaking that is separate from other undertakings under paragraph (e) of this section; or

(C) A professional service undertaking (within the meaning of paragraph (h) of this section).

(2) *Treatment as part of the same activity.* A taxpayer's interests in two or more trade or business undertakings that are similar (within the meaning of paragraph (f)(4) of this section) and controlled by the same interests (within the meaning of paragraph (j) of this section) shall be treated as part of the same activity of the taxpayer for any taxable year in which the taxpayer—

(i) Owns interests in each such undertaking through the same passthrough entity;

(ii) Owns a direct or substantial indirect interest (within the meaning of paragraph (f)(3) of this section) in each such undertaking; or

(iii) Materially or significantly participates (within the meaning of § 1.469-5T) in the activity that would result if such undertakings were treated as part of the same activity.

(3) *Substantial indirect interest*—(i) *In general.* For purposes of this paragraph (f), a taxpayer owns a substantial indirect interest in an undertaking for a taxable year if at any time during such taxable year the taxpayer's ownership percentage (determined in accordance with paragraph (j)(3) of this section) in a passthrough entity that directly owns such undertaking exceeds ten percent.

(ii) *Coordination rule.* A taxpayer shall be treated for purposes of this paragraph (f) as owning a substantial indirect interest in each of two or more undertakings for any taxable year in which—

(A) Such undertakings are treated as part of the same activity of the taxpayer under paragraph (f)(2)(i) of this section; and

(B) The taxpayer owns a substantial indirect interest (within the meaning of paragraph (f)(3)(i) of this section) in any such undertaking.

(4) *Similar undertakings*—(i) *In general.* Except as provided in paragraph (f)(4)(iii) of this section, two undertakings are similar for purposes of this paragraph (f) if and only if—

(A) There are predominant operations in each such undertaking; and

(B) The predominant operations of both undertakings are in the same line of business.

(ii) *Predominant operations.* For purposes of paragraph (f)(4)(i)(A) of this section, there are predominant operations in an undertaking if more than 50 percent of the undertaking's gross income is attributable to operations in a single line of business.

(iii) *Vertically-integrated undertakings.* If an undertaking (the "supplier undertaking") provides property or services to other undertakings (the "recipient undertakings"), the following rules apply for purposes of this paragraph (f):

(A) *Supplier undertaking similar to recipient undertaking.* If the supplier undertaking predominantly involves the provision of property and services to a recipient undertaking that is controlled by the same interests (within the meaning of paragraph (j) of this section), the supplier undertaking shall be treated as similar to the recipient undertaking. For purposes of applying the preceding sentence—

(*1*) If a supplier undertaking and two or more recipient undertakings that are similar (within the meaning of paragraph (f)(4)(i) of this section) are controlled by the same interests, such recipient undertakings shall be treated as a single undertaking; and

(*2*) A supplier undertaking predominantly involves the provision of property and services to a recipient undertaking for any taxable year in which such recipient undertaking obtains more than 50 percent (by value) of all property and services provided by the supplier undertaking.

(B) *Recipient undertaking similar to supplier undertaking.* If the supplier undertaking is the predominant provider of property and services to a recipient undertaking that is controlled by the same interests (within the meaning of paragraph (j) of this section), the recipient undertaking shall be treated, except as otherwise provided in paragraph (f)(4)(iii)(C) of this section, as similar to the supplier undertaking. For purposes of the preceding sentence, a supplier undertaking is the predominant provider of property and services to a recipient undertaking for any taxable year in which the supplier undertaking provides more than 50 percent (by value) of all property and services obtained by the recipient undertaking.

(C) *Coordination rules.* (*1*) Paragraph (f)(4)(iii)(B) of this section does not apply if, under paragraph (f)(4)(iii)(A) of this section—

(*i*) The supplier undertaking is treated as an undertaking that is similar to any recipient undertaking;

(*ii*) The recipient undertaking is treated as a supplier undertaking that is similar to another recipient undertaking; or

(*iii*) Another supplier undertaking is treated as an undertaking that is similar to the recipient undertaking.

(*2*) If paragraph (f)(4)(iii)(A) of this section applies to a supplier undertaking, the supplier undertaking shall be treated as similar to undertakings that are similar to the recipient undertaking and shall not otherwise be treated as similar to undertakings to which the supplier undertaking would be similar without regard to paragraph (f)(4)(iii) of this section.

(*3*) If paragraph (f)(4)(iii)(B) of this section applies to a recipient undertaking, the recipient undertaking shall be treated as similar to undertakings that are similar to the supplier undertaking and shall not otherwise be treated as similar to undertakings to which the recipient undertaking would be similar without regard to paragraph (f)(4)(iii) of this section.

(iv) *Lines of business.* The Commissioner shall establish, by revenue procedure, lines of business for purposes of this paragraph (f)(4). Business and rental operations that are not included in the lines of business established by the Commissioner shall nonetheless be included in a line of business for purposes of this paragraph (f)(4). Such operations shall be included in a single line of business or in multiple lines of business on a basis that reasonably reflects—

(A) Similarities and differences in the property or services provided pursuant to such operations and in the markets to which such property or services are offered; and

(B) The treatment within the lines of business established by the Commissioner of operations that are comparable in their similarities and differences.

(5) *Examples.* The following examples illustrate the application of this paragraph (f). In each example that does not state otherwise, the taxpayer is an individual and the facts, analysis, and

conclusions relate to a single taxable year.

Example (1). (i) The taxpayer is a partner in partnerships A, B, C, and D and owns a five-percent interest in each partnership. Each partnership owns a single undertaking (undertakings A, B, C, and D), and the undertakings are trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section) that are controlled by the same interests (within the meaning of paragraph (j) of this section). In addition, undertakings A, B, and D are similar (within the meaning of paragraph (f)(4) of this section). The taxpayer is not related to any of the other partners, and does not participate in any of the undertakings.

(ii) In general, each undertaking in which a taxpayer owns an interest is treated as a single activity that is separate from other activities of the taxpayer (see paragraph (b)(1) of this section). This paragraph (f) provides aggregation rules for trade or business undertakings that are similar and controlled by the same interests. These aggregation rules do not apply, however, unless the taxpayer owns interests in the undertakings through the same passthrough entity, owns direct or substantial indirect interests in the undertakings, or materially or significantly participates in the undertakings. In this case, the taxpayer does not satisfy any of these conditions, and the aggregation rules in this paragraph (f) do not apply. Accordingly, except as otherwise provided in paragraph (g) of this section (relating to an aggregation rule for integrated businesses), undertakings A, B, C, and D are treated as separate activities of the taxpayer under paragraph (b)(1) of this section.

Example (2). (i) The facts are the same as in example (1), except that the taxpayer owns a 25-percent interest in partnership A, a 15-percent interest in partnership B, and a 40-percent interest in partnership C.

(ii) Paragraph (f)(2)(ii) of this section provides that trade or business undertakings that are similar and controlled by the same interests are treated as part of the same activity of the taxpayer if the taxpayer owns a direct or substantial indirect interest in each such undertaking. In this case, the taxpayer owns more than ten percent of partnerships A, B, and C, and these partnerships directly own undertakings A, B, and C. Thus, the taxpayer owns a substantial indirect interest in undertakings A, B, and C (see paragraph (f)(3)(i) of this section). Of these undertakings, only undertakings A and B are both similar and controlled by the same interests. Accordingly, the taxpayer's interests in undertakings A and B are treated as part of the same activity. As in example (1), the aggregation rules in this paragraph (f) do not apply to undertakings C and D, and except as otherwise provided in paragraph (g) of this section, undertakings C and D are treated as separate activities.

Example (3). (i) The facts are the same as in example (1), except that the taxpayer participates (within the meaning of § 1.469–5T(f)) for 60 hours in undertaking A and for 60 hours in undertaking B.

(ii) Paragraph (f)(2)(ii) of this section provides that trade or business undertakings that are similar and controlled by the same interests are treated as part of the same activity of the taxpayer if the taxpayer materially or significantly participates (within the meaning of § 1.469–5T) in the activity that would result from the treatment of similar, commonly-controlled undertakings as part of the same activity. In this case, the activity that would result from treating the similar, commonly-controlled undertakings as part of the same activity consists of undertakings A, B, and D, and the taxpayer participates for 120 hours in the activity that results from this treatment. Accordingly, undertakings A, B, and D are treated as part of the same activity because the taxpayer significantly participates (within the meaning of § 1.469–5T(c)(2)) in the activity that results from this treatment. The result is the same whether the taxpayer participates in one, two, or all three of the similar, commonly-controlled undertakings, so long as the taxpayer's aggregate participation in undertakings A, B, and D exceeds 100 hours. As in example (1), the aggregation rules in this paragraph (f) do not apply to undertaking C, and except as otherwise provided in paragraph (g) of this section, undertaking C is treated as a separate activity.

Example (4). (i) The taxpayer owns a 5-percent interest in partnership A. Partnership A owns interests in partnerships B and C, each of which owns a single undertaking (undertakings B and C). In addition, the taxpayer is a partner in partnerships C and D and directly owns a 15-percent interest in each partnership. Partnership D also owns a single undertaking (undertaking D). Undertakings B, C, and D are trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section) that are similar (within the meaning of paragraph (f)(4) of this section) and controlled by the same interests (within the meaning of paragraph (j) of this section). The taxpayer does not participate in undertaking B, C, or D.

(ii) Paragraph (f)(2)(i) of this section provides that trade or business undertakings that are similar and controlled by the same interests are treated as part of the same activity of the taxpayer if the taxpayer owns interests in the undertakings through the same passthrough entity. In this case, the taxpayer owns interests in undertakings B and C through partnership A. Thus, the taxpayer's interests in undertakings B and C are treated as part of the same activity.

(iii) Paragraph (f)(2)(ii) of this section provides that trade or business undertakings that are similar and controlled by the same interests are treated as part of the same activity of the taxpayer if the taxpayer owns a direct or substantial indirect interest in each such undertaking. In this case, the taxpayer owns more than ten percent of partnerships C and D, and these partnerships directly own undertakings C and D. Thus, the taxpayer owns a substantial indirect interest in undertakings C and D (see paragraph (f)(3)(i) of this section).

(iv) The coordination rule in paragraph (f)(3)(ii) of this section applies to undertakings B and C because they are treated as part of the same activity under paragraph (f)(2)(i) of this section, and the taxpayer owns a substantial indirect interest in undertaking C. Under the coordination rule, the taxpayer is treated as owning a substantial indirect interest in undertaking B as well as undertaking C. Accordingly, the taxpayer's interests in undertakings B, C, and D are treated as part of the same activity.

Example (5). (i) Undertakings A, B, C, and D are trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section), each of which involves the operation of a department store, restaurants, and movie theaters. The following table shows, for each undertaking, the percentages of gross income attributable to the various operations of the undertaking.

	Department store	Restaurants	Movie Theaters
Undertaking A	70%	20%	10%
Undertaking B	60%	20%	20%
Undertaking C	35%	35%	30%
Undertaking D	35%	10%	55%

(ii) Paragraph (f)(4)(i) of this section provides that two undertakings are similar for purposes of this paragraph (f) if and only if there are predominant operations in each undertaking and the predominant operations of the two undertakings are in the same line of business. (Assume that the applicable revenue procedure provides that "general merchandise stores," "eating and drinking places," and "motion picture services" are three separate lines of business.)

(iii) Undertaking A and undertaking B each derives more than 50 percent of its gross income from department-store operations, which are in the general-merchandise-store line of business. Thus, there are predominant operations in undertaking A and undertaking B, and the predominant operations of the two undertakings are in the same line of business. Accordingly, undertakings A and B are similar.

(iv) Undertaking C does not derive more than 50 percent of its gross income from operations in any single line of business. Thus, there are no predominant operations in undertaking C, and undertaking C is not similar to any of the other undertakings.

(v) Undertaking D derives more than 50 percent of its gross income from movie-theater operations, which are in the motion-picture-services line of business. Thus, there are predominant operations in undertaking D. The predominant operations of undertaking D, however, are not in the same line of business as those of undertakings A and B. Accordingly, undertaking D is not similar to undertakings A and B.

Example (6). (i) Undertakings A and B are trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section) that derive all of their gross income from the sale of automobiles. Undertakings C and D derive all of their gross income from the rental of automobiles. Undertaking C is not a rental undertaking (within the meaning of paragraph (d)(1)(iii) of this section) because the average period of customer use (within

the meaning of § 1.469–1T(e)(3)(iii)) for its automobiles does not exceed seven days (see § 1.469–1T(e)(3)(ii)(A)). Undertaking D, on the other hand, leases automobiles for periods of one year or more and is a rental undertaking.

(ii) Paragraph (f)(4)(i) of this section provides that two undertakings are similar for purposes of this paragraph (f) if and only if there are predominant operations in each undertaking and the predominant operations of the two undertakings are in the same line of business. (Assume that the applicable revenue procedure provides that (a) "automotive dealers and service stations" (automotive retail) and (b) "auto repair, services (including rentals), and parking" (automotive services) are two separate lines of business.)

(iii) Undertakings A and B both derive more than 50 percent of their gross income from operations in the automotive-retail line of business (the automobile-sales operations). Similarly, undertakings C and D both derive more than 50 percent of their gross income from operations in the automotive-services line of business (the automobile-rental operations). Thus, there are predominant operations in each undertaking, the predominant operations of undertakings A and B are in the same line of business, and the predominant operations of undertakings C and D are in the same line of business. Accordingly, undertakings A and B are similar, undertakings C and D are similar, and undertakings A and B are not similar to undertakings C and D.

(iv) Paragraph (f)(1) of this section provides that this paragraph (f) applies only to trade or business undertakings and that a rental undertaking is not a trade or business undertaking. Accordingly, this paragraph (f) does not apply to undertaking D, and undertakings C and D, although similar, are not treated, under this paragraph (f), as part of the same activity.

Example (7). (i) Undertakings A, B, and C are trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section) that involve real estate operations. Undertaking A derives all of its gross income from the development of real property, undertaking B derives all of its gross income from the management of real property and the performance of services as a leasing agent with respect to real property, and undertaking C derives all of its gross income from buying, selling, or arranging purchases and sales of real property. Undertaking D derives all of its gross income from the rental of residential apartments and is a rental undertaking (within the meaning of paragraph (d)(1)(iii) of this section).

(ii) Paragraph (f)(4)(i) of this section provides that two undertakings are similar for purposes of this paragraph (f) if there are predominant operations in each undertaking and the predominant operations of the two undertakings are in the same line of business. (Assume that the applicable revenue procedure provides that real estate development and services (including the development and management of real property, dealing in real property, and the performance of services as a leasing agent with respect to real property) is a single line of business (the "real-estate" line of business).)

(iii) Undertakings A, B, and C all derive more than 50 percent of their gross income from operations in the real-estate line of business. Thus, there are predominant operations in undertakings A, B, and C, and the predominant operations of the three undertakings are in the same line of business. Accordingly, undertakings A, B, and C are similar.

(iv) Undertaking D also derives more than 50 percent of its gross income from operations in the real-estate line of business. Thus, there are predominant operations in undertaking D, and the predominant operations of undertaking D are in the same line of business as those of undertakings A, B, and C. Paragraph (f)(1) of this section provides, however, that this paragraph (f) applies only to trade or business undertakings and that a rental undertaking is not a trade or business undertaking. Accordingly, this paragraph (f) does not apply to undertaking D, and undertaking D, although similar to undertakings A, B, and C, is not treated, under this paragraph (f), as part an activity that includes undertaking A, B, or C.

Example (8). (i) Undertakings A and B are trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section), both of which involve the provision of moving services. Undertaking A derives its gross income principally from local moves, and undertaking B derives its gross income principally from long-distance moves.

(ii) Paragraph (f)(4)(i) of this section provides that two undertakings are similar for purposes of this paragraph (f) if there are predominant operations in each undertaking and the predominant operations of the two undertakings are in the same line of business. Under paragraph (f)(4)(iv) of this section, operations that are not in the lines of business established by the applicable revenue procedure are nonetheless included in a line of business. In addition, such operations are included in a single line of business or in multiple lines of business on a basis that reasonably reflects (a) similarities and differences in the property or services provided pursuant to such operations and in the markets to which such property or services are offered, and (b) the treatment within the lines of business established by the Commissioner of operations that are comparable in their similarities and differences. (Assume that the provision of moving services is not in any line of business established by the Commissioner and that within the lines of business established by the Commissioner services that differ only in the distance over which they are performed (*e.g.*, local and long-distance telephone services) are generally treated as part of the same line of business.)

(iii) Undertakings A and B provide the same types of services to similar customers, and the only significant difference in the services provided is the distance over which they are performed. Thus, treating local and long-distance moving services as a single line of business (the "moving-services" line of business) reasonably reflects the treatment within the lines of business established by the Commissioner of operations that are comparable in their similarities and differences.

(iv) Each undertaking derives more than 50 percent of its gross income from operations in the moving-services line of business. Thus, there are predominant operations in each undertaking, and the predominant operations of the two undertakings are in the same line of business. Accordingly, undertakings A and B are similar.

Example (9). (i) Undertakings A, B, C, D, and E are trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section) and are controlled by the same interests (within the meaning of paragraph (j) of this section). Undertakings A, B, and C derive all of their gross income from retail sales of dairy products, and undertakings D and E derive all of their gross income from the processing of dairy products. Undertakings D and E sell less than ten percent of their dairy products to undertakings A, B, and C, and sell the remainder to unrelated undertakings. Undertakings A, B, and C purchase less than ten percent of their inventory from undertakings D and E and purchase the remainder from unrelated undertakings.

(ii) Paragraph (f)(4)(i) of this section provides that, except as provided in paragraph (f)(4)(iii) of this section, undertakings are similar for purposes of this paragraph (f) if and only if there are predominant operations in each undertaking and the predominant operations of the undertakings are in the same line of business. (Assume that the applicable revenue procedure provides that (a) "food stores" and (b) "manufacturing—food and kindred products" are two separate lines of business.)

(iii) Undertakings A, B, and C all derive more than 50 percent of their gross income from operations in the food-store line of business (the dairy-sales operations). Thus, there are predominant operations in undertakings A, B, and C, and the predominant operations of the three undertakings are in the same line of business. Accordingly, undertakings A, B, and C are similar.

(iv) Undertakings D and E both derive more than 50 percent of their gross income from operations in the food-manufacturing line of business (the dairy-processing operations). Thus, there are predominant operations in undertakings D and E, and the predominant operations of the two undertakings are in the same line of business. Accordingly, undertakings D and E are similar. The predominant operations of undertakings D and E are not in the same line of business as those of undertakings A, B, and C. Accordingly, undertakings D and E are not similar to undertakings A, B, and C.

(v) Paragraph (f)(4)(iii) of this section provides rules under which certain undertakings whose operations are not in the same line of business nevertheless are similar to one another if one of the undertakings (the "supplier undertaking") provides property or services to the other undertaking (the "recipient undertaking"), and the undertakings are controlled by the same interests. These rules apply, however, only if the supplier undertaking predominantly involves the provision of property and services to the recipient undertaking (see

paragraph (f)(4)(iii)(A) of this section), or the supplier undertaking is the predominant provider of property and services to the recipient undertaking (see paragraph (f)(4)(iii)(B) of this section). In this case, undertakings D and E are supplier undertakings, and undertakings A, B, and C are recipient undertakings. Undertakings D and E, however, sell less than ten percent of their dairy products to undertakings A, B, and C and thus do not predominantly involve the provision of property and services to recipient undertakings. Similarly, undertakings D and E are not the predominant providers of property and services to undertakings A, B, and C. Thus, the rules for vertically-integrated undertakings in paragraph (f)(4)(iii) of this section do not apply in this case.

Example (10). (i) The facts are the same as in example (9), except that undertaking D sells 75 percent of its dairy products to undertakings A, B, and C.

(ii) Paragraph (f)(4)(iii)(A) of this section applies if a supplier undertaking predominantly involves the provision of property to a recipient undertaking that is controlled by the same interests. Paragraph (f)(4)(iii)(A)(*2*) of this section provides that a supplier undertaking predominantly involves the provision of property to a recipient undertaking if the supplier undertaking provides more than 50 percent of its property to such recipient undertaking. In addition, paragraph (f)(4)(iii)(A)(*1*) of this section provides that if a supplier undertaking and two or more similar recipient undertakings are controlled by the same interests, the recipient undertakings are treated as a single undertaking for purposes of applying paragraph (f)(4)(iii)(A) of this section. Undertakings D and E both provide dairy products to undertakings A, B, and C. Thus, for purposes of paragraph (f)(4)(iii) of this section, undertakings D and E are supplier undertakings and undertakings A, B, and C are recipient undertakings. Undertaking D predominantly involves the provision of property to undertakings A, B, and C. Moreover, undertakings A, B, and C are treated as a single undertaking under paragraph (f)(4)(iii)(A)(*1*) of this section because undertakings A, B, and C are similar to one another under paragraph (f)(4)(i) of this section, and undertakings A, B, C, and D are controlled by the same interests. Accordingly, paragraph (f)(4)(iii)(A) of this section applies to undertakings A, B, C, and D.

(iii) If paragraph (f)(4)(iii)(A) of this section applies to supplier and recipient undertakings, the supplier undertaking is treated under paragraph (f)(4)(iii) (A) and (C)(*2*) of this section as an undertaking that is similar to the recipient undertakings and to undertakings to which the recipient undertakings are similar. Accordingly, undertaking D is similar, for purposes of this paragraph (f), to undertakings A, B, and C.

(iv) Undertaking E does not predominantly involve the provision of property to undertakings A, B, and C, or to any other related undertakings. Thus, paragraph (f)(4)(iii)(A) of this section does not apply to undertaking E, and undertaking E is not similar to undertakings A, B, and C. Moreover, undertakings D and E are not similar because, under paragraph (f)(4)(iii)(C)(*2*) of this section, undertaking D is not similar to any undertaking that is not similar to undertakings A, B, and C.

Example (11). (i) The facts are the same as in example (10), except that 75 percent of undertaking D's dairy products are sold to undertakings A and B, and none are sold to undertaking C.

(ii) In this case, undertaking D is a supplier undertaking only with respect to undertakings A and B. Accordingly, paragraph (f)(4)(iii)(A) applies only to undertakings A, B, and D. As in example (10), undertaking D is similar to undertakings A and B, and is not similar to undertaking E. In addition, if paragraph (f)(4)(iii)(A) of this section applies to supplier and recipient undertakings, the supplier undertaking is treated under paragraph (f)(4)(iii)(C)(*2*) of this section as an undertaking that is similar to the recipient undertakings and undertakings to which the recipient undertakings are similar. Accordingly, even though undertaking D does not provide any property or services to undertaking C, undertaking D is similar to undertaking C because undertaking C is similar to undertakings A and B.

Example (12). (i) The facts are the same as in example (9), except that undertakings A and B purchase 80 percent of their inventory from undertaking D.

(ii) Paragraph (f)(4)(iii)(B) of this section applies, except as provided in paragraph (f)(4)(iii)(C) of this section, if a supplier undertaking is the predominant provider of property to a recipient undertaking that is controlled by the same interests. Undertakings D and E both provide dairy products to undertakings A, B, and C. Thus, for purposes of paragraph (f)(4)(iii) of this section, undertakings D and E are supplier undertakings, and undertakings A, B, and C are recipient undertakings. In addition, undertaking D is the predominant provider of property and services to undertakings A and B, and undertakings A, B and D are controlled by the same interests. Thus, except as provided in paragraph (f)(4)(iii)(C) of this section, paragraph (f)(4)(iii)(B) of this section applies to undertakings A, B, and D.

(iii) The coordination rules in paragraph (f)(4)(iii)(C)(*1*) of this section provide that paragraph (f)(4)(iii)(B) of this section does not apply in certain cases to which paragraph (f)(4)(iii)(A) of this section applies. These coordination rules would apply if undertaking D or E (or any other undertaking that is controlled by the interests that control undertakings A, B, and C) predominantly involved the provision of property and services to undertakings A, B, and C. The coordination rules in paragraph (f)(4)(iii)(C)(*1*) of this section would also apply if undertaking A, B, or D predominantly involved the provision of property or services to a recipient undertaking that is controlled by the same interests. Assume that these coordination rules do not apply in this case.

(iv) If paragraph (f)(4)(iii)(B) of this section applies to supplier and recipient undertakings, the recipient undertakings are treated under paragraph (f)(4)(iii) (B) and (C)(*3*) of this section as undertakings that are similar to the supplier undertaking and to undertakings to which the supplier undertaking is similar. Accordingly, undertakings A and B are similar, for purposes of this paragraph (f), to undertaking D and, because undertakings D and E are similar, to undertaking E.

(v) The principal providers of property and services to undertaking C are unrelated undertakings. Thus, paragraph (f)(4)(iii)(B) of this section does not apply to undertaking C, and undertaking C is not similar to undertakings D and E. Moreover, undertaking C is not similar to undertakings A and B because, under paragraph (f)(4)(iii)(C)(*3*) of this section, undertakings A and B are not similar to any undertaking that is not similar to undertaking D.

Example (13). (i) Undertakings A through Z are trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section) and are controlled by the same interests (within the meaning of paragraph (j) of this section). Undertaking A derives all of its gross income from the manufacture and sale of men's and women's clothing, undertaking B derives all of its gross income from sales of men's and women's clothing to retail stores, and undertakings C through Z derive all of their gross income from retail sales of men's and women's clothing. Undertaking A sells clothing exclusively to undertaking B. Undertaking B sells 75 percent of its clothing to undertakings C through Z, and sells the remainder to unrelated retail stores. Undertaking B purchases 80 percent of its inventory from undertaking A, and undertakings C through Z purchase 60 to 90 percent of their inventory from undertaking B.

(ii) Paragraph (f)(4)(iii)(A) of this section applies if a supplier undertaking predominantly involves the provision of property to a recipient undertaking that is controlled by the same interests. In addition, paragraph (f)(4)(iii)(A)(*1*) of this section provides that if a supplier undertaking and two or more similar recipient undertakings are controlled by the same interests, the recipient undertaking are treated as a single undertaking for this purpose. Undertaking B provides men's and women's clothing to undertaking C through Z. Thus, for purposes of paragraph (f)(4)(iii) of this section, undertaking B is a supplier undertaking and undertakings C through Z are recipient undertakings. In addition, undertaking B predominantly involves the provision of property to undertakings C through Z, and undertakings C through Z are treated as a single undertaking for purposes of paragraph (f)(4)(iii)(A) of this section. Accordingly, paragraph (f)(4)(iii)(A) of this section applies to undertakings B and C through Z.

(iii) If paragraph (f)(4)(iii)(A) of this section applies to supplier and recipient undertakings, the supplier undertaking is treated under paragraph (f)(4)(iii)(A) of this section as an undertaking that is similar to the recipient undertakings. Accordingly, undertaking B is similar, for purposes of this paragraph (f), to undertakings C through Z.

(iv) Undertaking A provides men's and women's clothing to undertaking B. Thus, for purposes of paragraph (f)(4)(iii) of this section, undertaking A is a supplier undertaking and undertaking B is a recipient

undertaking. In addition, undertaking A predominantly involves the provision of property to undertaking B, and undertakings A and B are controlled by the same interests. Accordingly, paragraph (f)(4)(iii)(A) of this section applies to undertakings A and B, and undertaking A is similar to undertaking B.

(v) If paragraph (f)(4)(iii)(A) of this section applies to supplier and recipient undertakings, the supplier undertaking is treated under paragraph (f)(4)(iii)(C)(*2*) of this section as an undertaking that is similar to undertakings to which the recipient undertakings are similar. Accordingly, undertaking A is also similar, for purposes of this paragraph (f), to undertakings C through Z.

(vi) The coordination rule in paragraph (f)(4)(iii)(C)(*1*)(*i*) of this section provides that paragraph (f)(4)(iii)(B) of this section does not apply if, as described above, the supplier undertaking predominantly involves the provision of property to recipient undertakings and is treated under paragraph (f)(4)(iii)(A) of this section as an undertaking that is similar to such recipient undertakings. Accordingly, paragraph (f)(4)(iii)(B) of this section does not apply to undertakings B through Z, even though undertaking B is the predominant provider of property and services to undertakings C through Z, and undertakings B through Z are controlled by the same interests. For the same reason, paragraph (f)(4)(iii)(B) of this section does not apply to undertaking A and B. (Paragraph (f)(4)(iii)(B) of this section is also inapplicable to undertakings A and B because the coordination rule in paragraph (f)(4)(iii)(C)(*1*)(*ii*) of this section applies if the recipient undertaking (undertaking B) is itself a supplier undertaking that is treated under paragraph (f)(4)(iii)(A) of this section as an undertaking that is similar to its recipient undertakings (undertakings C through Z).)

(g) *Integrated businesses*—(1) *Applicability*—(i) *In general.* This paragraph (g) applies to a taxpayer's interests in trade or business activities (within the meaning of paragraph (g)(1)(ii) of this section).

(ii) *Trade or business activity.* For purposes of this paragraph (g), the term "trade or business activity" means any activity (determined without regard to this paragraph (g)) that consists of interests in one or more trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section).

(2) *Treatment as a single activity.* A taxpayer's interests in two or more trade or business activities shall be treated as a single activity if and only if—

(i) The operations of such trade or business activities constitute a single integrated business, activities constitute a single integrated business; and

(ii) Such activities are controlled by the same interests (within the meaning of paragraph (j) of this section).

(3) *Facts and circumstances test.* In determining whether the operations of two or more trade or business activities constitute a single integrated business for purposes of this paragraph (g), all the facts and circumstances are taken into account, and the following factors are generally the most significant:

(i) Whether such operations are conducted at the same location;

(ii) The extent to which other persons conduct similar operations at one location;

(iii) Whether such operations are treated as a unit in the primary accounting records reflecting the results of such operations;

(iv) The extent to which other persons treat similar operations as a unit in the primary accounting records reflecting the results of such similar operations;

(v) Whether such operations are owned by the same person (within the meaning of paragraph (c)(2)(v) of this section);

(vi) The extent to which such operations involve products or services that are commonly provided together;

(vii) The extent to which such operations serve the same customers;

(viii) The extent to which the same personnel, facilities, or equipment are used to conduct such operations;

(ix) The extent to which such operations are conducted in coordination with or reliance upon each other;

(x) The extent to which the conduct of any such operations is incidental to the conduct of the remainder of such operations;

(xi) The extent to which such operations depend on each other for their economic success; and

(xii) Whether such operations are conducted under the same trade name.

(4) *Examples.* The following examples illustrate the application of this paragraph (g). The facts, analysis, and conclusion in each example relate to a single taxable year, and the trade or business activities described in each example are controlled by the same interests (within the meaning of paragraph (j) of this section).

Example (1). (i) The taxpayer owns a number of department stores and auto-supply stores. Some of the taxpayer's department stores include auto-supply departments. In other cases, the taxpayer operates a department store and an auto-supply store at the same location (within the meaning of paragraph (c)(2)(iii) of this section), or at different locations from which the same group of customers can be served. In cases in which a department store and an auto-supply store are operated at the same location, the department-store operations are the predominant operations (within the meaning of paragraph (f)(4)(ii) of this section), and the undertaking that includes the stores is treated as a department-store undertaking for purposes of paragraph (f) of this section. Under paragraph (f) of this section, the department-store undertakings are all treated as part of the same activity of the taxpayer (the "department-store activity"). Similarly, the auto-supply undertakings (*i.e.*, the auto-supply stores that are not operated at a department-store location) are all treated as part of the same activity (the "auto-supply activity"). (Assume that department-store undertakings and auto-supply undertakings are not similar and are not treated as part of the same activity under paragraph (f) of this section.)

(ii) The department stores and auto-supply stores use a common trade name and coordinate their marketing activities (*e.g.*, the stores advertise in the same catalog and the same newspaper supplements, honor the same credit cards (including credit cards issued by the department stores), and jointly conduct sales and other promotional activities). Although sales personnel generally work only in a particular store or in a particular department within a store, other employees (*e.g.*, cashiers, janitorial and maintenance workers, and clerical staff) may work in or perform services for various stores, including both department and auto-supply stores. In addition, the management of store operations is organized on a geographical basis, and managers above the level of the individual store generally supervise operations in both types of store. A central office provides payroll, financial, and other support services to all stores and establishes pricing and other business policies. Most inventory for both types of stores is acquired through a central purchasing department and inventory for all stores in an area is stored in a common warehouse.

(iii) Based on the foregoing facts and circumstances, the operations of the department-store activity and the auto-supply activity constitute an integrated business. Paragraph (g)(3) of this section provides that the factors relevant to this determination include the conduct of department-store and auto-supply operations at the same location, the location of department and auto-supply stores at sites where the same group of customers can be served, the treatment of all such operations as a unit in the taxpayer's financial statements, the taxpayer's ownership and the common management of all such operations, the use of the same personnel, facilities, and equipment to conduct and support the operations, the use of a common trade name, and the coordination (as evidenced by the coordinated marketing activities) of department-store and auto-supply operations.

(iv) Paragraph (g)(2) of this section provides that a taxpayer's interests in two or more trade or business activities (within the meaning of paragraph (g)(1)(ii) of this section) are treated as a single activity of the taxpayer if the operations of such activities constitute an integrated business and the activities are controlled by the same interests. The department-store activity and the auto-supply activity consist of trade or business undertakings and, thus, are trade or business activities. In addition, the activities are controlled by the same interests (the

taxpayer), and the operations of the activities constitute an integrated business. Accordingly, the department-store activity and the auto-supply activity are treated as a single activity of the taxpayer.

Example (2). (i) The taxpayer owns a number of stores that sell stereo equipment and a repair shop that services stereo equipment. Under paragraph (f) of this section, the stores are all treated as part of the same activity of the taxpayer (the "store activity"). The repair shop does not sell stereo equipment, does not predominantly involve the provision of services to the taxpayer's stores, and is treated as a separate activity (the "repair-shop activity"). (Assume that stereo-sales undertakings and stereo-repair undertakings are not similar and are not treated as part of the same activity under paragraph (f) of this section.)

(ii) The stores sell stereo equipment produced by manufacturers for which the stores are an authorized distributor. The repair shop's operations principally involve the servicing of stereo equipment produced by the same manufacturers. These operations include repairs on equipment under warranty for which reimbursement is received from the manufacturer and reconditioning of equipment taken as trade-ins by the taxpayer's stores. The majority of the operations, however, involve repairs that are performed for customers and are not covered by a warranty. The taxpayer's distribution agreements with manufacturers generally require the taxpayer to repair and service equipment produced by the manufacturer both during and after the warranty period. In some cases, the distribution agreements require that the taxpayer's repair facility meet the manufacturer's standards and provide for periodic inspections to ensure that these standards are met.

(iii) The stores and the repair shop use a common trade name. Sales personnel generally work only in a particular store and stereo technicians work only in the repair shop. The stores and the repair shop are, however, managed from a central office, which supervises both store and repair-shop operations, provides payroll, financial, and other support services to the stores and the repair shop, and establishes pricing and other business policies. In addition, inventory for the stores and supplies for the repair shop are acquired through a central purchasing department and are stored in a single warehouse.

(iv) Based on the foregoing facts and circumstances, the operations of the store activity and the repair-shop activity constitute an integrated business. Paragraph (g)(3) of this section provides that the factors relevant to this determination include the treatment of all such operations as a unit in the taxpayer's financial statements, the taxpayer's ownership and the common management of all such operations, the use of the same personnel and facilities to support the operations, the use of a common trade name, the extent to which the same customers patronize both the stores and the repair shop, the similarity of the products (*i.e.*, stereo equipment) involved in both store and repair-shop operations, and the extent to which the provision of repair services contributes to the taxpayer's ability to obtain the stereo equipment sold in store operations.

(v) Paragraph (g)(2) of this section provides that a taxpayer's interests in two or more trade or business activities (within the meaning of paragraph (g)(1)(ii) of this section) are treated as a single activity of the taxpayer if the operations of such activities constitute an integrated business and the activities are controlled by the same interests. The store activity and repair-shop activity consist of trade or business undertakings and thus are trade or business activities. In addition, the activities are controlled by the same interests (the taxpayer), and the operations of the activities constitute an integrated business. Accordingly, the store activity and the repair-shop activity are treated as a single activity of the taxpayer.

Example (3). (i) The taxpayer owns interests in three partnerships. One partnership owns a television station, the second owns a professional sports franchise, and the third owns a motion-picture production company. The operations of the partnerships are treated as three separate undertakings. Although other persons own interests in the partnerships, all three undertakings are controlled (within the meaning of paragraph (j) of this section) by the taxpayer. The operations of the partnerships are treated as three separate activities (the "television activity," the "sports activity," and the "motion-picture activity"). (Assume that the undertakings are not similar and are not treated as part of the same activity under paragraph (f) of this section.)

(ii) Each partnership prepares financial statements that reflect only the results of that partnership's operations, and each of the activities is conducted under its own trade name. The taxpayer participates extensively in the management of each partnership and makes the major business decisions for all three partnerships. Each partnership, however, employs separate management and other personnel who conduct its operations on a day-to-day basis. The taxpayer generally arranges the partnerships' financing and often obtains loans for two, or all three, partnerships from the same source. Although the assets of one partnership are not used as security for loans to another partnership, the taxpayer's interest in a partnership may secure loans to the other partnerships. The television station broadcasts the sports franchise's games, and the motion-picture production company occasionally prepares programming for the television station. In addition, support staff of one partnership may, during periods of peak activity or in the case of emergency, be made available to another partnership on a temporary basis. There are no other significant transactions between the partnerships. Moreover, all transactions between the partnerships involve essentially the same terms as would be provided in transactions between unrelated persons.

(iii) Based on the foregoing facts and circumstances, the television activity, the sports activity, and the motion-picture activity constitute three separate businesses. Paragraph (g)(3) of this section provides that the factors relevant to this determination include the treatment of the activities as separate units in the partnerships' financial statements, the use of a different trade name for each activity, the separate day-to-day management of the activities, and the limited extent to which the activities contribute to or depend on each other (as evidenced by the small number of significant transactions between the partnerships and the arm's length nature of those transactions). The taxpayer's participation in management and financing are taken into account in this determination, as are the transactions between the partnerships, but these factors do not of themselves support a determination that the activities constitute an integrated business.

(iv) Paragraph (g)(2) of this section provides that a taxpayer's interests in two or more trade or business activities (within the meaning of paragraph (g)(1)(ii) of this section) are treated as a single activity of the taxpayer only if the operations of such activities constitute an integrated business and the activities are controlled by the same interests. In this case, the taxpayer's activities do not constitute an integrated business, and the aggregation rule in paragraph (g)(2) of this section does not apply. Accordingly, the television activity, the sports activity, and the motion-picture activity are treated as three separate activities of the taxpayer.

(h) *Certain professional service undertakings treated as a single activity*—(1) *Applicability*—(i) *In general.* This paragraph (h) applies to a taxpayer's interests in professional service undertakings (within the meaning of paragraph (h)(1)(ii) of this section).

(ii) *Professional service undertaking.* For purposes of this paragraph (h), an undertaking is treated as a professional service undertaking for any taxable year in which the undertaking derives more than 50 percent of its gross income from the provision of services that are treated, for purposes of section 448 (d)(2)(A) and the regulations thereunder, as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, or consulting.

(2) *Treatment as a single activity*—(i) *Undertakings controlled by the same interest.* A taxpayer's interests in two or more professional service undertakings that are controlled by the same interests (within the meaning of paragraph (j) of this section) shall be treated as part of the same activity of the taxpayer.

(ii) *Undertakings involving significant similar or significant related services.* A taxpayer's interests in two or more professional service undertakings that involve the provision of significant similar services or significant related services shall be treated as part of the same activity of the taxpayer.

(iii) *Coordination rule.* (A) Except as provided in paragraph (h)(2)(iii)(B) of this section, a taxpayer's interests in two or more undertakings (the "original undertakings") that are treated as part of the same activity of the taxpayer under the provisions of paragraph (h)(2)(i) or (ii) of this section shall be treated as interests in a single professional service undertaking (the "aggregated undertaking") for purposes of reapplying such provisions.

(B) If any original undertaking included in an aggregated undertaking and any other undertaking that is not included in such aggregated undertaking involve the provision of significant similar or related services, the aggregated undertaking and such other undertaking shall be treated as undertakings that involve the provision of significant similar or related services for purposes of reapplying the provisions of paragraph (h)(2)(ii) of this section.

(3) *Significant similar or significant related services.* For purposes of this paragraph (h)—

(i) Services (other than consulting services) in any field described in paragraph (h)(1)(ii) of this section are similar to all other services in the same field;

(ii) All the facts and circumstances are taken into account in determining whether consulting services are similar;

(iii) Two professional service undertakings involve the provision of significant similar services if and only if—

(A) Each such undertaking provides significant professional services; and

(B) Significant professional services provided by one such undertaking are similar to significant professional services provided by the other such undertaking;

(iv) Services are significant professional services if and only if such services are in a field described in paragraph (h)(1)(ii) of this section and more than 20 percent of the undertaking's gross income is attributable to services in such field (or, in the case of consulting services, to similar services in such field); and

(v) Two professional service undertakings involve the provision of significant related services if and only if more than 20 percent of the gross income of one such undertaking is derived from customers that are also customers of the other such undertaking.

(4) *Examples.* The following examples illustrate the application of this paragraph (h). In each example that does not state otherwise, the taxpayer is an individual, and the facts, analysis, and conclusions relate to a single taxable year.

Example (1). (i) The taxpayer is a partner in a law partnership that has offices in various cities. Some of the partnership's offices provide a full range of legal services. Other offices, however, specialize in a particular area or areas of the law (*e.g.*, litigation, tax law, corporate law, *etc.*). In either case, substantially all of the office's gross income is derived from the provision of legal services. Under paragraph (c)(1) of this section, each of the law partnership's offices is treated as a single undertaking that is separate from other undertakings (a "law-office undertaking").

(ii) Each law-office undertaking derives more than 50 percent of its gross income from the provision of services in the field law. Thus, each such undertaking is treated as a professional service undertaking (within the meaning of paragraph (h)(1)(ii) of this section).

(iii) Each law-office undertaking derives more than 20 percent of its gross income from services in the field of law. Thus, each such undertaking involves significant professional services (within the meaning of paragraph (h)(3)(iv) of this section) in the field of law. In addition, all services in the field of law are treated as similar services under paragraph (h)(3)(i) of this section. Thus, the law-office undertakings involve the provision of significant similar services (within the meaning of paragraph (h)(3)(iii) of this section).

(iv) Paragraph (h)(2)(ii) of this section provides that a taxpayer's interest in professional service undertakings that involve the provision of significant similar services are treated as part of the same activity of the taxpayer. Accordingly, the taxpayer's interests in the law-office undertakings are treated as part of the same activity of the taxpayer under paragraph (h)(2)(ii) of this section even if the undertakings are not controlled by the same interests (within the meaning of paragraph (j) of this section).

Example (2). (i) The taxpayer is a partner in medical partnerships A and B. Both partnerships derive all of their gross income from the provision of medical services, but partnership A specializes in internal medicine and partnership B operates a radiology laboratory. Under paragraph (c)(1) of this section, the medical-service business of each partnership is treated as a single undertaking that is separate from other undertakings (a "medical-service undertaking"). Partnerships A and B are not controlled by the same interests (within the meaning of paragraph (j) of this section).

(ii) Each partnership's medical-service undertaking derives more than 50 percent of its gross income from the provision of services in the field of health. Thus, each partnership's medical-service undertaking is treated as a professional service undertaking (within the meaning of paragraph (h)(1)(ii) of this section).

(iii) Each partnership's medical-service undertaking derives more than 20 percent of its gross income from services in the field of health. Thus, each such undertaking involves significant professional services (within the meaning of paragraph (h)(3)(iv) of this section) in the field of health. In addition, all services in the field of health are treated as similar services under paragraph (h)(3)(i) of this section. Thus, the medical-services undertakings of partnerships A and B involve the provision of significant similar services (within the meaning of paragraph (h)(3)(iii) of this section).

(iv) Paragraph (h)(2)(ii) of this section provides that a taxpayer's interests in professional service undertakings that involve the provision of significant similar services are treated as part of the same activity of the taxpayer. Accordingly, the taxpayer's interests in the medical-service undertakings of partnerships A and B are treated as part of the same activity of the taxpayer under paragraph (h)(2)(ii) of this section even though the undertakings are not controlled by the same interests.

Example (3). (i) The facts are the same as in example (2), except that the taxpayer withdraws from partnership A in 1989 and becomes a partner in partnership B in 1990. In addition, the taxpayer was a full-time participant in the operations of partnership A from 1970 through 1989, but does not participate in the operations of partnership B.

(ii) Paragraph (h)(2)(ii) of this section provides that a taxpayer's interests in professional service undertakings that involve the provision of significant similar services are treated as part of the same activity of the taxpayer. This rule is not limited to cases in which the taxpayer holds such interests simultaneously. Thus, as in example (2), the taxpayer's interests in the medical-service undertakings of partnerships A and B are treated as part of the same activity of the taxpayer.

(iii) The activity that includes the taxpayer's interests in the medical-service undertakings of partnerships A and B is a personal service activity (within the meaning of § 1.469–5T(d)) because it involves the performance of personal services in the field of health. In addition, the taxpayer materially participated in the activity for three or more taxable years preceding 1990 (see § 1.469–5T(j)(1)). Thus, even if the taxpayer does not work in the activity after 1989, the taxpayer is treated, under § 1.469–5T(a)(6), as materially participating in the activity for 1990 and subsequent taxable years.

Example (4). (i) The taxpayer is a partner in an accounting partnership that has offices in various cities (partnership A) and in a management-consulting partnership that has a single office (partnership B). Each of partnership A's offices derives substantially all of its gross income from services in the field of accounting, and partnership B derives substantially all of its gross income from services in the field of consulting. Under paragraph (c)(1) of this section, partnership B's consulting business is treated as a single undertaking that is separate from other undertakings (the "consulting undertaking") and each of partnership A's offices is similarly treated (the "accounting undertakings"). The accounting undertakings are controlled by the same interests, but partnerships A and B are not controlled by the same interests (within the meaning of

paragraph (j) of this section). Partnership B's consulting business derives 50 percent of its gross income from customers of partnership A's accounting undertakings, but does not derive more than 20 percent of its gross income from the customers of any single accounting undertaking.

(ii) Each accounting undertaking derives more than 50 percent of its gross income from the provision of services in the field of accounting, and the consulting undertaking derives more than 50 percent of its gross income from the provision of services in the field of consulting. Thus, each accounting undertaking is treated as a professional service undertaking (within the meaning of paragraph (h)(1)(ii) of this section), and the consulting undertaking is also treated as a professional service undertaking.

(iii) Each accounting undertaking derives more than 20 percent of its gross income from services in the field of accounting. Thus, each such undertaking involves significant professional services (within the meaning of paragraph (h)(3)(iv) of this section) in the field of accounting. In addition, all services in the field of accounting are treated as similar services under paragraph (h)(3)(i) of this section. Thus, the accounting undertakings involve the provision of significant similar services (within the meaning of paragraph (h)(3)(iii) of this section).

(iv) Paragraph (h)(2) (i) and (ii) of this section provides that a taxpayer's interests in professional service undertakings that are controlled by the same interests or that involve the provision of significant similar services are treated as part of the same activity of the taxpayer. The accounting undertakings are controlled by the same interests (see (i) above) and involve the provision of significant similar services (see (iii) above). Accordingly, the taxpayer's interests in the accounting undertakings are treated as part of the same activity under paragraph (h)(2) (i) and (ii) of this section.

(v) The consulting undertaking derives more than 20 percent of its gross income from services in the field of consulting. If, based on all the facts and circumstances, these services are determined to be similar consulting services under paragraph (h)(3)(ii) of this section, the consulting undertaking involves significant professional services (within the meaning of paragraph (h)(3)(iv) of this section). In this case, however, the consulting undertaking and the accounting undertakings do not involve the provision of significant similar services (within the meaning of paragraph (h)(3)(iii) of this section) because consulting services and accounting services are not treated as similar services under paragraph (h)(3)(i) of this section.

(vi) The consulting undertaking does not derive more than 20 percent of its gross income from the customers of any single accounting undertaking of partnership A. If, however, partnership A's accounting undertakings are aggregated, the consulting undertaking derives more than 20 percent of its gross income from customers of the aggregated undertakings. Paragraph (h)(3)(v) of this section provides that two professional service undertakings involve the provision of significant related services if more than 20 percent of the gross income of one undertaking is derived from customers of the other undertaking. For purposes of applying this rule, partnership A's accounting undertakings are treated as a single undertaking under paragraph (h)(2)(iii) of this section because the accounting undertakings are treated as part of the same activity under paragraph (h)(2)(i) and (ii) of this section. Thus, the consulting undertaking and the accounting undertakings involve the provision of significant related services.

(vii) Paragraph (h)(2)(ii) of this section provides that a taxpayer's interests in professional service undertakings that involve the provision of significant related services are treated as part of the same activity of the taxpayer. Accordingly, the taxpayer's interests in the consulting undertaking and the accounting undertakings are treated as part of the same activity of the taxpayer under paragraph (h)(2)(ii) of this section.

Example (5). (i) The facts are the same as in example (4), except that partnership B's consulting business derives only 15 percent of its gross income from customers of partnership A's accounting undertakings.

(ii) As in example (4), the taxpayer's interests in the accounting undertakings are treated as part of the same activity under paragraph (h)(2)(i) and (ii) of this section and are treated under paragraph (h)(2)(iii) of this section as a single undertaking for purposes of reapplying those provisions. In this case, however, the consulting undertaking does not derive more than 20 percent of its gross income from the customers of partnership A's accounting undertakings. Thus, the consulting undertaking and the accounting undertakings do not involve the provision of significant related services. Accordingly, the accounting undertakings and the consulting undertaking are not treated as part of the same activity under paragraph (h)(2)(i) or (ii) of this section because they are not controlled by the same interests and do not involve the provision of significant similar or related services.

Example (6). (i) The taxpayer is a partner in partnerships A, B, and C. Partnership A derives substantially all of its gross income from the provision of engineering services, partnership B derives substantially all of its gross income from the provision of architectural services, and partnership C derives 40 percent of its gross income from the provision of engineering services and the remainder from the provision of architectural services. Under paragraph (c)(1) of this section, each partnership's service business is treated as a single undertaking that is separate from other undertakings. Partnerships A, B, and C are not controlled by the same interests (within the meaning of paragraph (j) of this section).

(ii) Each partnership's undertaking derives more than 50 percent of its gross income from the provision of services in the fields of architecture and engineering. Thus, each such undertaking is treated as a professional service undertaking (within the meaning of paragraph (h)(1)(ii) of this section).

(iii) Partnership A's undertaking ("undertaking A") derives more than 20 percent of its gross income from services in the field of engineering, partnership B's undertaking ("undertaking B") derives more than 20 percent of its gross income from services in the field of architecture, and partnership C's undertaking ("undertaking C") derives more than 20 percent of its gross income from services in the field of engineering and more than 20 percent of its gross income from services in the field of architecture. Thus, undertaking A involves significant services in the field of engineering, undertaking B involves significant services in the field of architecture, and undertaking C involves significant services in both fields. Under paragraph (h)(3)(i) of this section, all services within each field are treated as similar services, but engineering services and architectural services are not treated as similar services. Thus, undertakings A and C, and undertakings B and C, involve the provision of significant similar services (within the meaning of paragraph (h)(3)(iii) of this section).

(iv) Paragraph (h)(2)(ii) of this section provides that a taxpayer's interests in professional service undertakings that involve the provision of significant similar services are treated as part of the same activity of the taxpayer. Accordingly, the taxpayer's interests in undertakings A and C are treated as part of the same activity of the taxpayer.

(v) Under paragraph (h)(2)(iii)(A) of this section, undertakings A and C are also treated as a single undertaking for purposes of determining whether undertaking B involves the provision of significant similar services. Paragraph (h)(2)(iii)(B) of this section in effect provides that treating undertakings A and C as a single undertaking does not affect the conclusion that the architectural services provided by undertakings B and C are significant similar services. Thus, undertaking B and the single undertaking in which undertakings A and C are included under paragraph (h)(3)(iii) of this section involve the provision of significant similar services, and the taxpayer's interests in undertakings A, B, and C are treated as part of the same activity of the taxpayer under paragraph (h)(2)(ii) of this section.

(i) [Reserved]

(j) *Control by the same interests and ownership percentage*—(1) *In general.* Except as otherwise provided in paragraph (j)(2) of this section, all the facts and circumstances are taken into account in determining, for purposes of this section, whether undertakings are controlled by the same interests. For this purpose, control includes any kind of control, direct or indirect, whether legally enforceable, and however exercisable or exercised. It is the reality of control that is determinative, and not its form or mode of exercise.

(2) *Presumption*—(i) *In general.* Undertakings are rebuttably presumed to be controlled by the same interests if such undertakings are part of the same common-ownership group.

(ii) *Common-ownership group.* Except as provided in paragraph (j)(2)(iii) of this

section, two or more undertakings of a taxpayer are part of the same common-ownership group for purposes of this paragraph (j)(2) if and only if the sum of the common-ownership percentages of any five or fewer persons (within the meaning of section 7701(a)(1), but not including passthrough entities) with respect to such undertakings exceeds 50 percent. For this purpose, the common-ownership percentage of a person with respect to such undertakings is the person's smallest ownership percentage (determined in accordance with paragraph (j)(3) of this section) in any such undertaking.

(iii) *Special aggregation rule.* If, without regard to this paragraph (j)(2)(iii), an undertaking of a taxpayer is part of two or more common-ownership groups, any undertakings of the taxpayer that are part of any such common-ownership group shall be treated for purposes of this paragraph (j)(2) as part of a single common-ownership group in determining the activities of such taxpayer.

(3) *Ownership percentage*—(i) *In general.* For purposes of this section, a person's ownership percentage in an undertaking or in a passthrough entity shall include any interest in such undertaking or passthrough entity that the person holds directly and the person's share of any interest in such undertaking or passthrough entity that is held through one or more passthrough entities.

(ii) *Passthrough entities.* The following rules apply for purposes of applying paragraph (j)(3)(i) of this section:

(A) A partner's interest in a partnership and share of any interest in a passthrough entity or undertaking held through a partnership shall be determined on the basis of the greater of such partner's percentage interest in the capital (by value) of such partnership or such partner's largest distributive share of any item of income or gain (disregarding guaranteed payments under section 707(c)) of such partnership.

(B) A shareholder's interest in an S corporation and share of any interest in a passthrough entity or undertaking held through an S corporation shall be determined on the basis of such shareholder's stock ownership.

(C) A beneficiary's interest in a trust or estate and share of any interest in a passthrough entity or undertaking held through a trust or estate shall not be taken into account.

(iii) *Attribution rules*—(A) *In general.* Except as otherwise provided in paragraph (j)(3)(iii)(B) of this section, a person's ownership percentage in a passthrough entity or in an undertaking shall be determined by treating such person as the owner of any interest that a person related to such person owns (determined without regard to this paragraph (j)(3)(iii)) in such passthrough entity or in such undertaking.

(B) *Determination of common-ownership percentage.* The common-ownership percentage of five or fewer persons with respect to two or more undertakings shall be determined, in any case in which, after the application of paragraph (j)(3)(iii)(A) of this section, two or more such persons own the same interest in any such undertaking (the "related-party owners") by treating as the only owner of such interest (or portion thereof) the related-party owner whose ownership of such interest (or a portion thereof) would result in the highest common-ownership percentage.

(C) *Related person.* A person is related to another person for purposes of this paragraph (j)(3)(iii) if the relationship of such persons is described in section 267(b) or 707(b)(1).

(4) *Special rule for trade or business activities.* In determining whether two or more trade or business activities are controlled by the same interests for purposes of paragraph (g) of this section, each such activity shall be treated as a separate undertaking in applying this paragraph (j).

(5) *Examples.* The following examples illustrate the application of this paragraph (j):

Example (1). (i) Partnership X is the sole owner of an undertaking (undertaking X), and partnership Y is the sole owner of another undertaking (undertaking Y). Individuals A, B, C, D, and E are the only partners in partnerships X and Y, and the partnership agreements of both X and Y provide that no action may be taken or decision made on behalf of the partnership without the unanimous consent of the partners. Moreover, each partner actually participates in, and agrees to, all major decisions that affect the operations of either partnership. The ownership percentages (within the meaning of paragraph (j)(3) of this section) of A, B, C, D, and E in each partnership (and in the undertaking owned by the partnership) are as follows:

Partner	Partnership/Undertaking	
	X (percent)	Y (percent)
A	15	5
B	10	60
C	10	20
D	77	12
E	8	20
	120	117

The sum of the ownership percentages exceeds 100 percent for both X and Y because, under paragraph (j)(3)(ii)(A) of this section, each partner's ownership percentage is determined on the basis of the greater of the partner's percentage interest in the capital of the partnership or the partner's largest distributive share of any item of income or gain of the partnership.)

(ii) Paragraph (j)(2)(ii) of this section provides that a person's common-ownership percentage with respect to any two or more undertakings is the person's smallest ownership percentage in any such undertaking. Thus, the common-ownership percentages of A, B, C, D, and E with respect to undertakings X and Y are as follows:

Partner	Common-ownership percentage
A	5
B	10
C	10
D	12
E	8
	45

(iii) Paragraph (j)(2)(i) of this section provides that undertakings are rebuttably presumed to be controlled by the same interests if the undertakings are part of the same common-ownership group. In general, undertakings are part of a common-ownership group only if the sum of the common-ownership percentages of any five or fewer persons with respect to such undertakings exceeds 50 percent. In this case, the sum of the partners' common-ownership percentages with respect to undertakings X and Y is only 45 percent. Thus, undertakings X and Y are not part of the same common-ownership group.

(iv) If the presumption in paragraph (j)(2)(i) of this section does not apply, all the facts and circumstances are taken into account in determining whether undertakings are controlled by the same interests (see paragraph (j)(1) of this section). In this case, all actions and decisions in both undertakings require the unanimous consent of the same persons and each of those persons actually participates in, and agrees to, all major decisions. Accordingly, undertakings X and Y are controlled by the same interests (*i.e.*, A, B, C, D, and E).

Example (2). (i) Partnerships W, X, Y, and Z are each the sole owner of an undertaking (undertakings W, X, Y, and Z). Individuals A, B, and C are partners in each of the four partnerships, and the remaining interests in each partnership are owned by a number of unrelated individuals, none of whom owns more than a one-percent interest in any of the partnerships. The ownership percentages (within the meaning of paragraph (j)(3) of this section) of A, B, and C in each partnership (and in the undertaking owned by the partnership) are as follows:

Partnership/Undertaking	Partner		
	A	B	C
W	23%	21%	40%
X	19%	30%	22%
Y	25%	25%	20%
Z	8%	4%	2%

(ii) Paragraph (j)(2)(ii) of this section provides that a person's common-ownership percentage with respect to any two or more undertakings is the person's smallest ownership percentage in any such undertaking. Thus, the common-ownership percentages of A, B, and C in undertakings W, X, Y, and Z are as follows:

Partner	Common-ownership percentage
A	8
B	4
C	2
	14

(iii) The sum of the common-ownership percentages of A, B, and C with respect to undertakings W, X, Y, and Z is 14 percent, and no other person owns more than a one-percent interest in any of the undertakings. Thus, the sum of the common-ownership percentages of any five or fewer persons with respect to all four undertakings cannot exceed 50 percent. Accordingly, undertakings W, X, Y, and Z are not part of the same common-ownership group (see paragraph (j)(2)(ii) of this section) and are not rebuttably presumed to be controlled by the same interests (see paragraph (j)(2)(i) of this section).

(iv) The common-ownership percentages of A, B, and C in undertakings W, X, and Y are as follows:

Partner	Common-ownership percentage
A	19
B	21
C	20
	60

(v) The sum of the common-ownership percentages of A, B, and C, taking into account only undertakings W, X, and Y, is 60 percent. Because the sum of the common-ownership percentages exceeds 50 percent, undertakings W, X, and Y are part of the same common-ownership group (see paragraph (j)(2)(ii) of this section and are rebuttably presumed to be controlled by the same interests (see paragraph (j)(2)(i) of this section).

Example (3). (i) Corporation X, an S corporation, is the sole owner of an undertaking (undertaking X), and corporation Y, another S corporation, is the sole owner of another undertaking (undertaking Y). Individuals A, B, and C are shareholders in corporations X and Y. Both A and B are related (within the meaning of paragraph (j)(3)(iii)(C) of this section) to C, but not to each other. A, B, and C are not related to any other person that owns an interest in either corporation X or corporation Y. The ownership percentages (determined without regard to the attribution rules of paragraph (j)(3)(iii) of this section) of A, B, and C in each corporation (and in the undertaking owned by the corporation) are as follows:

CORPORATION/UNDERTAKING

Shareholder	X (percent)	Y (percent)
A	20	
B		20
C	5	5

(ii) In general, a person's ownership percentage is determined by treating the person as the owner of interests that are actually owned by related persons (see paragraph (j)(3)(iii)(A) of this section). If A, B, and C are treated as owning interests that are actually owned by related persons, their ownership percentages are as follows:

CORPORATION/UNDERTAKING

Shareholder	X (percent)	Y (percent)
A	25	5
B	5	25
C	25	25

(iii) Paragraph (j)(3)(iii)(B) of this section provides that, in determining the sum of the common-ownership percentages of any five or fewer persons with respect to any undertakings, each interest in such undertakings is counted only once. If two or more persons are treated as owners of the same interest under paragraph (j)(3)(iii)(A) of this section, the person whose ownership would result in the highest sum is treated as the only owner of the interest. In this case, C's common-ownership percentage with respect to undertakings X and Y, determined by treating C as the owner of the interests actually owned by A and B, is 25 percent. If, however, A and B are treated as the owners of the interests actually owned by C, each has a common-ownership percentage of only five percent. Thus, in determining the sum of common-ownership percentages with respect to undertakings X and Y, C is treated as the owner of the interests actually owned by A and B because this treatment results in the highest sum of common-ownership percentages with respect to such undertakings.

Example (4). (i) The ownership percentages of individuals A, B, and C in undertakings X, Y, and Z are as follows:

UNDERTAKING

Individual	X	Y	Z
A	30%	30%	30%
B	30%	30%	30%
C		30%	30%

No other person owns an interest in more than one of the undertakings.

(ii) Paragraph (j)(2)(ii) of this section provides that a person's common ownership percentage with respect to any two or more undertakings is the person's smallest ownership percentage in any such undertaking. Thus, A's common-ownership percentage with respect to undertakings X, Y, and Z is 30 percent, and the common-ownership percentages of B and C (and all other persons owning interests in such undertakings) with respect to such undertakings is zero. Accordingly, the sum of the common ownership percentages with respect to undertakings X, Y, and Z is only 30 percent, and undertakings X, Y, and Z are not treated as part of the same common-ownership group under paragraph (j)(2)(ii) of this section.

(iii) B's common-ownership percentage with respect to undertakings X and Y is 30 percent, and the sum of A's and B's common-ownership percentages with respect to such undertakings is 60 percent. Thus, undertakings X and Y are treated as part of the same common-ownership group under paragraph (j)(2)(ii) of this section. Similarly, C's common-ownership percentage with respect to undertakings Y and Z is 30 percent, and the sum of A's and C's common-ownership percentages with respect to such undertakings is 60 percent. Thus, undertakings Y and Z are also treated as part of the same common-ownership group under paragraph (j)(2)(ii) of this section.

(iv) Paragraph (j)(2)(iii) of this section requires the aggregation of common-ownership groups that include the same undertaking. In this case, undertaking Y is treated as part of the common-ownership group XY and as part of the common-ownership group YZ. Accordingly, undertakings X, Y, and Z are treated as part of a single common-ownership group and are rebuttably presumed to be controlled by the same interests (see paragraph (j)(2)(i) of this section) even though B does not own an interest in undertaking Z and C does not own an interest in undertaking X. The fact that B and C are not common owners with respect to undertakings X and Z is taken into account, however, in determining whether this presumption is rebutted.

(k) *Identification of rental real estate activities*—(1) *Applicability*—(i) *In general.* Except as otherwise provided in paragraph (k)(6) of this section, this paragraph (k) applies to a taxpayer's interests in rental real estate undertakings (within the meaning of paragraph (k)(1)(ii) of this section).

(ii) *Rental real estate undertaking.* For purposes of this paragraph (k), a rental real estate undertaking is a rental undertaking (within the meaning of paragraph (d) of this section) in which at least 85 percent of the unadjusted basis (within the meaning of § 1.469–2T(f)(3)) of the property made available for use by customers is real property. For this purpose the term "real property" means any tangible property other than tangible personal property (within the meaning of § 1.48–1(c)).

(2) *Identification of activities*—(i) *Multiple undertakings treated as a single activity or multiple activities by taxpayer.* Except as otherwise provided in this paragraph (k), a taxpayer may

treat two or more rental real estate undertakings (determined after the application of paragraph (k)(2) (ii) and (iii) of this section) as a single activity or may treat such undertakings as separate activities.

(ii) *Multiple undertakings treated as a single activity by passthrough entity.* A taxpayer must treat two or more rental real estate undertakings as a single rental real estate undertaking for a taxable year if any passthrough entity through which the taxpayer holds such undertakings treats such undertakings as a single activity on the applicable return of the passthrough entity for the taxable year of the taxpayer.

(iii) *Single undertaking treated as multiple undertakings.* Notwithstanding that a taxpayer's interest in leased property would, but for the application of this paragraph (k)(2)(iii), be treated as used in a single rental real estate undertaking, the taxpayer may, except as otherwise provided in paragraph (k)(3) of this section, treat a portion of the leased property (including a ratable portion of any common areas or facilities) as a rental real estate undertaking that is separate from the undertaking or undertakings in which the remaining portion of the property is treated as used. This paragraph (k)(2)(iii) shall apply for a taxable year if and only if—

(A) Such portion of the leased property can be separately conveyed under applicable State and local law (taking into account the limitations, if any, imposed by any special rules or procedures, such as condominium conversion laws, restricting the separate conveyance of parts of the same structure); and

(B) The taxpayer holds such leased property directly or through one or more passthrough entities, each of which treats such portion of the leased property as a separate activity on the applicable return of the passthrough entity for the taxable year of the taxpayer.

(3) *Treatment in succeeding taxable years.* All rental real estate undertakings or portions of such undertakings that are treated, under this paragraph (k), as part of the same activity for a taxable year ending after August 9, 1989 must be treated as part of the same activity in each succeeding taxable year.

(4) *Applicable return of passthrough entity.* For purposes of this paragraph (k), the applicable return of a passthrough entity for a taxable year of a taxpayer is the return reporting the passthrough entity's income, gain, loss, deductions, and credits taken into account by the taxpayer for such taxable year.

(5) *Evidence of treatment required.* For purposes of this paragraph (k), a person (including a passthrough entity) does not treat a rental real estate undertaking as multiple undertakings for a taxable year or, except as otherwise provided in paragraph (k) (2)(ii) or (3) of this section, treat multiple rental real estate undertakings as a single undertaking for a taxable year unless such treatment is reflected on a schedule attached to the person's return for the taxable year.

(6) *Coordination rule for rental of nondepreciable property.* This paragraph (k) shall not apply to a rental real estate undertaking if less than 30 percent of the unadjusted basis (within the meaning of § 1.469–2T(f)(3)) of property used or held for use by customers in such undertaking during the taxable year is subject to the allowance for depreciation under section 167.

(7) *Coordination rule for rental of dwelling unit.* For any taxable year in which section 280A(c)(5) applies to a taxpayer's use of a dwelling unit—

(i) Paragraph (k) (2) and (3) of this section shall not apply to the taxpayer's interest in such dwelling unit; and

(ii) The taxpayer's interest in such dwelling unit shall be treated as a separate activity of the taxpayer.

(8) *Examples.* The following examples illustrate the application of this paragraph (k). In each example, the taxpayer is an individual whose taxable year is the calendar year.

Example (1). (i) In 1989, the taxpayer directly owns five condominium units (units A, B, C, D, and E) in three different buildings. Units A, B, and C are in one of the buildings and constitute a single rental real estate undertaking (within the meaning of paragraph (k)(1)(ii) of this section). Units D and E are in the other two buildings, and each of these units constitutes a separate rental real estate undertaking. Each of the units can be separately conveyed under applicable State and local law.

(ii) Paragraph (k)(2)(iii) of this section permits a taxpayer to treat a portion of the property included in a rental real estate undertaking as a separate rental real estate undertaking if the property can be separately conveyed under applicable State and local law and the taxpayer owns the property directly. Thus, the taxpayer can treat units A, B, and C as three separate undertakings. Alternatively, the taxpayer could treat two of those units (*e.g.*, units A and C) as an undertaking and the remaining unit as a separate undertaking, or could treat units A, B, and C as a single undertaking.

(iii) Paragraph (k)(2)(i) of this section permits a taxpayer to treat two or more rental real estate undertakings as a single activity, or to treat such undertakings as separate activities. Thus, the taxpayer, by combining undertakings, can treat all five units as a single activity. Alternatively, the taxpayer could treat each undertaking as a separate activity, or could combine some, but not all, undertakings. Thus, for example, the taxpayer could treat units A, B, C, and D as an activity and unit E as a separate activity.

(iv) For purposes of paragraph (k)(2)(i) of this section, a taxpayer's rental real estate undertakings are determined after the application of paragraph (k)(2)(iii) of this section. Thus, the taxpayer, by treating units as separate undertakings under paragraph (k)(2)(iii) of this section and combining them with other units under paragraph (k)(2)(i) of this section, can treat any combination of units as a single activity. For example, the taxpayer could treat units A and B as a separate rental real estate undertaking, and then treat units A, B, and D as a single activity. In that case, the taxpayer could treat units C and E either as a single activity or as two separate activities.

Example (2). (i) The facts are the same as in example (1). In addition, the taxpayer treats all five units as a single activity for 1989 and sells unit E in 1990. (See paragraph (k)(5) of this section for a rule providing that the units are treated as a single activity only if such treatment is reflected on a schedule attached to the taxpayer's return.)

(ii) Under paragraph (k)(3) of this section, rental real estate undertakings that are treated as part of the same activity for a taxable year must be treated as part of the same activity in each succeeding year. In this case, all five units were treated as part of the same activity for 1989 and must therefore be treated as part of the same activity for 1990. Accordingly, the taxpayer's sale of unit E in 1990 cannot be treated as a disposition of the taxpayer's entire interest in an activity for purposes of section 469(g) and the rules to be contained in § 1.469–6T (relating to the treatment of losses upon certain dispositions of passive and former passive activities).

Example (3). (i) The facts are the same as in example (1), except that the taxpayer is a partner in a partnership that is the direct owner of the five condominium units. In its return for its taxable year ending on November 30, 1989, the partnership treats the five units as a single activity. (See paragraph (k)(5) of this section for a rule providing that the units are treated as a single activity only if such treatment is reflected on a schedule attached to the partnership's return.) The partnership sells unit E on November 1, 1990.

(ii) Paragraph (k)(2)(ii) of this section provides that a taxpayer who holds rental real estate undertakings through a passthrough entity must treat those undertakings as a single rental real estate undertaking if they are treated as a single activity on the applicable return of the passthrough entity. Under paragraph (k)(4) of this section, the applicable return of the partnership for the taxpayer's 1989 taxable year is the partnership's return for its taxable year ending on November 30, 1989. Accordingly, the taxpayer must treat the five condominium units as a single rental real estate undertaking (and thus as part of the

same activity) for 1989 because they are treated as a single activity on the partnership's return for its taxable year ending in 1989.

(iii) Under paragraph (k)(3) of this section, the taxpayer must continue treating the condominium units as part of the same activity for taxable years after 1989. Accordingly, as in example (2), the five condominium units are treated as part of the same activity for 1990, and the sale of unit E in 1990 cannot be treated as a disposition of the taxpayer's interest in an activity for purposes of section 469(g) and the rules to be contained in § 1.469–6T.

Example (4). (i) The taxpayer owns a shopping center and a vacant lot that are separate rental real estate undertakings (within the meaning of paragraph (k)(1)(ii) of this section). The taxpayer rents space in the shopping center to various tenants and rents the vacant lot to a parking lot operator. Most of the unadjusted basis of the property used in the shopping-center undertaking (taking into account the land on which the shopping center is built) is subject to the allowance for depreciation, but no depreciable property is used in the parking-lot undertaking.

(ii) This paragraph (k) provides rules for identifying rental real estate activities (including the rule in paragraph (k)(2)(i) of this section that permits a taxpayer to treat two or more rental real estate undertakings as a single activity). Paragraph (k)(6) of this section provides, however, that these rules do not apply to a rental real estate undertaking if less than 30 percent of the unadjusted basis of the property used in the undertaking is subject to the allowance for depreciation. Thus, the taxpayer may not combine the parking-lot undertaking, which includes no depreciable property, with the shopping-center undertaking or any other rental real estate undertaking under paragraph (k)(2)(i) of this section. Accordingly, the parking lot undertaking is treated as a separate activity under paragraph (b)(1) of this section.

Example (5). (i) The facts are the same as in example (4), except that the shopping center and the vacant lot are at the same location (within the meaning of paragraph (c)(2)(iii) of this section) and are part of the same rental real estate undertaking (within the meaning of paragraph (k)(1)(ii) of this section). Taking into account the property used in the shopping center operations (including the land on which the shopping center is built) and the vacant lot, 50 percent of the unadjusted basis of the property used in the undertaking is subject to the allowance for depreciation.

(ii) In this case, the vacant lot is used in a rental real estate undertaking in which depreciable property is also used. Moreover, the exception in paragraph (k)(6) of this section does not apply to the undertaking consisting of the shopping center and the parking lot because at least 30 percent of unadjusted basis of the property used in the undertaking is subject to the allowance for depreciation. Accordingly, the taxpayer may combine the undertaking with other rental real estate undertakings and treat the combined undertakings as a single activity under paragraph (k)(2)(i) of this section.

(l) [Reserved.]

(m) *Consolidated groups*—(1) *In general.* The activities of a consolidated group (within the meaning of § 1.469–1T(h)(2)(ii)) and of each member of such group shall be determined under this section as if the consolidated group were one taxpayer.

(2) *Examples.* The following examples illustrate the application of this paragraph (m). In each example, the facts, analysis, and conclusions relate to a single taxable year.

Example (1). (i) Corporations M, N, and O are the members of a consolidated group (within the meaning of § 1.469–1T(h)(2)(ii)). Under § 1.469–1T(h)(4)(i)(A) and (ii), the consolidated group and its members are treated as closely held corporations (within the meaning of § 1.469–1T(g)(2)(ii)). Each member of the consolidated group owns a two-percent interest in partnership X and a two-percent interest in partnership Y, and owns interests in a number of trade or business undertakings (within the meaning of paragraph (f)(1)(ii) of this section) through the partnerships. Each of these undertakings is directly owned by partnership X or Y, and all the undertakings of partnerships X and Y are controlled by the same interests (within the meaning of paragraph (j) of this section) and are similar (within the meaning of paragraph (f)(4) of this section). The employees of the consolidated group and the shareholders of its common parent do not participate in the undertakings that the member corporations own through the partnerships.

(ii) Paragraph (f)(2)(i) of this section provides that trade or business undertakings that are similar and controlled by the same interests are treated as part of the same activity of the taxpayer if the taxpayer owns interests in the undertakings through the same passthrough entity. In this case, the member corporations own interests in similar, commonly-controlled undertakings through both partnerships, and such interests are treated under this paragraph (m) as interests owned by one taxpayer (the consolidated group). Accordingly, the member corporations' interests in the undertakings owned through partnership X are treated as part of the same activity of the consolidated group, and their interests in the undertakings owned through partnership Y are treated similarly.

Example (2). (i) The facts are the same as in example (1), except that each member of the consolidated group owns a five-percent interest in partnership X and a five-percent interest in partnership Y.

(ii) Paragraph (f)(2)(ii) of this section provides that trade or business undertakings that are similar and controlled by the same interests are treated as part of the same activity of the taxpayer if the taxpayer owns a direct or substantial indirect interest in each such undertaking. In this case, the member corporations own, in the aggregate, a 15-percent interest in partnership X and a 15-percent interest in partnership Y, and such interests are treated under this paragraph (m) as interests owned by one taxpayer (the consolidated group). Thus, the consolidated group owns a substantial indirect interest in the similar, commonly-controlled undertakings owned by partnerships X and Y (see paragraph (f)(3)(i) of this section). Accordingly, the member corporations' interests in the undertakings owned through partnerships X and Y are treated as part of the same activity of the consolidated group.

(n) *Publicly traded partnerships.* The rules of this section shall apply to a taxpayer's interest in business and rental operations held through a publicly traded partnership (within the meaning of section 469(k)(2)) as if the taxpayer had no interest in any other business and rental operations. The following example illustrates the application of this paragraph (n):

Example. (i) The taxpayer, an individual, owns a 20-percent interest in partnership X and a 15-percent interest in partnership Y. Partnership X directly owns a hotel ("hotel 1") and a commercial office building ("building 1"). Partnership Y directly owns two hotels ("hotels 2 and 3") and two commercial office buildings ("buildings 2 and 3"). Each of the three hotels is a separate trade or business undertaking (within the meaning of paragraph (f)(1)(ii) of this section), and each of the three office buildings is a separate rental real estate undertaking (within the meaning of paragraph (k)(1)(ii) of this section). The three hotel undertakings are similar (within the meaning of paragraph (f)(4) of this section) and are controlled by the same interests (within the meaning of paragraph (j) of this section). Partnership X is not a publicly traded partnership (within the meaning of section 469(k)(2)). Partnership Y, however, is a publicly traded partnership and is not treated as a corporation under section 7704.

(ii) This paragraph (n) provides that the rules of this section apply to a taxpayer's interest in business and rental operations held through a publicly traded partnership as if the taxpayer had no interest in any other business and rental operations. Thus, undertakings owned through partnership Y may be treated as part of the same activity under the rules of this section, but an undertaking owned through partnership Y and an undertaking that is not owned through partnership Y may not be treated as part of the same activity.

(iii) Paragraph (f)(2)(i) of this section provides that a taxpayer's interests in two or more trade or business undertakings that are similar and controlled by the same interests are treated as part of the same activity if the taxpayer owns interests in each undertaking through the same passthrough entity. Partnership Y's hotel undertakings (*i.e.*, hotels 2 and 3) are similar and are controlled by the same interests. In addition, the taxpayer owns interests in both undertakings through the same partnership. Accordingly, the taxpayer's interests in partnership Y's hotel undertakings are treated as part of the same activity.

(iv) The hotel undertaking owned through partnership X (*i.e.*, hotel 1) and the hotel undertakings owned through partnership Y are similar and controlled by the same

interests, and the taxpayer owns a substantial indirect interest in each of the undertakings (see paragraph (f)(3)(i) of this section). Thus, the three undertakings would ordinarily be treated as part of the same activity under paragraph (f)(2)(ii) of this section. Under this paragraph (n), however, undertakings that are owned through a publicly traded partnership cannot be treated as part of the same activity as any undertaking not owned through that partnership. Accordingly, the hotel undertaking that the taxpayer owns through partnership X and the hotel undertakings that the taxpayer owns through partnership Y are treated as two separate activities.

(v) Paragraph (k)(2)(i) of this section provides that, with certain exceptions, a taxpayer may treat two or more rental real estate undertakings as a single activity or as separate activities. Thus, the taxpayer's interests in the rental real estate undertakings owned through partnership Y (*i.e.*, buildings 2 and 3) may be treated as a single activity or as separate activities. Under this paragraph (n), however, undertakings that are owned through a publicly traded partnership cannot be treated as part of the same activity as any undertaking not owned through that partnership. Accordingly, the taxpayer's interest in the rental real estate undertaking owned through partnership X (building 1) cannot be treated as part of an activity that includes any rental real estate undertaking owned through partnership Y.

(o) *Elective treatment of undertakings as separate activities*—(1) *Applicability.* This paragraph applies to a taxpayer's interest in any undertaking (other than a rental real estate undertaking (within the meaning of paragraph (k)(1)(ii) of this section)) that would otherwise be treated under this section as part of an activity that includes the taxpayer's interest in any other undertaking.

(2) *Undertakings treated as separate activities.* Except as otherwise provided in this paragraph (o), a person (including a passthrough entity) shall treat an undertaking to which this paragraph (o) applies as an activity separate from the remainder of the activity in which such undertaking would otherwise be included for a taxable year if and only if, for such taxable year or any preceding taxable year, such person made an election with respect to such undertaking under this paragraph (o).

(3) *Multiple undertakings treated as a single activity by passthrough entity.* A person (including a passthrough entity) must treat interests in two or more undertakings as part of the same activity for a taxable year if any passthrough entity through which the person holds such undertakings treats such undertakings as part of the same activity on the applicable return of the passthrough entity for the taxable year of such person.

(4) *Multiple undertakings treated as a single activity for a preceding taxable year.* If a person (including a passthrough entity) treats undertakings as part of the same activity on such person's return for a taxable year ending after August 9, 1989, such person may not treat such undertakings as part of different activities under this paragraph (o) for any subsequent taxable year.

(5) *Applicable return of passthrough entity.* For purposes of this paragraph (o), the applicable return of a passthrough entity for a taxable year of a taxpayer is the return reporting the passthrough entity's income, gain, loss, deductions, and credits taken into account by the taxpayer for such taxable year.

(6) *Participation.* The following rules apply to multiple activities (the "separate activities") that would be treated as a single activity (the "original activity") if the taxpayer's activities were determined without regard to this paragraph (o):

(i) The taxpayer shall be treated as materially participating (within the meaning of § 1.469–5T) for the taxable year in the separate activities if and only if the taxpayer would, but for the application of this paragraph (o), be treated as materially participating for the taxable year in the original activity.

(ii) The taxpayer shall be treated as significantly participating (within the meaning of § 1.469–5T(c)(2)) for the taxable year in the separate activities if and only if the taxpayer would, but for the application of this paragraph (o), be treated as significantly participating for the taxable year in the original activity.

(7) *Election*—(i) *In general.* A person makes an election with respect to an undertaking under this paragraph (o) by attaching the written statement described in paragraph (o)(7)(ii) of this section to such person's return for the taxable year for which the election is made (see paragraph (o)(2) of this section).

(ii) *Written statement.* The written statement required by paragraph (o)(7)(i) of this section must—

(A) State the name, address, and taxpayer identification number of the person making the election;

(B) Contain a declaration that an election is being made under § 1.469–4T(o);

(C) Identify the undertaking with respect to which such election is being made; and

(D) Identify the remainder of the activity in which such undertaking would otherwise be included.

(8) *Examples.* The following examples illustrate the application of this paragraph (o):

Example (1). (i) During 1989, the taxpayer, an individual whose taxable year is the calendar year, acquires and is the direct owner of ten grocery stores. The operations of each grocery store are treated under paragraph (c)(1) of this section as a single undertaking that is separate from other undertakings (a "grocery-store undertaking"), and the taxpayer's interests in the grocery-store undertakings would be treated as part of the same activity of the taxpayer under paragraph (f)(2) of this section.

(ii) Paragraph (o)(2) of this section provides that, with certain exceptions, undertakings that would be treated as part of the same activity under other rules in this section may, at the election of the taxpayer, be treated as separate activities. Thus, the taxpayer may elect to treat each grocery-store undertaking as a separate activity for 1989. Alternatively, the taxpayer may combine grocery-store undertakings in any manner and treat each combination of undertakings (and each uncombined undertaking) as a separate activity for 1989. In either case, the election must be made by attaching the written statement described in paragraph (o)(7)(ii) of this section to the taxpayer's 1989 return.

Example (2). (i) The facts are the same as in example (1). In addition, the taxpayer, in 1989, elects to treat each grocery-store undertaking as a separate activity and participates for 15 hours in each of the grocery-store undertakings.

(ii) The taxpayer's interest in each grocery-store undertaking is treated, under paragraph (o)(2) of this section, as a separate activity of the taxpayer for 1989 (a "grocery-store activity"). In 1989, however, the taxpayer participates for more than 100 hours in the activity in which the undertakings would be included (but for the election to treat the grocery-store undertakings as separate activities) and would be treated under § 1.469–5T(c)(2) as significantly participating in such activity. Accordingly, the taxpayer is treated under paragraph (o)(6)(ii) of this section as significantly participating in each of the grocery-store activities for 1989.

Example (3). (i) The facts are the same as in example (1). In addition, the taxpayer, in 1989, elects to treat each grocery-store undertaking as a separate activity. The taxpayer does not participate in any of the grocery-store undertakings in 1989 or 1990, and sells one of the grocery stores in 1990.

(ii) As in example (2), the taxpayer's interests in each grocery-store undertaking is treated, under paragraph (o)(2) of this section, as a separate activity of the taxpayer for 1989. Because the taxpayer elected to treat the undertakings as separate activities for a preceding taxable year (1989), each grocery-store undertaking is also treated, under paragraph (o)(2) of this section, as a separate activity of the taxpayer for 1990. In addition, each of the taxpayer's grocery-store activities is a passive activity for 1989 and 1990 because the taxpayer does not participate in any of the grocery store undertakings for 1989 and 1990. Accordingly, the taxpayer's sale of the grocery store will generally be treated as a disposition of the taxpayer's entire interest in a passive activity for purposes of section 469(g) and the rules to be contained in § 1.469–6T (relating to the treatment of losses

upon certain dispositions of passive and former passive activities).

Example (4). (i) The facts are the same as in example (3), except that the taxpayer elects to treat the grocery-store undertakings as two separate activities. One of the activities includes three grocery-store undertakings, and the store sold in 1990 is part of this activity. The other activity includes the seven remaining grocery-store undertakings.

(ii) Paragraph (o)(4) of this section provides that a person who treats undertakings as part of the same activity for a taxable year ending after August 9, 1989, may not elect to treat those undertakings as separate activities for a subsequent taxable year. The grocery store sold in 1990 was treated for 1989 as part of an activity that includes two other grocery stores. Thus, those three stores must be treated as part of the same activity for 1990. Accordingly, the taxpayer's sale of the grocery store cannot be treated as a disposition of the taxpayer's entire interest in a passive activity for purposes of section 469(g) and the rules to be contained in § 1.469–6T.

Example (5). (i) The facts are the same as in example (1), except that the taxpayer is a partner in a partnership that acquires and is the direct owner of the ten grocery stores. The taxable year of the partnership ends on November 30, and the partnership acquires the grocery stores in its taxable year ending on November 30, 1989. In its return for that taxable year, the partnership treats the grocery-store undertakings as a single activity.

(ii) Paragraph (o)(3) of this section provides that a person who holds undertakings through a passthrough entity may not elect to treat those undertakings as separate activities if they are treated as part of the same activity on the applicable return of the passthrough entity. Under paragraph (o)(5) of this section, the applicable return of the partnership for the taxpayer's 1989 taxable year is the partnership's return for its taxable year ending on November 30, 1989. Accordingly, the taxpayer must treat the grocery-store undertakings as a single activity for 1989 because those undertakings are treated as a single activity on the partnership's return for its taxable year ending in 1989.

(iii) Under paragraph (o)(4) of this section, the taxpayer must continue treating the grocery-store undertakings as part of the same activity for taxable years after 1989. This rule applies even if the partnership subsequently distributes its interest in the grocery stores to the taxpayer, and the taxpayer becomes the direct owner of the grocery-store undertakings.

(p) Special rule for taxable years ending before August 10, 1989—(1) *In general.* For purposes of applying section 469 and the regulations thereunder for a taxable year ending before August 10, 1989, a taxpayer's business and rental operations may be organized into activities under the rules or paragraphs (b) through (n) of this section or under any other reasonable method. For example, for such taxable years a taxpayer may treat each of the taxpayer's undertakings as a separate activity, or a taxpayer may treat undertakings that involve the provision of similar goods or services as a single activity.

(2) *Unreasonable methods.* A method of organizing business and rental operations into activities is not reasonable if such method—

(i) Treats rental operations (within the meaning of paragraph (d)(3) of this section) that are not ancillary to a trade or business activity (within the meaning of § 1.469–1T(e)(2)) as part of a trade or business activity;

(ii) Treats operations that are not rental operations and are not ancillary to a rental activity (within the meaning of § 1.469–1T(e)(3)) as part of a rental activity;

(iii) Includes in a passive activity of a taxpayer any oil or gas well that would be treated, under paragraph (e)(1) of this section, as a separate undertaking in determining the taxpayer's activities;

(iv) Includes in a passive activity of a taxpayer any interest in a dwelling unit that would be treated, under paragraph (K)(7) of this section, as a separate activity of the taxpayer; or

(v) Is inconsistent with the taxpayer's method of organizing business and rental operations into activities for the taxpayer's first taxable year beginning after December 31, 1986.

(3) *Allocation of dissallowed deductions in succeeding taxable year.* If any of the taxpayer's passive activity deductions or the taxpayer's credits from passive activities are disallowed under § 1.469–1T for the last taxable year of the taxpayer ending before August 10, 1989, such disallowed deductions or credits shall be allocated among the taxpayer's activities for the first taxable year of the taxpayer ending after August 9, 1989, using any reasonable method. See § 1.469–1T(f)(4).

§ 1.469–5T [Amended]

Par. 7. Section 1.469–5T is amended as follows:

1. Paragraph (f)(1) is amended by removing the parenthetical phrase "(directly or indirectly, other than through a C corporation)".

2. Paragraph (h) is amended by adding the following new paragraph (h)(3):

(h) * * *

(3) *Coordination with rules governing the treatment of passthrough entities.* If a taxpayer takes into account for a taxable year of such taxpayer any item of gross income or deduction from a partnership or S corporation that is characterized as an item of gross income or deduction from an activity in which the taxpayer materially participated under § 1.469–2T(e)(1), such taxpayer shall be treated as materially participating in such activity for such taxable year for purposes of applying paragraph (a)(5) and (6) of this section to any succeeding taxable year of such taxpayer.

* * * * *

3. Paragraph (j) is amended by redesignating paragraph (j) (including its heading) as paragraph (j)(2) and adding the following new heading and paragraph (j)(1):

* * * * *

(j) *Material participation for preceding taxable years*—(1) *In general.* For purposes of paragraph (a)(5) and (6) of this section, a taxpayer has materially participated in an activity for a preceding taxable year if such activity includes an undertaking that involves substantially the same business and rental operations as an undertaking that was included in an activity in which the taxpayer materially participated (determined without regard to paragraph (a)(5) of this section) for such preceding taxable year

* * * * *

4. Paragraph (k), *Example (5),* is amended by removing "1999" and adding in its place "2000" wherever the former occurs.

Par. 8. Section 1.469–11T is amended as follows:

1. Paragraph (c)(2)(i) is revised.
2. Paragraph (c)(3)(i)(A) is revised.
3. Paragraph (c)(3)(ii) is revised.
4. The examples in paragraph (c)(4) are revised.
5. In paragraph (c)(5)(i), the introductory text is revised.
6. The first four examples in paragraph (c)(5)(iii) are revised.
7. The revised provisions read as follows:

§ 1.469–11T Effective date and transition rules (temporary).

* * * * *

(c) * * *

(2) *Qualified interest*—(1) *In general* For purposes of this paragraph (c), a taxpayer's interest in an undertaking (the "current-year undertaking") shall be treated as a qualified interest in the activity in which such undertaking is included for the taxable year if and only if the current-year undertaking continues business and rental operations of an undertaking that was—

(A) Held by the taxpayer on October 22, 1986, and at all times thereafter; or

(B) Acquired by the taxpayer after October 22, 1986, directly or indirectly, pursuant to one or more written binding contracts to which the taxpayer was a

party (see paragraph (c)(7) of this section) on October 22, 1986, and held by the taxpayer at all times after such acquisition.

* * * * *

(3) * * *

(1) * * *

(A) Any of the business and rental operations that are part of such activity continue business and rental operations that were being conducted by any person on October 22, 1986; or

* * * * *

(ii) *Character before 1987 irrelevant.* For purposes of this paragraph (c), an activity may be treated as a pre-enactment activity without regard to whether such activity continues business and rental operations that would have been part of a passive activity of the taxpayer for any taxable year beginning before January 1, 1987, had section 469 and the regulations been in effect for such year.

(4) * * *

Example (1). On October 22, 1986, the taxpayer owned an interest in property used as a personal residence. After October 22, 1986, the taxpayer ceased to use the property as a personal residence and began to use it in a rental activity (within the meaning of § 1.469–1T(e)(3)). The rental activity is a pre-enactment activity (within the meaning of paragraph (c)(3) of this section) because the property used in the rental activity was in existence on August 16, 1986. The rental activity does not continue business and rental operations of any undertaking in which the taxpayer held an interest on October 22, 1986, because the taxpayer did not hold the property in an activity on that date. In addition, the taxpayer did not acquire an interest in an undertaking involving such operations pursuant to a written binding contract to which the taxpayer was a party on October 22, 1986. Accordingly, the taxpayer's interest in the rental activity is not a qualified interest (within the meaning of paragraph (c)(2) of this section), and the taxpayer does not have a preenactment interest in the rental activity.

Example (2). The taxpayer owns an interest in a partnership, which owns property used in a rental activity (within the meaning of § 1.469–1T(e)(3)). The taxpayer acquired the partnership interest pursuant to a written bidding contract to which the taxpayer was a party on October 22, 1986. The partnership acquired its interest in the rental property pursuant to written binding contracts to which the partnership was a party on October 22, 1986. Construction of the property used in the rental activity commenced prior to August 16, 1986. Under paragraph (c)(7)(ii) of this section, the taxpayer is treated as a party to the contracts to which the partnership was a party on October 22, 1986. Therefore, the taxpayer's interest in the rental activity is a qualified interest (within the meaning of paragraph (c)(2) of this section) because the taxpayer's interest in the rental property (*i.e.*, in undertakings involving business and rental operations that are continued in the rental activity) was acquired after October 22, 1986, pursuant to written binding contracts to which the taxpayer was a party on that date. Because the property used in the rental activity was under construction on August 16, 1986, the rental activity is a pre-enactment activity (within the meaning of paragraph (c)(3) of this section). Accordingly, the taxpayer's interest in the rental activity is a pre-enactment interest.

Example (3). The facts are the same as in example (2), except that the partnership acquired the property after October 22, 1986, pursuant to a contract entered into after October 22, 1986. The taxpayer's interest in the rental activity is not a pre-enactment interest because the taxpayer's interest in the rental property was not acquired pursuant to written binding contracts to which the taxpayer was a party on October 22, 1986.

Example (4). The taxpayer owned a pre-enactment interest in an activity that continues business and rental operations that were conducted by the taxpayer on October 22, 1986. After that date, the taxpayer died, and the decedent's interest in the activity passed to the decedent's estate. Because a decedent and the decedent's estate are not the same taxpayer, the estate must independently satisfy the requirements for a pre-enactment interest regardless of the fact that the decedent had a pre-enactment interest in the activity. Since the activity was being conducted by the decedent on October 22, 1986, the activity is a pre-enactment activity (within the meaning of paragraph (c)(3) of this section). Because, however, the activity does not continue the business and rental operations of an undertaking that the estate held on October 22, 1986, or acquired pursuant to a written binding contract, the estate does not have a qualified interest in the activity (within the meaning of paragraph (c)(2) of this section).

(5) *Effect of changes in a taxpayer's interest in a pre-enactment activity*—(i) *In general.* If the taxpayer's share for a taxable year of an item of income, gain, loss, deduction, or credit from an interest in a pre-enactment activity was increased or decreased at any time after October 22, 1986, and prior to the end of such taxable year (other than pursuant to a written binding contract to which the taxpayer was a party on October 22, 1986), the share of such item that is attributable to a pre-enactment interest in such activity shall be determined by taking into account— * * *

* * * * *

(iii) * * *

Example (1). A taxpayer owns interests in a pre-enactment activity through an S corporation. On October 22, 1986, the taxpayer owned a 10-percent interest in the S corporation. After October 22, 1986, the taxpayer acquires an additional 5-percent interest in the S corporation pursuant to a contract entered into after October 22, 1986. Under this paragraph (c)(5), only items from the 10-percent interest that the taxpayer owned on October 22, 1986, are attributable to the taxpayer's pre-enactment interest in the activity.

Example (2). On October 22, 1986, individuals A and B each owned a rental property. After October 22, 1986, A and B contribute their rental properties to a partnership in exchange for which each receives a 50-percent interest in all items of income, gain, loss, deduction, and credit of the partnership. Under paragraph (c)(5)(i) of this section, A's 50-percent share of each partnership item attributable to the rental property contributed by A is attributable to a pre-enactment interest. None of A's share of the partnership items attributable to the rental property contributed by B is attributable to a pre-enactment interest.

Example (3). The facts are the same as in example (2), except that under the partnership agreement the items of income, gain, loss, deduction, and credit attributable to the rental property A contributed to the partnership are allocated 80 percent to A and 20 percent to B. Under paragraph (c)(5)(i) of this section, A's 80-percent share of each partnership item attributable to the rental property contributed by A is attributable to a pre-enactment interest.

Example (4). The facts are the same as in example (3) except that on January 1, 1988, the partnership liquidates, distributing to A the rental property contributed by A to the partnership. Under paragraph (c)(5)(i) of this section, only 80 percent of A's income, gain, loss, deductions, and credits from the property for 1988 and subsequent years is attributable to a pre-enactment interest.

* * * * *

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 9. The authority for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 10. Section 602.101(c) is amended by inserting in the appropriate places in the table "§ 1.469–4T(k) * * * 1545–1037" and "§ 1.469–4T(o) * * * 1545–1037".

* * * * *

There is need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impracticable to issue this Treasury decision with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective

date limitation of subsection (d) of that section.

* * * * *

Lawrence B. Gibbs,
Commissioner of Internal Revenue.
March 20, 1989.
Dennis Earl Ross,
Acting Assistant Secretary of the Treasury.
[FR Doc. 89-11334 Filed 5-11-89; 8:45 am]
BILLING CODE 4830-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 931

Surface Coal Mining and Reclamation Operations Under the Federal Lands Program; State-Federal Cooperative Agreements, New Mexico

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE); Interior.

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is adopting an amendment to the cooperative agreement between the Department of the Interior and the State of New Mexico for the regulation of surface coal mining and reclamation operations on Federal lands in New Mexico under the permanent regulatory program. Cooperative agreements are provided for under section 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This final rule provides the terms of the amendment to the cooperative agreement. The amendment revises the cooperative agreement concerning the regulation of coal mining and reclamation operations on Federal lands within the State to be consistent with the revised Federal regulations regarding Historic Preservation.

EFFECTIVE DATE: June 12, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Robert H. Hagen, Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, 625 Silver Ave., SW., Suite 310, Albuquerque, New Mexico 87102; Telephone: (505) 766-1486.

SUPPLEMENTARY INFORMATION:

I. Background

II. Public Comment and Summary of Amendment to Cooperative Agreement

III. Procedural Matters

I. Background

Section 523(c) of SMCRA, 30 U.S.C. 1201 et seq., and the implementing regulations at 30 CFR Parts 740 and 745, allow a State and the Secretary of the Interior to enter into a permanent program cooperative agreement if the State has an approved State program for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands.

Permanent program cooperative agreements are authorized by the first sentence of section 523(c), which provides that:

> [A]ny State with an approved State program may elect to enter into a cooperative agreement with the Secretary to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State, provided the Secretary determines in writing that such State has the necessary personnel and funding to fully implement such a cooperative agreement in accordance with the provision(s) of (SMCRA). 30 U.S.C. 1273(c).

On February 9, 1981, the State of New Mexico requested a cooperative agreement between the Department of the Interior and the State of New Mexico to give the State primacy in the administration of its approved regulatory program on Federal lands in New Mexico. The Secretary approved the cooperative agreement on December 20, 1982 (47 FR 56800). The text of the existing cooperative agreement can be found at 30 CFR 931.30.

On February 10, 1987, OSMRE promulgated revised regulations concerning the consideration which must be accorded historic properties during the permitting of surface coal mining operations (52 FR 4244). Revised 30 CFR 773.12 requires that where Federal lands are involved, each regulatory program shall provide for the coordination of review and issuance of permits for surface coal mining and reclamation operations with applicable requirements of the Archaeological Resources Protection Act of 1979.

On June 9, 1987, OSMRE notified New Mexico of the change to 30 CFR 773.12 and the need for a corresponding amendment pursuant to 30 CFR 732.17(d). The State responded on October 16, 1987, and indicated its intent to modify the existing cooperative agreement to satisfy OSMRE's requirement to amend the State program.

On September 12, 1988, the State of New Mexico submitted to OSMRE a proposed amendment to its approved cooperative agreement under the permanent regulatory program. The proposed amendment consists of the addition of the Archaeological Resources Protection Act of 1979 to the list of other applicable laws for permit coordination in Appendix A of the agreement.

II. Public Comment and Summary of Amendment to Cooperative Agreement

The proposed amendment published in the **Federal Register** on December 8, 1988 (53 FR 49561) announced that the public comment period would close January 9, 1989, and that a public hearing would be held, if it were requested. Since no one asked to testify, a public hearing was not held. No substantive comments were received from the respondents.

The proposed amendment adds the Archaeological Resources Protection Act of 1979 to the list of other applicable laws for permit coordination in Appendix A of the agreement. There are no other changes to the document.

III. Procedural Matters

1. Executive Order No. 12291 and the Regulatory Flexibility Act

On October 21, 1982, the Department of the Interior received from the Office of Management and Budget (OMB) an exemption for State-Federal cooperative agreements from the requirements of sections 3 and 7 of Executive Order 12291.

The Department has reviewed this proposed agreement in light of the Regulatory Flexibility Act (Pub. L. 96-354). Having conducted this review, the Department has determined that this document will not have a significant economic effect on a substantial number of small entities because no significant departure from either the State or Federal requirements already in effect will occur and no new or additional information will be required by the proposed agreement.

2. Paperwork Reduction Act

This proposed amendment to the New Mexico Cooperative Agreement does not contain information collection requirements which require clearance from OMB under 44 U.S.C. 3507.

3. National Environmental Policy Act

Proceedings relating to adoption or amendment of a permanent program State-Federal cooperative agreement are part of the Secretary's implementation of the Federal lands program pursuant to section 523 of the Act. Such proceedings are exempt under section 702(d) of the Act from the requirements to prepare a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

4. Author

The author of this regulation is Robert H. Hagen, Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, 625 Silver Ave., SW., Suite 310, Albuquerque, New Mexico 87102; Telephone: (505) 766-1486.

List of Subjects in 30 CFR Part 931

Coal mining, Intergovernmental relations, Surface Mining, Underground mining.

Date: April 18, 1989.

Michael A. Poling,

Deputy Assistant Secretary—Land and Minerals Management.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 931—NEW MEXICO

The authority citation for Part 931 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. In § 931.30, State-Federal Cooperative Agreement, Appendix A is amended by redesignating items 14 and 15 as items 15 and 16, respectively, and adding new item 14 to read as follows:

§ 931.30 State-Federal Cooperative Agreement

* * * * *

Appendix A

* * * * *

14. The Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa *et seq.*

Approved:

Manuel Lujan, Jr.,

Secretary of the Interior.

Date: May 5, 1989.

Garrey Carruthers,

Governor of New Mexico.

Date: March 23, 1989.

[FR Doc. 89-11449 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF TREASURY

Fiscal Service

31 CFR Part 210

Federal Payments Made Through Financial Institutions by the Automated Clearing House Method

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Final rule.

SUMMARY: There are four reasons for this revision of 31 CFR Part 210. First, to clarify the breadth of payments governed by these regulations. In addition to the benefit payments enumerated in the current text of 31 CFR 210.2(d), these regulations apply to nonbenefit payments, including but not limited to, vendor payments, Internal Revenue Service tax refunds, savings bonds, grants, and loans. This part, as its title suggests, generally applies to all payments which the Federal Government originates through financial institutions by the Automated Clearing House (ACH) Method. Second, a section on prenotification is added to establish the framework for these messages. Third, provisions are added, expressly applying the ACH Method of payment to discretionary allotments from Federal employees' wage and salary payments. Fourth, other minor changes are needed including a paragraph to cover instances of termination of enrollments due to the closing of a financial institution.

EFFECTIVE DATE: June 12, 1989.

FOR FURTHER INFORMATION CONTACT: Sheryl Morrow, Manager, Policy Research Branch, Financial Management Service, U.S. Department of the Treasury, Room 328, Liberty Center, 401 14th Street, SW, Washington, DC 20227, (202) 287-0308.

SUPPLEMENTARY INFORMATION: On July 27, 1988 (53 FR 28233), Treasury published a Notice of Proposed Rulemaking (minor corrections were published on August 12, 1988 (53 FR 30512), because of typesetting errors) proposing a number of revisions to Part 210 of Title 31 of the Code of Federal Regulations, which sets forth the rights and liabilities of the Federal Government, financial institutions, and recipients where recipients of Federal Government payments authorize the payments to be made by the ACH Method. The regulations in this part were promulgated in 1975 and revised in 1976, 1984, and 1987.

A number of new or revised definitions have been added at § 210.2, including definitions of allotment, recipient, allotter, discretionary allotment, employee, and nonbenefit payment. The definition of "Payment" has been expanded to include nonbenefit payments. The definition of "Payment instruction" has been modified to change the phrase "similar writing" to read "similar record" to describe more accurately the media on which payment instructions may be contained. Finally, the definition of "Recipient" has been expanded to mean a person, corporation, or other public or private entity which is authorized by a program agency to receive benefit or nonbenefit payments from the Federal Government. "Recipient" includes a natural person or entity authorized by a program agency to receive benefit payments for a beneficiary.

A new paragraph designated § 210.4(c)(5) has been added to cover instances of termination of enrollments due to the closing of a financial institution without successor.

Changes have been made to § 210.6(e) to reflect that the Federal Reserve Bank will now be required to make the amount specified in a nonbenefit payment available for withdrawal from a financial institution's books on the payment date, rather than the opening of business on the payment date. This is consistent with current usage in the commercial world and other Treasury programs such as *Treasury Direct.* Treasury has always required that benefit and salary payments be available to the recipient at the opening of business on the payment date, and will continue with this policy for these payments only.

A parallel change has been made to § 210.7(d) which requires a financial institution to make the amount specified in a nonbenefit payment instruction available on the payment date.

Section 210.8 has been added to establish the framework for sending prenotification messages to financial institutions prior to the first payment. Before an initial payment is to occur, the Government may send the financial institution a prenotification message to alert it that an ACH payment has been authorized. For consistency with other areas of this regulation, the phrase in § 210.8(d) "post the payment" has been changed to read "make the payment available." Prenotification requires verification by the financial institution of the accuracy of the account information. When prenotifications are used, information relating to the ACH payment, except the amount, will be provided so that the information can be verified by the financial institution.

Commenters suggested that prenotifications be required for all Government ACH payments. Operational constraints, within the Financial Management Service and Federal program agencies, preclude making prenotifications mandatory. This regulation now will permit the use of prenotifications and will require the appropriate responses to them from financial institutions, while retaining the ability to expand the use of prenotification as the Service and agency operational systems are modified to permit using prenotifications.

Policy determinations regarding the use of prenotification may be made from time to time by the Service. Prenotification procedures will be issued by the Service.

A new Subpart C has been added to establish the framework by which Federal Government employees may make discretionary allotment payments directly from their wage and salary payments by ACH to a third party account.

Changes to policies and operating procedures may be issued by the Financial Management Service as needed in The Green Book on Direct Deposit or other communications.

Discussion of Comments

Sec. 210.2—Definitions

The proposed regulations defined "business day" as any day on which the Federal Reserve Bank of the district is open to the public.

The majority of the commenters stated that "business day" and "banking day" should be defined as "any day on which the financial institution is open for business." To respond to the comments, the "banking day" and "business day" definitions have been changed to conform to the Federal Reserve Board's definitions under Regulation CC (53 FR 19434).

The proposed rule defined "financial institution" to mean "bank, savings bank, savings and loan association, credit union, or similar institution. Where a financial institution utilizes the services of a correspondent bank, the term financial institution shall include a designated correspondent." The majority of the commenters objected to including the term "correspondent bank" due to inherent risks and responsibilities of the receiving depository institution. The reference to a correspondent bank has been deleted from the definition.

The "nonbenefit payment" definition has been expanded to include other types of Government payments that may be made by the ACH Method.

Commenters raised concern about the language of § 210.7: financial institutions shall make the amount of a recurring benefit or Federal salary payment ". . . available for withdrawal or other use by the recipient by the opening of business on the payment date." Several commenters stated that under the Federal Reserve Board's Regulation CC the payment does not have to be available until the next day after receipt. Regulation CC states that it does not override Treasury regulations or ACH association rules that require prompter availability.

A new § 210.8 is included to establish a framework for sending prenotification messages to financial institutions prior to receipt of payment to be used at the option of the Financial Management Service (a bureau of the United States Department of the Treasury). Commenters suggested that prenotification be required for all Government ACH payments. Operational constraints, both within the Financial Management Service and Federal program agencies, preclude making prenotification a requirement. This regulation will now permit the use of prenotifications and require the appropriate response to them from financial institutions.

Some comments expressed concern over the liability of financial institutions regarding verification of enrollments. No changes were made to § 210.11(b) as the regulations provide that financial institutions are not liable when the initial enrollment was not made by the financial institution.

Subpart C—Discretionary allotments.

One commenter was of the opinion that discretionary allotments were mandatory. Discretionary allotments are not mandatory and may be made for any purpose that is approved by the agency head consistent with existing regulations (210.17(a)).

The proposed language on collection and reclamation of discretionary allotment payments (210.18(c)) has been deleted. Federal salary discretionary allotments, like all nonbenefit payments, are not subject to reclamation.

Treasury has determined that this is not a major rule as defined by Executive Order 12291. Accordingly, a regulatory impact analysis is not required. It is hereby certified pursuant to the Regulatory Flexibility Act that this revision will not have a significant economic impact on a substantial number of small entities. Accordingly, a Regulatory Flexibility Act analysis is not required.

List of Subjects in 31 CFR Part 210

Automated Clearing House, banks, banking, electronic funds transfer, Federal Reserve System.

Accordingly, 31 CFR Part 210 is amended as follows:

1. The Table of Contents is revised to read as follows:

Subpart A—General

Sec.
210.1 Scope of regulations.
210.2 Definitions.
210.3 Policy for payments by the Automated Clearing House Method.
210.4 Recipients.
210.5 The Federal Government.
210.6 Federal Reserve Banks.
210.7 Financial institutions.
210.8 Prenotification.
210.9 Timeliness of action.
210.10 Liability of, and acquittance to, the United States.
210.11 Fraud.

Subpart B—Repayment of Benefit Payments

210.12 Death or legal incapacity of recipients or death of beneficiaries.
210.13 Collection procedures.
210.14 Notice to Account Owners of collection action.
210.15 Erroneous death information.

Subpart C—Discretionary Salary Allotments

210.16 General.
210.17 Criteria and standards.
210.18 Method of payment.

2. The authority citation for Part 210 is revised to read as follows:

Authority: 5 U.S.C. 5525; 12 U.S.C. 391; 31 U.S.C. 321; and other provisions of law.

3. Section 210.1 is revised to read as follows:

§ 210.1 Scope of regulations.

This part governs Federal Government payments (benefit and nonbenefit) made by the Automated Clearing House (ACH) Method through Federal Reserve Banks, and financial institutions to recipients maintaining accounts at financial institutions. It describes the procedures to be used, defines the obligations and responsibilities of the participants in ACH payments, and states terms of a contract between the Federal Government and those participants. It also prescribes the liabilities of financial institutions to the Federal Government arising from payments to deceased or incompetent recipients, and deceased beneficiaries of Federal benefit payments. Regulations promulgated by the Bureau of the Public Debt governing *Treasury Direct* payments made by the ACH Method for principal and interest on Government securities can be found at Part 357 of this title; regulations promulgated by the Bureau of the Public Debt governing State and Local Government series payments made by the ACH for principal and interest on Government securities can be found at Part 344 of this title.

4. The paragraph designations for § 210.2 are removed. The definitions for "Payment", "Payment instruction", and "Recipient" are revised. The definitions for "Allotment", "Banking day", "Business day", "Discretionary allotment", "Employee", "Nonbenefit payment", and "Prenotification" are added to read as follows:

§ 210.2 Definitions.

* * * * *

"Allotment" means a recurring specified deduction from pay of an employee for a legal purpose authorized by an employee to be paid to a recipient.

"Allotter" means the employee from whose pay an allotment is made.

* * * * *

"Banking day" means that part of any business day on which an office of a financial institution is open to the public for carrying out its banking functions.

"Business day" means any day other than a Saturday, Sunday or legal holiday.

"Discretionary allotment" means an amount that a Federal Government employee is permitted, by the employing Federal agency, to direct voluntarily to be deducted from his or her net salary amount and paid to a recipient. The aggregate amount of discretionary allotments may not exceed the net pay due the employee for each pay period after all deductions required by law are subtracted.

"Employee" means an employee of a Federal Government agency, unless otherwise provided.

* * * * *

"Nonbenefit Payment" means any Federal Government payment other than a benefit payment. Nonbenefit payments can be one-time or recurring payments, including but not limited to: vendor payments, Internal Revenue Service tax refunds, Federal Government salary payments, and allotments therefrom, grants, travel disbursements and reimbursements, loans, and payments of principal and/or interest related to United States savings bonds, notes, and other savings-type securities, and payments of service fees to organizations qualified to issue and/or redeem savings bonds.

* * * * *

"Payment" means a sum of money which is transferred to a recipient in satisfaction of an obligation. A payment includes any Federal Government benefit, or nonbenefit payment.

* * * * *

"Payment instruction" means an order issued by the Federal Government for the payment of money under this part. A payment instruction may be contained on:

(1) A letter, memorandum, telegram, bill, invoice, computer printout or similar record, or

(2) Any form of nonverbal communication, registered upon magnetic tape, disc or any other medium designed to capture and contain in durable form conventional signals used to electronically communicate messages.

"Prenotification" means a zero dollar ACH payment instruction. It is used to ensure that, before actual payment instructions are sent through a Federal Reserve Bank, the financial institution will be able to credit payments accurately to the designated account. A prenotification, if used, will precede the relevant first dollar payment instruction by at least ten (10) days and is constructed from a recipient's enrollment to receive an ACH payment.

* * * * *

"Recipient" means a person, corporation, or other public or private entity which is authorized by a program agency to receive benefit or nonbenefit payments from the Federal Government. Recipient includes a natural person or entity authorized by a program agency to receive benefit or nonbenefit payments from the Federal Government.

5. Section 210.4 is amended by adding paragraph (c)(5) to read as follows:

§ 210.4 Recipients.

* * * * *

(c) * * *

(5) The closing of a financial institution, whether voluntarily or involuntarily, without successor.

* * * * *

6. Section 210.6(e) is revised to read as follows:

§ 210.6 Federal Reserve Banks.

* * * * *

(e) A Federal Reserve Bank receiving a payment instruction from the Federal Government shall make the amount specified in the payment instruction available to the financial institution, referred to in paragraph (d) of this section, on the payment date. In the case of a Federal Government benefit or salary payment, the amount of the payment shall be made available by the opening of business on the payment date.

* * * * *

7. Section 210.7(d) is revised to read as follows:

§ 210.7 Financial institutions.

* * * * *

(d) A financial institution receiving a nonbenefit (except Federal salary) payment instruction under this part shall credit the amount of the payment to the designated account of the recipient on its books, and it shall make the amount available on the payment date. In the case of a Federal Government salary or benefit payment instruction, the financial institution shall make the amount of the payment available for withdrawal not later than the opening of business on the payment date.

"Available" in this paragraph means accessible through any means of access provided by a financial institution to its customers for the recipients' type of account, for example, automated teller machines owned by the financial institution, or automatic transfers from the recipient's account. If the payments or any related information received by the financial institution from a Federal Reserve Bank do not balance; are incomplete; are clearly erroneous on their face; or are incapable of being processed, the financial institution, after assuring itself that neither it nor any of its agents are responsible, shall immediately notify the Federal Reserve Bank in order that it may deliver corrected information to the financial institution.

* * * * *

8. Section 210.8 is redesignated as § 210.9.

9. A new § 210.8 is added to Subpart A to read as follows:

§ 210.8 Prenotification.

(a) Regardless of whether it has participated in an enrollment, a financial institution's acceptance and handling of a prenotification or a payment issued pursuant to this part shall constitute its agreement to the provisions of this part.

(b) At the discretion of the Service, a prenotification may be originated for any ACH payment.

(c) The financial institution shall respond to the prenotification message by midnight of the banking day following the banking day of receipt of such prenotification if the information contained in the message does not agree with the corresponding record of the financial institution, or if for any reason the financial institution will not be able to credit the payment in accordance with this part.

(d) If a financial institution does not respond to a prenotification message within the specified time period, the financial institution shall be deemed to have accepted the prenotification and to have warranted to the Federal Government that it shall make the payment available on time to the account specified in the prenotification.

10. Section 210.9 is redesignated as § 210.10.

11. Section 210.11 is amended by revising paragraph (b) to read as follows:

§ 210.11 Fraud.

* * * * *

(b) A financial institution shall verify the identity of any person who initiates

and executes an enrollment through such financial institution. The Federal Government shall verify the identity of any person who presents an enrollment to the Federal Government without prior review or execution by a financial institution. A financial institution that executes an enrollment in which the recipient's or beneficiary's signature is forged or other information is falsified shall be liable to the Federal Government for all payments made in reliance thereon, except for the case where the beneficiary was deceased at the time the recipient executed the enrollment and if the financial institution had no knowledge of the beneficiary's death. However, once the financial institution has provided written or electronic notice to the program agency that a payment certified by the program agency has not been received by the correct recipient or beneficiary, it shall not be liable for any payments based on the forged, false, or fraudulent information which are certified for payment after the date such written or electronic notice is received by the program agency.

12. Subpart C is added to read as follows:

Subpart C—Discretionary Salary Allotments

Sec.
210.16 General.
210.17 Criteria and standards.
210.18 Method of payment.

§ 210.16 General.

This subpart applies only to discretionary allotments. This regulation does not supersede, and shall not be used to circumvent, the requirements of particular statutes, Executive Orders or other executive branch regulations; for example, see Office of Personnel Management regulations at 5 CFR Part 550, Subpart C implementing 5 U.S.C. 5525. Savings allotments are governed under the regulations at 31 CFR Part 209.

§ 210.17 Criteria and standards.

(a) Discretionary allotments may be made for any purpose determined appropriate by the head of an agency and which are consistent with Subchapter III of Chapter 55 of Title 5, United States Code, and Part 550 Subpart C of Chapter 1 of Title 5, Code of Federal Regulations.

(b) Discretionary allotment payments shall be made in accordance with the schedule established by the program agency, provided such allotment payments are not issued until the related earnings have accrued.

§ 210.18 Method of payment.

(a) Payment of discretionary allotments shall be made following the policy and procedures outlined in 31 CFR Part 210, Subpart A.

(b) Discretionary allotments shall be made available by the allotter to the recipient on the payment date in accordance with § 210.7(d).

W.E. Douglas,

Commissioner.

Dated: February 21, 1989.

[FR Doc. 89-11435 Filed 5-11-89; 8:45 am]

BILLING CODE 4810-35-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD1 89-018]

Connecticut River Raft Race

AGENCY: Coast Guard, DOT.

ACTION: Notice of implementation of regulations.

SUMMARY: This notice puts into effect the permanent regulations, 33 CFR 100.102, for the Connecticut River Raft Race between 10:00 a.m. and 2:00 p.m. on July 29, 1989. The regulations in 33 CFR 100.103 are needed to control vessel traffic within the immediate vicinity of the event due to the confined nature of the waterway and the expected congestion at the time of the event. The regulations restrict general navigation in the area for the safety of life and property on the navigable waters during the event.

EFFECTIVE DATES: The regulations are effective from 10:00 a.m. until 2:00 p.m. on Saturday, July 29, 1989 and annually thereafter during the same time period on the first Saturday of August or as specified in the Coast Guard Local Notice to Mariners and a Federal Register Notice.

FOR FURTHER INFORMATION CONTACT: Lieutenant Luke Brown, (617) 223-8311.

SUPPLEMENTARY INFORMATION: The Connecticut River Raft race is held annually on the Connecticut River between Hurd State Park and Haddam Meadows State Park. Approximately 100 watercraft of all description are expected to participate along with some 500 spectator craft. All participating vessels will be unpowered; traditionally, the event attracts a great number of homemade rafts of unique design. The event will be patrolled by the Coast Guard, state and local law enforcement organizations, and sponsor provided patrol craft. Members of the Coast Guard Auxiliary may be present to advise vessels of the regulations. The regulatory text may be found in 33 CFR 100.102.

DRAFTING INFORMATION: The drafters of this notice are LT L. BROWN, project officer, First Coast Guard District Boating Safety Division, and LT J.B. GATELY, project attorney, First Coast Guard District Legal Division.

Dated: April 27, 1989.

R.I. Rybacki,

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

[FR Doc. 89-11392 Filed 5-11-89; 8:45 am]

BILLING CODE 4910-14-M

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33 CFR Part 165

[CGD188-106]

Safety Zone; Portsmouth Harbor, Portsmouth, NH

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a permanent safety zone to safeguard vessels carrying Liquified Petroleum Gas (LPG) to a facility along the Piscataqua River in Newington, New Hampshire. This safety zone is necessary to safeguard the LPG carriers and minimize the effects of the movement of these vessels on the maritime and recreational boating communities. This regulation will eliminate the need for written safety zones for each movement of the LPG carriers.

EFFECTIVE DATE: June 12, 1989.

FOR FURTHER INFORMATION CONTACT: Lieutenant Scott Kuhaneck at Marine Safety Office, Portland at (207) 780-3251.

SUPPLEMENTARY INFORMATION: On February 22, 1989, the Coast Guard published a notice of proposed rule making in the **Federal Register** for these regulations (54 FR 7571). Interested persons were requested to submit comments and no comments were received.

Drafting Information

The drafters of this notice are Lieutenant Scott Kuhaneck, project officer, Portland Marine Safety Office and Lieutenant John Gately, project attorney, First Coast Guard District Legal Office.

Discussion of Comments

No comments were received concerning this regulation.

Economic Assessment and Certification

This action has been analyzed in accordance with the principles and

criteria contained in Executive Order 12612, and it has been determined that this final rule does not have sufficient federalism implications to warrant a Federalism Assessment.

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact has been found to be so minimal that a full regulatory evaluation is unnecessary. This regulation is strictly administrative in nature and will reduce the number of written safety zones that Captain of the Port, Portland is required to submit.

Since the impact of this proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

Final Regulations

In consideration of the foregoing, Part 165 of Title 33, Code of Federal Regulations is amended as follows:

PART 165—[AMENDED]

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1225; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5.

2. Section 165.103 is added to read as follows:

§ 165.103 Safety Zone; Portsmouth Harbor, Portsmouth, New Hampshire.

(a) The following areas are established as safety zones during the specified conditions:

(1) For all inbound tank vessels carrying Liquified Petroleum Gas (LPG), the waters bounded by the limits of the Piscataqua River Channel and extending 1000 yards ahead and 500 yards astern of an LPG tanker while the vessel transits Bigelow Bight, Portsmouth Harbor and the Piscataqua River to the LPG receiving facility at Newington, New Hampshire. This safety zone remains in effect until the LPG carrier is safely moored at the LPG receiving facility on the Piscataqua River.

(2) For all outbound tank vessels carrying LPG, the waters bounded by the limits of the Piscataqua River Channel and extending 1000 yards ahead and 500 yards astern of an LPG tanker while the vessel departs the LPG facility and transits the Piscataqua River, Portsmouth Harbor and Bigelow Bight. This safety zone remains in effect until the LPG carrier passes Gunboat Shoal Lighted Bell Buoy "1" (LLNR 185) located in Bigelow Bight.

(b) The general regulations governing safety zones contained in 33 CFR 165.23 apply.

(c) The Captain of the Port will notify the maritime community and local agencies of periods during which this safety zone will be in effect by providing advance notice of scheduled arrivals and departures of LPG vessels via the telephone and/or Marine Safety Information Radio Broadcasts.

Dated: May 8, 1989.

R.I. Rybacki,

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

[FR Doc. 89–11395 Filed 5–11–89; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR PART 165

[COTP Hampton Roads, Reg. 89–15]

Safety Zone; Chesapeake Bay, off Fort Story, Virginia Beach, VA

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a safety zone around a U.S. Navy exercise off Fort Story in Virginia Beach, Virginia. The exercise is scheduled to begin May 5, 1989 and end May 13, 1989. The safety zone is intended to minimize the risk of collision between Naval and other military vessels involved in the exercise and other vessels. The Captain of the Port may restrict access to the safety zone in the interest of safety if necessary. These restrictions may include, but are not limited to, closing the zone to non-military traffic during unusually heavy military traffic periods, and closing the safety zone to non-military traffic for indefinite periods of time. Mariners are required to contact the Captain of the Port or his representative to determine what restrictions, if any, shall be observed during the transit. Although vessels will be permitted to transit the safety zone, subject to any restrictions imposed by the Captain of the Port, anchoring, fishing, trawling, crabbing, dragging, diving, or otherwise loitering within the safety zone will be prohibited. In addition, all persons or vessels entering or operating within the safety zone will be required to immediately obey any direction or order of the Captain of the Port or his designated representative.

EFFECTIVE DATE: These regulations are effective from 5:00 a.m., May 5, 1989 to 11:59 p.m., May 13, 1989, unless terminated sooner by the Captain of the Port Hampton Roads, Virginia.

FOR FURTHER INFORMATION CONTACT: Lieutenant (Junior Grade) G.E. Magrane at Coast Guard Marine Safety Office Hampton Roads, 200 Granby Street, Norfolk, Virginia 23510–1888, telephone number (804) 441–3299. Normal working hours are between 7:30 a.m. and 4:00 p.m., Monday through Friday, except holidays.

SUPPLEMENTARY INFORMATION: On April 13, 1989, the Coast Guard published a notice of proposed rulemaking in the **Federal Register** for these regulations (54 FR 14826). Interested persons were requested to submit comments. No comments were received.

Drafting Information

The drafters of this notice are Lieutenant (Junior Grade) G.E. Magrane, project officer, and Lieutenant Commander R.K. Kutz, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Comments

Although no comments were received, the Coast Guard believes that additional regulatory language is necessary concerning how to contact the Captain of the Port or his representative to determine if any access restrictions have been imposed. Consequently, paragraph 165.T0515(b) has been expanded to provide a more thorough definition of "representative of the Captain of the Port" and to provide contact information so interested persons can obtain information on what additional restrictions, if any, have been placed on vessels desiring to transit the zone. In addition, a new paragraph 165.T0515(c)(4) has been added, requiring all vessels desiring to transit the zone to contact one of the representatives listed in paragraph (b) for information on any access restriction that may be in effect. Finally, paragraph 165T0515(d) has been renamed paragraph (e), and a new paragraph (d) has been added, stating that the Coast Guard will issue a Broadcast Notice to Mariners whenever additional access restrictions have been imposed.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

Final Regulations

In consideration of the foregoing, Subpart D of Part 165 of Title 33, Code of

Federal Regulations, is amended as follows:

PART 165—[AMENDED]

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05-1(g), 6.04-1, 6.04-6 and 33 CFR 160.5.

2. A new § 165.T0515 is added to read as follows:

§ 165.T0515 Safety Zone: Chesapeake Bay, off Fort Story, Virginia Beach, Virginia

(a) *Location.* The following area is a safety zone: The waters of the Chesapeake Bay bounded by the shoreline and a line connecting the following points:

Latitude	Longitude
36°55'52.0" N	76°02'15.0" W.
36°57'07.0" N	76°03'53.5" W.
36°57'29.0" N	76°03'44.5" W.
36°57'11.5" N	76°02'45.0" W.
36°55'55.5" N	76°01'48.5" W.

(b) The "representative of the Captain of the Port" is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port, Hampton Roads, Virginia to act on his behalf. The following officers have been or will be designated by the Captain of the Port: the coxswain or Officer-in-Charge on each vessel flying the Coast Guard ensign enforcing the safety zone and the Duty Officer at Coast Guard Marine Safety Office Hampton Roads in Norfolk, Virginia.

(1) The Captain of the Port can be contacted via the Chief, Port Operations department at telephone number (804) 441-3299.

(2) The Duty Officer at Coast Guard Marine Safety Office Hampton Roads can be contacted at telephone number (804) 441-3314.

(3) Coast Guard vessels enforcing the safety zone on scene may be contacted on VHF-FM channels 13 or 16.

(c) *Regulations:* (1) Persons and vessels may transit the safety zone in accordance with any Captain of the Port imposed restrictions, but no person or vessel other than those participating in the U.S. Navy exercise may anchor, fish, trawl, crab, drag, dive, or otherwise loiter within the zone.

(2) The Captain of the Port may restrict access to or close the safety zone to non-exercise vessels if he deems it necessary in the interest of safety.

(3) All persons and vessels in the vicinity of the safety zone shall immediately obey any direction or order of the Captain of the Port or a representative of the Captain of the Port.

(4) Before entering the safety zone a vessel operator shall contact the Captain of the Port or a representative of the Captain of the Port to determine what restrictions, if any, have been imposed on vessels transiting the safety zone. The Captain of the Port or his representative may be contacted by radio, telephone, or by coming alongside a Coast Guard vessel patrolling the perimeter of the safety zone.

(d) The Captain of the Port will issue a Marine Safety Information Broadcast Notice to Mariners to notify the maritime community whenever additional access restrictions have been imposed.

(e) *Effective Dates:* These regulations are effective from 5:00 a.m., May 5, 1989 to 11:59 p.m., May 13, 1989, unless terminated sooner by the Captain of the Port Hampton Roads, Virginia.

Dated: May 8, 1989.

E.K. Johnson,

Captain, U.S. Coast Guard, Captain of the Port Hampton Roads.

[FR Doc. 89-11393 Filed 5-11-89; 8:45 am]

BILLING CODE 4910-14-M

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33 CFR Part 165

(CGD7 88-46)

RIN 2115-AD25

Regulated Navigation Area; Kings Bay, GA

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is revising the language in 33 CFR 165.730 to more accurately describe the boundaries of the previously established Regulated Navigation Area.

DATES: This regulation becomes effective on May 12, 1989. Comments on this regulation must be received on or before June 12, 1989.

ADDRESS: Comments should be mailed to Commander (oan), Seventh Coast Guard District, 909 SE. First Ave., Miami, FL 33131-3050. The comments will be available for inspection and copying at 909 SE. First Ave., Room 406, Miami, FL. Normal office hours are between 7:00 a.m. and 4:00 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Lauzon, (305) 536-5621.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a Notice of Proposed Rule Making was not published for this regulation and good cause exists for making it effective in less than 30 days from the date of publication. Following normal rule making procedures would have been unnecessary. The revisions to the regulations should have little or no economic impact and no adverse comments are expected concerning the terms of the revised regulation.

Although this regulation is published as a final rule without prior notice, an opportunity for public comment is nevertheless desirable to ensure that the regulation is both reasonable and workable. Accordingly, persons wishing to comment may do so by submitting written comments to the office listed under "ADDRESS" in this preamble. Commenters should include their names and addresses, identify the docket number for the regulations, and give reasons for their comments. Based upon comments received, the regulation may be changed.

Drafting Information

The drafters of this regulation are Lieutenant Junior Grade M.M. Lauzon, project officer, Seventh Coast Guard District Aids to Navigation Branch, and Lieutenant Commander S.T. Fuger, Jr., project attorney, Seventh Coast Guard District Legal Office.

Discussion of Regulation

The original rule was requested by the U.S. Navy to minimize the effects of wakes on the drydock ARDM 1 OAKRIDGE, moored in King's Bay, Georgia, 500 yards from the Atlantic Intracoastal Waterway. Wakes cause vessels inside the drydock to shift on their keelblocks. The regulation established a bare steerageway speed zone in the vicinity of King's Bay and Cumberland Sound. The restriction eliminates a substantial hazard to workers caused by vessel movement in the drydock.

The original Notice of Proposed Rule Making was published in the **Federal Register** on May 17, 1984 (49 FR 20870), and the Final Rule became effective on December 10, 1984 (49 FR 44632, Nov. 8, 1984).

This revision defines the boundaries of the zone in terms of latitude and longitude. The original rule defined the boundaries by the positions of specific aids to navigation. However, the aids to navigation system in the area has been changed, leaving the boundaries in the original rule incorrectly stated. The geographic area of the zone defined by this rule is the same as that defined by the original rule, except that the boundary point formerly defined by Lighted Buoy 45 has been slightly shifted

to coincide with the new configuration of the dredged waterway.

Additionally, the title of the original rule did not specify the type of regulation involved. This revision adds the words "Regulated Navigation Area" to the title.

Economic Assessment and Certification:

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this amendment has been found to be so minimal that further evaluation is unnecessary. The Coast Guard certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Federalism

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Vessels, Waterways.

Final Regulation:

In consideration of the foregoing, Part 165 of Title 33, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5.

2. Section 165.730 is revised to read as follows:

§ 165.730 King's Bay, GA—Regulated navigation area.

Vessels transiting in the water bounded by the line connecting the following points must travel no faster than needed for steerageway:

Latitude	*Longitude*
30°47'58.5" N	081°29'24.5" W
30°46'44.0" N	081°29'18.4" W
30°47'35.0" N	081°30'16.5" W

and thence to the point of beginning.

Martin H. Daniell,

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

February 7, 1989.

[FR Doc. 89-11394 Filed 5-11-89; 8:45 am]

BILLING CODE 4910-14-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3560-8]

Approval and Promulgation of State Implementation Plan; North Dakota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the revision to the Implementation Plan for the Control of Air Pollution for the State of North Dakota. The revisions were submitted on January 26, 1988, by the Governor of North Dakota. The revisions established new regulations and revised existing regulations and procedures to make them equivalent to the New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPs), Prevention of Significant Deterioration (PSD), Stack Heights and Visibility. The revisions also updated existing State rules and provided new state rules for oil and gas production facilities. This action only addresses the PSD rule revisions, the updating of existing State rules and the addition of the new rules for oil and gas production facilities. This action does not address the new and revised rules for NSPS, NESHAPs, Stack Heights or Visibility. These latter items have been addressed in separate actions.

EPA proposed to approve this action in 53 FR 48544, December 1, 1988. No comments were received.

EFFECTIVE DATE: The rule will become effective on June 12, 1989.

FOR FURTHER INFORMATION CONTACT: Laurie Ostrand, Environmental Protection Agency, Denver Place, Suite 500, 999 18th Street, Denver, Colorado 80202, (303) 293-1814, FTS 564-1814.

SUPPLEMENTARY INFORMATION: On January 26, 1988, the Governor of North Dakota submitted to EPA revisions to the Implementation Plan for the Control of Air Pollution for the State of North Dakota. The revisions established new regulations and revised existing regulations and procedures to make them equivalent to NSPS, NESHAPs, PSD, Stack Heights and Visibility. The revisions also updated various existing State rules and provided new state rules for oil and gas production facilities. This action only addresses the PSD rule revisions, the updating of various existing State rules and the addition of the new rules for oil and gas production facilities. A more detailed discussion of the revisions follows below.

1. Chapter 33-15-01—General Provisions

The definition of "Trade waste" (33-15-01-04(36)) was revised by adding the term "wood-containing preservatives" to the list of what constitutes a "trade waste".

A change was made in the malfunctions regulation (33-15-01-13(2)). Prior to this change, the malfunction subsection required companies to notify the State immediately concerning any malfunction that was expected to cause a violation of any article or other applicable rules and regulations of the State. This proved to be unworkable in some situations, and, as a matter of practice, the State had been requiring notifications only if the malfunction was expected to last greater than 24 hours or if the discharge of the contaminant posed an immediate danger. The regulations have been amended to require sources to report a malfunction to the State as soon as possible if the malfunction is expected to last longer than 24 hours and cause the emission of air contaminants in violation of this article or other applicable rules and regulations of the State. The regulation has also been amended to require immediate notification to the State for any malfunction that would threaten health or welfare, or pose an imminent danger.

A subsection on continuous emission monitoring system (CEM) failures (33-15-01-13(3)) was added. This addition requires that when a CEM fails, an alternative method acceptable to the State for measuring or estimating emissions must be undertaken as soon as possible. In addition, timely repair of the emission monitoring system must be made.

The State added a new section on the confidentiality of records (33-15-01-16) to clarify the State's procedure concerning the submittal of confidential information. This section addresses public inspection, information submitted as trade secrets, accepted trade secret claims, rejected trade secret claims, appeal of nondisclosure claims, retention of confidential information, maintenance of log, transmittals of confidential information, and relationship to issuance of permits.

2. Chapter 33-15-02—Ambient Air Quality Standards

There were numerous changes to this Chapter to bring the wording of the regulation up-to-date and to clarify the Air Quality Guidelines the State follows.

The State rescinded several Ambient Air Quality Standards (AAQS) which were no longer used or necessary. The

rescinded AAQS included settled particulate (dustfall), coefficient of haze, reactive sulfur (sulfation), suspended sulfate, sulfuric acid mist, sulfur trioxide or any combination thereof, and hydrocarbons.

The State also amended its hydrogen sulfide (H_2S) AAQS. Prior to the regulation change, there were two AAQS for H_2S. Both standards were based on ½-hour concentrations. This proved to be cumbersome for dispersion modeling purposes, as well as general review of monitoring data. The State changed the H_2S standard to a 1-hour standard that it believes is as stringent as the two ½-hour standards.

The State deleted Table 2—Methods of Air Contaminant Measurement. Methods of measurement have been incorporated by reference into 33-15-02-05, Methods of Sampling and Analysis.

3. Chapter 33-15-03—Restriction of Emission of Visible Air Contaminants

The State added provisions into 33-15-03-01 that require: (1) existing sources to comply with the visible air contaminant restrictions for new installations in 33-15-03-02 when technology and feasibility develop; and (2) existing sources that install control technology capable of meeting the restrictions of 33-15-03-02 to meet those restrictions. The State also added provisions to allow parties aggrieved by the above two items the ability to request a hearing before the department, according to Article 33-22 and North Dakota Century Code Chapter 28-32.

In Method of Measurement, 33-15-03-05, the State defined "per hour" for Reference Method 9. The State also added to this subsection a sentence that allows sources to use a continuous opacity monitor to determine compliance with visible emission standards when Reference Method 9 opacity readings are not available.

For clarification, additional minor wording changes were incorporated into this Chapter.

4. Chapter 33-15-04—Open Burning Restrictions

Minor changes were adopted in 33-15-04-02. One of these changes includes the addition of the requirement that open burning comply with the Rural Fire Mitigation Action Guide included in the North Dakota Rural Fire Contingency Plan.

Language in 33-15-04-02(7)(c) and (8)(c), which restricted open burning between three hours after sunrise and three hours before sunrise, was omitted. Deleting this language allows open burning during times of the day when dampness and calm conditions prevail, and thus provides for safer burning conditions.

Language was also added (33-15-04-02(8)(c) and (d)) to restrict the burning of liquid hydrocarbons near Class I areas if it will adversely affect the ambient air or visibility of such areas, except in emergencies.

5. Chapter 33-15-05—Emissions of Particulate Matter Restricted

The State added 33-15-05-01(2)(b) and 33-15-05-02(2)(g) to provide a mechanism for parties aggrieved by restrictions applied on them to request a hearing, according to Article 33-22 and North Dakota Century Code Chapter 28-32.

The maximum allowable emissions of particulate matter from fuel burning equipment used for indirect heating (33-15-05-02) was amended to exempt the following from the particulate standard: (1) sources with a heat input of not more than ten million BTU/hour and (2) sources with multiple boilers with a total aggregate heat input of not more than ten million BTU/hour. Previous to this revision, the rule had exempted sources with a heat input of less than five million BTU/hour or sources with multiple boilers each with heat inputs of five million BTU/hour or less and a total aggregate heat input of less than ten million BTU/hour.

Subdivision (f) was added to 33-15-05-02 and requires existing sources whose heat input is greater than 250 million BTU/hour and who are equipped with state-of-the-art control technology to comply with the particulate emission limitation of the fossil fuel-fired NSPS when directed by the State.

6. Chapter 33-15-07—Control of Organic Compounds Emissions

The State amended this Chapter to correct the overlap that existed between this Chapter and the NSPS Chapter concerning storage tanks. Storage tanks are now incorporated in the NSPS for storage tanks (33-15-12-01(8)).

7. Chapter 33-15-10—Control of Pesticides

The State added to this Chapter paragraph 33-15-10-02(3) to highlight the disposal requirements for surplus pesticides and empty pesticide containers.

8. Chapter 33-15-11—Prevention of Air Pollution Emergency Episodes

The State made minor wording changes in this Chapter to update its regulations.

9. Chapter 33-15-14—Designated Air Contaminant Sources, Permit to Construct, Permit to Operate

This Chapter was amended by adding alcohol plants to the list of designated air contaminant sources (33-15-14-01(1)(x)). A paragraph was also added that prohibits permits to construct from being transferred without prior approval by the State (33-15-14-02(11)). The permit to construct and permit to operate fees were compiled into one section (33-15-14-04) and updated. The fees were adopted as follows:

1. The filing fee of $75.00 or $100.00 was increased to $150.00 for all sources.

2. A new classification system was developed based upon the frequency of inspections and the amount of staff time spent on projects. Annual costs were adjusted based upon the amount of staff time involved with the various classifications.

3. An addition was made that allows the State to collect annual fees for sources operating under a permit to construct that have not yet received a permit to operate.

The State also changed the permit exemption limit (33-15-14-05(1)(b) and (c)) for fuel burning equipment to be consistent with the language in the particulate emission rate exemption discussed in Chapter 33-15-05. Previous to the revision, fuel burning equipment, other than smokehouse generators, which had a heat input of not more than ten million BTUs/hour (and burned gaseous fuels containing not more than 2 and 5-tenths grain H_2S per 100 standard cubic feet; or distillate oil) or one million BTU/hour (and burned residual oil); or 350,000 BTU/hour (and burned solid fuel), were exempt from obtaining a permit to construct or operate. The rule has been revised to exempt fuel burning equipment, other than smokehouse generators, which meet the following criteria:

(1) The aggregate heat input does not exceed ten million BTU/hour.

(2) The total aggregate heat input from all equipment does not exceed ten million BTU/hour.

(3) The emissions from all equipment do not exceed 25 tons per year of any contaminant.

Finally, the State amended this Chapter to correct the overlap that existed between this Chapter and the NSPS Chapter concerning storage tanks. Storage tank exemptions are now incorporated in the NSPS Chapter (33-15-12).

10. Chapter 33-15-15—Prevention of Significant Deterioration

This Chapter was amended by updating the regulations and making them consistent with Federal regulations. The stack height section (33-15-15-01(3)), was revised by deleting all the stack height regulations from 33-15-15 and referencing the new stack height Chapter (33-15-18).

The State updated the air quality models subdivision (33-15-15-01(4)(f)(1)) by deleting the reference to outdated EPA modeling guidelines and inserting general language on modeling requirements. Dana Mount, Director, Division of Environmental Engineering, submitted a letter of interpretation on June 29, 1987, stating that the general language means the applicant must comply with the requirements of EPA 1986 version "Guidelines on Air Quality Models (Revised)", EPA 450/2-78-027R.

To the subdivision on additional impact analyses (33-15-15-01(04)(i)), the State added language to require evaluation of endangered and threatened species of vegetation and wildlife. To the subdivision on sources impacting federal Class I areas—additional impacts (33-15-15-01(4)(j)), the State clarified the notice requirements to the federal land managers. To the subdivision on Public Participation (33-15-15-01(5)), the State clarified the procedures on public hearings.

11. Chapter 33-15-16—Restriction of Odorous Air Contaminants

In this Chapter, the State made wording changes to clarify the rules. The changes allow a State-certified inspector to determine whether an odor is objectionable.

12. Chapter 33-15-20—Control of Emission from Oil and Gas Production Facilities

The State added this Chapter to establish registration and reporting requirements for oil and gas production facilities. The registration and reporting requirements provide a means to determine if sources are subject to PSD (33-15-15). They also provide requirements for the control of production facility emissions.

The State received numerous public comments, as well as comments from EPA, on the draft regulation revisions. In some instances the State amended its regulations in addressing such comments. EPA feels the State has adequately addressed all of the public comments, as well as EPA comments.

EPA made several interpretations regarding this submittal. The State was notified on June 13, 1988 of such interpretations. In a letter dated June 16, 1988, Dana Mount, Director, Division of Environmental Engineering, confirmed EPA's interpretations. The following are EPA's interpretations:

1. Subsequent to the State revising Chapter 33-15-11, Prevention of Air Pollution Emergency Episodes, 40 CFR 51, Appendix L, was amended to address PM-10 (see 52 FR 24672, 7/1/87). The State submitted draft regulations on March 8, 1988. EPA interprets the State's submittal of the draft regulations as a commitment to revise its regulations as required.

2. Subsequent to the State revising 33-15-15, 40 CFR 51.166, Prevention of Significant Deterioration, was amended to address PM-10 (see 52 FR 24672, 7/1/87). As required by Section 110(a)(2) of the Act, the State must adopt and submit to the [EPA] Administrator, within nine months, a plan to implement, enforce and maintain the PM-10 ambient air quality standards. The State has submitted draft regulations to EPA and held a public hearing to address the PM-10 amendments to 40 CFR 51.166. EPA interprets the State's submittal of draft regulations and the holding of a public hearing as a commitment to revise its regulations as required.

3. Subsequent to the State revising 33-15-15, EPA promulgated Supplement A (1987) to the Guidelines on Air Quality Models on January 6, 1988 (see 53 FR 392). Supplement A (1987) adds four additional models to the Guidelines. Because North Dakota's air quality modeling regulations [33-15-15-01(4)(f)] are written in such a manner as to not preclude the use of Supplement A (1987), EPA interprets the State's rules to mean that Supplement A (1987) and any future additions to the modeling guidelines promulgated by EPA will be utilized by the State to estimate ambient air concentration required under PSD.

4. Regarding Chapter 33-15-20, Control of Emissions from Oil and Gas Production Facilities, EPA would like to point out that it interprets the State's requirement that demonstrations must be performed in accordance with the "North Dakota Guideline for Air Quality Modeling Analyses" in 33-15-20-03(3) to mean that EPA's Guidelines on Air Quality Models (Revised) will also be followed, as appropriate. EPA makes this interpretation because, even though 33-15-20-03(3) specifically references the State's modeling guidelines, it also says that all sources that emit greater than 250 tpy must comply with the State's PSD chapter. In the State's PSD chapter, EPA modeling guidelines are required.

One further interpretation not addressed in the June 13, 1988, letter is with respect to the malfunction notification regulation, 33-15-01-13(2). EPA interprets this regulation as merely a notification requirement for sources that have a malfunction that can be expected to last longer than 24 hours and cause the emission of air contaminants in violation of statutes and regulations. Additionally, EPA interprets that all sources will report a malfunction, regardless of duration, if it would threaten health or welfare, or pose imminent danger. Whether a source is required to report a malfunction or not does not obviate such a source from meeting its obligation to comply with applicable emission limitations and federal and State statutes and regulations.

In addition to the interpretations addressed in the June 13, 1988, letter to the State, EPA also requested the State to commit to correcting a few discrepancies found in the PSD regulations. When EPA reviewed the draft submittal which addressed PM-10, it found a few discrepancies in the State's PSD regulations that had not been detected earlier. The discrepancies are as follows: (1) In 33-15-15-01(2)(a), the following statement appeared, "the provisions of this Chapter do not apply to those counties or other functionally equivalent areas on a contaminant specific basis that exceed the national ambient air quality standard for sulfur dioxide or particulate matter." This is incorrect because PSD applies to those areas that have been designated attainment or unclassifiable for any National Ambient Air Quality Standard (NAAQS) under Section 107 of the Clean Air Act. EPA pointed this out to the State and is requiring the State to amend this paragraph to say that this Chapter applies to areas designated as attainment or unclassifiable for *any* NAAQS. (2) In 33-15-15-01(6)(d), "subsections 5 and 6" should be "subsections 5, 6 and 7. (3) In 33-15-15-02(1), "subdivision d or e" should be "subdivision c or d". Although these discrepancies were noted in a submittal subsequent to the submittal EPA is currently processing, the EPA required the State to commit to correct these deficiencies in order to proceed with this submittal. In a letter dated June 16, 1988, Dana Mount, Director, Division of Environmental Engineering, committed to correct such discrepancies.

EPA is not approving or disapproving the revisions to Chapter 33-15-16, Restrictions of Odorous Air Contaminants. This Chapter is not a part of the federally enforceable SIP, since it

bears no relationship to attainment or maintenance of any NAAQS. (See 44 FR 63102, November 2, 1979.) Likewise, EPA has no basis for approving or disapproving these revisions to the Chapter.

Final action: EPA hereby approves the revisions to the Implementation Plan for the Control of Air Pollution for the State of North Dakota as submitted on January 26, 1988 (except for the additions and revisions to the NSPS, NESHAPs, Stack Height and Visibility regulations which are being addressed in separate actions and the odor regulation which is not a part of the federally enforceable SIP), with the interpretations as discussed and the understanding that the State will correct the discrepancies noted in the PSD regulations.

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

Under Section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by (60 days from date of publication). This action may not be challenged later in proceedings to enforce its requirements. (See Section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Authority: 42 U.S.C. 7401–7642.

Date: March 13, 1989.

James J. Scherer,

Regional Administrator.

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

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7642.

Subpart JJ—North Dakota

2. Section 52.1820 is amended by adding paragraph (c)(18) to read as follows:

§ 52.1820 Identification of Plan

* * * * *

(c) * * *

(18) On January 26, 1988, the Governor of North Dakota submitted revisions to the plan. The revisions established new regulations and revised existing regulations and procedures.

(i) Incorporation by reference:

(A) Revisions to the Air Pollution Control Rules of the State of North Dakota Chapters 33–15–01, 33–15–02, 33–15–03, 33–15–04, 33–15–05, 33–15–07, 33–15–10, 33–15–11, 33–15–14, and 33–15–15, inclusive, and the addition of a new chapter 33–15–20 which were effective on October 1, 1987.

[FR Doc. 89–11423 Filed 5–11–89; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–3565–4]

Approval and Promulgation of Implementation Plan; State of New Mexico; Particulate Matter (PM_{10}) Group II Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: This **Federal Register** notice approves a revision to the New Mexico State Implementation Plan (SIP) that commits the New Mexico Environmental Improvement Division to conduct particulate matter ambient air monitoring, data analyses, reporting, and submittal of control strategies (if any necessary) for the areas which were identified as particulate matter (PM_{10}) Group II areas in the **Federal Register** notice of August 7, 1987 (52 FR 292383). This revision is partially in response to the requirements of the PM_{10} National Ambient Air Quality Standards that were promulgated by the EPA in the **Federal Register** notice of July 1, 1987 (52 FR 24634). This action today only approves the New Mexico PM_{10} Group II SIPs (committal SIPs) for the areas cited in this notice. The EPA will publish its action on the remaining PM_{10} SIPs (including Bernalillo County) under separate notices at a later date.

Today's notice is published to advise the public that the EPA is approving the New Mexico State PM_{10} Group II SIPs. The rationale for this approval is contained in this notice.

DATE: This action will be effective on July 11, 1989, unless notice is received within 30 days that adverse or critical comments will be submitted. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Copies of the State's submittal and other information are available for inspection during normal business hours at the following locations. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least twenty-hours before the visiting day.

SIP New Source Section, Air Programs Branch, Air, Pesticides and Toxics Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 655–7214.

Air Quality Bureau, New Mexico Environmental Improvement Division, P.O. Box 968, Santa Fe, New Mexico, Telephone: (505) 827–0042.

FOR FURTHER INFORMATION CONTACT: Mr. J. Behnam, P.E.; SIP New Source Section, Air Programs Branch, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 655–7214.

SUPPLEMENTARY INFORMATION:

Background

The Clean Air Act requires the EPA Administrator to set and periodically reexamine national ambient air quality standards. Section 108 of the Act directs the Administrator to identify widespread pollutants that endanger public health or welfare and to issue air quality criteria for them. The intent of these air quality criteria is to reflect the latest scientific information useful in indicating the kind and extent of all identifiable effects on public health or welfare that may be expected from the presence of a pollutant in the ambient air. In addition, section 109 requires the Administrator to establish "primary" standards to protect public health and "secondary" standards to protect public welfare for pollutants identified under section 108. Once the Federal standards have been set, section 110 of the Act requires that States submit State Implementation Plans (SIP), which contain control measures needed to attain the health based standards within specific statutory deadlines and to attain standards for welfare effects within a reasonable time.

Statutory Requirements

The Clean Air Act (amended August 1977) establishes a joint State and Federal program to control air pollution. Under sections 108 and 109 of the Act, the EPA is responsible for issuing air quality criteria and promulgating National Ambient Air Quality Standards (NNAQS). The States have primary responsibility for implementing the

NAAQS. Under section 110 of the Act, each State must develop and submit to EPA a plan that provides for attainment and maintenance of each NAAQS as expeditiously as practicable within three years of the approved date of SIP. The State is required to adopt and submit a SIP revision to the EPA within nine months after the promulgation or revision of a primary NAAQS. The EPA must review each SIP and approve or disapprove its provisions. If the State fails to submit a plan, or the EPA finds the plan inadequate, a Federal program may be instituted in place.

In fulfilling the requirements of the Act, the EPA promulgated the particulate matter (PM_{10}) rules on July 1, 1987. The PM_{10} rules replaced the former standards for total suspended particulate matter (TSP) with a new indicator that includes particulate matters with the aerodynamic diameters less than or equal to a nominal 10 micrometers (PM_{10}) as measured by a reference method established by the EPA. The new 24-hour primary (health-based) standards limit PM_{10} to 150 micrograms per cubic meter of air. In addition to the 24-hour standard, a new annual standard is set at 50 micrograms per cubic meter.

PM_{10} SIP Requirements

The EPA implemented the PM_{10} NAAQS under section 110 of the Act. The States and EPA began developing a monitoring network in 1983 to determine the concentrations of PM_{10} at various locations. Initially, the network targeted areas with high concentrations of total suspended particulates (TSP). Since the quantity of good quality ambient PM_{10} data was limited, yet the States had a significant amount of TSP data, EPA developed a procedure for determining the probability that an area would violate the PM_{10} NAAQS. The EPA has placed all the counties in the nation into three groups based on their probability of violating the PM_{10} NAAQS. Under this scheme, the area of each state was classified as Group I, II, or III. The Group I areas are those areas with a high probability of not attaining the standards, Group II are those areas where existing air quality data are not sufficient to determine if they are attaining the standards, and Group III areas are those with a high probability of attaining the NAAQS without revisions to the existing control strategies. The list of PM_{10} Group I and Group II areas was published in the **Federal Register** notice of August 7, 1987 (52 FR 29383).

The States are required to submit SIPs for all areas in Group II within nine months of NAAQS promulgation, but these SIPs need not contain full control strategies and demonstrations of attainment and maintenance. Instead, States may submit "committal" SIPs that supplement the existing SIPs with enforceable commitments to: (a) Gather ambient PM_{10} data, at least to an extent consistent with minimum EPA requirements and guidance; (b) Analyze and verify the ambient PM_{10} data and report 24-hour PM_{10} NAAQS exceedances to the Regional Office within 45 days of each exceedance; (c) When an appropriate number of verifiable 24-hour NAAQS exceedances becomes available or when an annual arithmetic mean above the level of the annual PM_{10} NAAQS becomes available, acknowledge that a nonattainment problem exists and immediately notify the Regional Office; (d) within 30 days of the notification referred to in (c) above, or within 37 months of promulgation, whichever comes first, detemine whether the measures in the exising SIP will assure timely attainment and maintenance of the primary PM_{10} standards, and immediately notify the Regional Office; and (e) Within 6 months of the notification referred to in (d) above, adopt and submit to EPA a PM_{10} control strategy that assures attainment as expeditiously as practicable but no later than three years from approval of the committal SIP.

State Submission

The EPA has identified six Group II areas in the State of New Mexico; namely Bernalillo, Dona Ana, Grant, Sandoval, Sante Fe, and Taos counties. The New Mexico Air Quality Control Act (NMAQCA) allows, by ordinance, "A" class counties and any municipality within an "A" class county to create municipal, county, or joint air quality board to administer and enforce the provisions of the NMAQCA. The City of Albuquerque and Bernalillo county have jointly established such a board for administration and enforcement of NMAQCA because Bernalillo County is an "A" class county. Therefore, the City of Albuquerque and Bernalillo County Air Quality Control Board has submitted a PM_{10} Group II SIP through the Governor's office for Bernalillo county that will be processed by the EPA under a separate action at a later date.

On August 19, 1988, the Governor of New Mexico submitted a comprehensive SIP revision for meeting the requirements of the PM_{10} program (52 FR 24634) including the five Group II areas: Dona Ana, Grant, Sandoval, Sante Fe, and Taos counties. Before the Governor's submission, the New Mexico Environmental Improvement Board adopted part of this plan revision on July 7, 1988, and the remainder on July 8, 1988. The State regulatory amendments were filed on August 1, 1988, at the State Records Center and became effective thirty (30) days after filing. The PM_{10} Group II SIP revision contained (1) area description, (2) monitoring and quality assurance plan, (3) commitments on the procedures and milestones for meeting the Federal mandate, and (4) a letter of commitment from the Director of New Mexico Environmental Improvement Division. The Director's letter fully commits the State to comply with the PM_{10} Group II requirements, and the content of this letter is stated below:

This letter is in reference to PM_{10} Group II State Implementation Plan (SIP) requirements. In response to the requirements of the July 1, 1987 **Federal Register** notice on PM_{10}, the Environmental Improvement Division has prepared a Committal SIP for Group II areas. As expressed in this SIP revision, the Division is committing to carry out all required actions such as monitoring, reporting, emission inventory development, and other tasks necessary to satisfy the SIP requirements for PM_{10} Group II areas.

The specific commitments for monitoring, data analysis, and reporting of the PM_{10} Group II areas are given in the SIP and quoted as follows:

VI. Commitments for Group II areas

At the Group II sites described above the Division commits to the following actions as specified in "Requirements for Group II Areas" in the **Federal Register**, 52 Fed. No. 126, pp. 24681 (July 1, 1987).

1. Monitoring: Unless a different frequency is requested by EPA, the Division will monitor at these sites during every other 24 hour period. Data collection will begin by August 1, 1988. All data will be collected and analyzed as expeditiously as possible. All monitoring will be performed in accordance with standard procedures delineated in 40 CFR Part 53, "Ambient Air Monitoring Reference and Equivalent Methods", and Part 58, "Ambient Air Quality Surveillance for Particulate Matter".

2. Exceedances: The Division will report any exceedances of 24-hour PM_{10} NAAQS to EPA Region VI within 45 days of when the exceedance becomes known to the State.

3. Nonattainment Acknowledgment: The Division will follow the provisions of section 2 of the *PM_{10}* SIP Development Guideline (June 1987) *to determine the attainment status of the Group II areas based on PM_{10}* monitoring data. When it is determined per the above guideline that an area is in nonattainment of the 24-hour or annual PM_{10} NAAQS, the Division will acknowledge the nonattainment status and promptly notify EPA Region VI.

4. SIP Adequacy Determination: Within 30 days of a notification to EPA Region VI of a nonattainment determination, or by August 31, 1990, whichever comes first, the Division will determine whether the measures in the existing SIP will assure timely attainment

and maintenance of the 24-hour and annual average PM_{10} NAAQS and promptly notify EPA Region VI. In making this determination the Division will consider the following factors:

(A) Air quality data will be analyzed to determine if attainment can be demonstrated in accordance with 40 CFR Part 50, Appendix K or the "Guideline on Exceptions to Data Requirements for Determining Attainment of Particulate Matter Standards" in the absence of adequate PM_{10} data.

(B) The existing control strategy will be reviewed to ensure it is fully implemented and enforced. This will include a determination as to whether the provisions of AQCR 801—Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance are adequate to prevent circumvention of particulate matter emission limitations.

(C) Emission inventories and source limitations will be evaluated to determine if increases from actual to allowable emissions could cause exceedances of the PM_{10} NAAQS. By August 31, 1989, the division will prepare the necessary emission inventory to make this determination. The inventory will be prepared according to the procedures and guidelines provided in the *PM_{10} SIP Development Guidelines* and the memorandum of 10/2/87 from D. Tyler to EPA Regional Offices.

It is understood that the deadline of August 31, 1990 does not allow sufficient time for the Division to obtain 3 years of ambient monitoring data, which is the minimum data requirement to show attainment of the PM_{10} NAAQS per 40 CFR Part 50, Appendix K. Therefore, if the Division determines in the required SIP adequacy determination filed by August 31, 1990 that the existing SIP is adequate, the conclusion must be viewed as preliminary. For this case, the Division will send an addendum to the determination to EPA within 30 days of the completion date of 3 years of PM_{10} data. At that time, should the Division now determine that the area is in fact nonattainment, the Division will follow the requirements of items 3, 4, and 5 of this section.

5. Control Strategy: If the Division determines that a nonattainment situation exists and subsequently finds the existing SIP to be inadequate for timely attainment and maintenance of the PM_{10} NAAQS, the Division will adopt and submit to EPA Region VI a PM_{10} control strategy within 6 months of the SIP adequacy notification required in item 4 above. The control strategy will assure attainment of the PM_{10} NAAQS as expeditiously as practicable but no later than 3 years from the date EPA approves this PM_{10} committal SIP revision. The Division may request an additional 2 years to reach attainment for any Group II site where monitoring data has demonstrated a nonattainment situation. The control strategy will be developed in accordance with *PM_{10} SIP Development Guideline*, EPA-450/2-86-001, June 1987.

The Governor's submission of August 19, 1988, also included the revisions required for PM_{10} Group III (i.e., monitoring network, other regulatory changes, and a request for redesignation of the total suspended particulate matter nonattainment areas to the unclassifiable status); however, today's action only approves the PM_{10} Group II SIPs (committal SIPs) for the areas cited earlier in this notice. The EPA will publish its action on the remaining PM_{10} SIP (statewide regulatory requirements) and the City of Albuquerque/Bernalillo County PM_{10} SIPs under separate notices at a later date.

Final Action

The EPA has reviewed the State's submittal and determined that the Statecommitments and procedures are adequate for monitoring, data analysis, reporting, and subsequently submitting a SIP revision (if any required) for the PM_{10} Group II areas. In addition, the EPA finds that the State commitments are in conformance with the specific requirements of the PM_{10} Group II areas of the July 1, 1987 **Federal Register** notice (52 FR 24634). However, the EPA wants to clarify paragraph number 5 of the State commitments, as quoted in this notice, that refers to the possibility of State commitments, as quoted in this notice, that refers to the possibility of State requesting extension under section 110(e) of the Clean Air Act beyond the maximum three-year period allowed in section 110(a)(2)(A) of the Act. Section 110(e) of the Act allows the Administrator of EPA to grant a two-year extension to the State in certain cases if the requirements of this section of the Act are satisfied by the State. The Administrator can not grant any extension solely by a request unless the conditions specified under section 110(e) are completely and clearly supported by actual data, documentation, and other evidence that the area in question can not attain the PM_{10} NAAQS within the three-year period. Therefore, the EPA, with clarification stated above, is approving the New Mexico PM_{10} Group II SIP for Dona Ana, Grant, Sandoval, Santa Fe, and Taos counties.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. This action will be effective 60 days from the date of publication unless, within 30 days of its publication, notice is received that adverse or critical comments will be submitted. If such notice is received, this action will be withdrawn before the effective date by publishing two subsequent notices. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period. If no comments are received, the public is advised that this action will be effective on July 11, 1989.

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 11, 1989. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

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

This rulemaking is issued under the authority of section 110 of the Clean Air Act, 42 U.S.C. 7410.

Lists of Subjects in 40 CFR Part 52

Air pollution controls, Particulate matter.

Date: April 17, 1989.

Robert E. Layton, Jr.,

Regional Administrator.

PART 52—[AMENDED]

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

Subpart GG—New Mexico

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

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

2. A new § 52.1637 is added as follows:

§ 52.1637 Particulate Matter (PM_{10}) Group II SIP commitments.

(a) On August 19, 1988, the Governor of New Mexico submitted a revision to the State Implementation Plan (SIP) that contained commitments, from the Director of New Mexico Environmental Improvement Division, for implementing all of the required activities including monitoring, reporting, emission inventory, and other tasks that may be necessary to satisfy the requirements of the PM_{10} Group II SIPs. The New Mexico Environmental Improvement Board adopted this SIP revision on July 7 and 8, 1988.

(b) The State of New Mexico has committed to comply with the PM_{10} Group II State Implementation Plan (SIP) requirements, as articulated in the **Federal Register** notice of July 1, 1987 (52 FR 24670), for Dona Ana, Grant, Sandoval, Santa Fe, and Taos counties as provided in the New Mexico PM_{10}

Group II SIPs. In addition to the SIP, a letter from the Director of New Mexico Environmental Improvement Division, dated July 15, 1988, stated that:

This letter is in reference to PM_{10} Group II State Implementation Plan (SIP) requirements. In response to the requirements of the July 1, 1987 **Federal Register**, notice on PM_{10}, the Environmental Improvement Division has prepared a Committal SIP for Group II areas. As expressed in this SIP revision, the Division is committing to carry out all required actions such as monitoring, reporting, emission inventory development, and other tasks necessary to satisfy the SIP requirements for PM_{10} Group II areas.

[FR Doc. 89-10469 Filed 5-11-89; 8:45 am]

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40 CFR Part 261

[SW-FRL-3569-8]

Hazardous Waste Management System: Identification and Listing of Hazardous Waste; Final Exclusion

AGENCY: Environmental Protection Agency.

ACTION: Final Rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) today is granting a final one-time exclusion from the lists of hazardous wastes contained in 40 CFR 261.31 and 261.32 for a specific waste generated by Merck & Company, Incorporated, Elkton, Virginia. This action responds to a delisting petition submitted under 40 CFR 260.20, which allows any person to petition the Administrator to modify or revoke any provision of Parts 260 through 268, 124, 270, and 271 of Title 40 of the Code of Federal Regulations, and under 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.

EFFECTIVE DATE: May 12, 1989.

ADDRESSES: The public docket for this final rule is located at the U.S. Environmental Protection Agency, 401 M Street, SW. (Room M2427), Washington DC 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Call (202) 475-9327 for appointments. The reference number for this docket is "F-89-MLEF-FFFFF". The public may copy material from any regulatory docket at a cost of $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline, toll free at (800) 424-9346, or at (202) 382-3000. For technical information concerning this notice, contact Linda Cessar, Office of Solid Waste (OS-343), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 475-9828.

SUPPLEMENTARY INFORMATION:

I. Background

A. Authority

Under 40 CFR 260.20 and 260.22, facilities may petition the Agency to remove their wastes from hazardous waste control by excluding them from the lists of hazardous wastes contained at 40 CFR 261.31 and 261.32. Petitioners must provide sufficient information to EPA to allow the Agency to determine (1) that the waste to be excluded is not hazardous based upon the criteria for which it was listed, and (2) that no other hazardous constituents are present in the wastes at levels of regulatory concern.

B. History of the Rulemaking

Merck & Company, Incorporated (Merck), located in Elkton, Virginia, petitioned the Agency for a one-time exclusion of certain solid wastes generated at its facility and contained in an on-site fly ash lagoon. After evaluating the petition, EPA proposed, on September 27, 1988, to exclude Merck's waste from the lists of hazardous waste under 40 CFR 261.31 and 261.32 (see 53 FR 37601).

This rulemaking addresses public comments received on the proposal and finalizes the proposed exclusion.

II. Disposition of Delisting Petition

A. Merck & Company, Incorporated, Elkton, Virginia

1. Proposed Exclusion

Merck petitioned the Agency for an exclusion of its incinerator fly ash contained in an on-site lagoon. The fly ash is derived from and listed as EPA Hazardous Waste No. F002. Merck petitioned to exclude its waste because it does not believe that the waste meets the criteria of the listing. Merck further believes that the waste is not hazardous for any other reason (*i.e.*, there are no additional constituents or factors that could cause the waste to be hazardous). In support of its petition, Merck submitted (1) a detailed description of its manufacturing and treatment processes, including schematic diagrams; (2) a list of raw materials used in the manufacturing processes; (3) results from total constituent analyses of the fly ash contained in the lagoon for methylene chloride, 1,1,1-trichloroethane, and certain other hazardous organic constituents potentially present in the waste; (4) results from EP toxicity and total constituent analyses for the EP toxic metals and nickel; (5) results from total cyanide analyses; (6) mass balance calculations for methylene chloride, benzene, chloroform, and xylene to provide maximum possible concentrations in the fly ash; (7) results from total oil and grease analyses; (8) test data on the hazardous waste characteristics of the fly ash; and (9) ground-water monitoring information (analytical data and hydrogeologic information) relevant to the lagoon.

The Agency evaluated the information and analytical data provided by Merck in support of its petition and determined that the hazardous constituents found in the petitioned waste would not pose a threat to human health and the environment. Specifically, the Agency used its Vertical and Horizontal Spread (VHS) model and Organic Leachate Model (OLM) to predict the potential mobility of the hazardous constituents found in the petitioned waste. The Agency also evaluated ground-water monitoring information submitted in support of Merck's petition. Based on these evaluations, the Agency determined that the constituents in Merck's waste would not leach and migrate at concentrations above the health-based levels used in delisting decision-making. See 53 FR 37601, September 27, 1988, for a more detailed explanation of why EPA proposed to grant Merck's petition for the fly ash contained in its lagoon.

2. Agency Response to Comments

The Agency received public comments on the proposed rule from one interested party. The commenter opposed the Agency's proposed decision, indicating the Merck has not submitted sufficient evidence to demonstrate that its waste is non-hazardous. The comments related to the following areas: (1) Sampling procedures/methodologies, (2) analytical method, detection limits, and parameters, (3) mass balance calculations, (4) VHS model data versus real data, (5) interpretation of ground-water monitoring data, and (6) other comments. The Agency's responses to these comments are discussed in the following sections.

a. *Sampling Procedures/Methodologies.* The commenter stated that the "fixed grid" sampling technique used by the petitioner for sample location selection was inappropriate because it did not consider horizontal variability. The commenter suggested that sampling points should have been randomly spaced on a horizontal grid.

The Agency has compared the representativeness of fixed grid

sampling approaches like Merck's to random sampling. The results of this study, which statistically determined the probability of locating areas of high concentration within a waste management unit, demonstrate that fixed grid sampling is at least as likely to detect "hot spots" (*i.e.,* areas of high concentrations of hazardous constituents) as random sampling. (See the RCRA public docket for this notice for a summary of this statistical study.) Therefore, for the fly ash lagoon, the Agency believes that the combined results of the fixed grid sampling conducted in 1982, 1984, and 1985 are sufficiently representative of the waste in the lagoon.

The commenter asserted that because process changes occurred in the wastewater treatment system during the period in which wastes were discharged to the fly ash lagoon (between 1980 and 1985), vertical stratification of ash in Merck's lagoon is likely. Therefore, Merck's grab samples were not representative of all of the waste in the lagoon and full-core samples should have been collected.

Because of changes in Merck's manufacturing and treatment processes which occurred during the life of the petitioned unit, the Agency agrees with the commenter that the petitioned fly ash may exhibit vertical variability. The Agency generally requests petitioners to collect full-core samples from such potentially stratified wastes. However, in Merck's case, the ash depth in the lagoon averaged only 16 inches, with no depth greater than 19 inches. Furthermore, it is expected that the ash in the lagoon is not compacted. For these reasons, the Agency believes that Merck's grab sampling approach (dredging the ash layer with a bucket) should have obtained material from all potential layers of the lagoon ash and, thus, represents any vertical stratification of waste in the lagoon.

b. *Analytical Methods/Detection Limits/Parameters.* The commenter stated that analytical methods used for organic constituent analyses of Merck's waste did not always conform with SW-846 analytical methods and that Merck did not provide any explanation regarding this deviation.

The Agency allows petitioners to use EPA-approved methods other than those listed in "Test Methods for Evaluating Solid Wastes: Physical/Chemical Methods," U.S. EPA, Office of Solid Waste and Emergency Response, Publication SW-846 (third edition), November 1986 (SW-846), if those methods are appropriate for the petitioned waste. The Agency notes that in cases where SW-846 methods were not used, Merck used EPA-approved methods from "Methods for Chemical Analysis of Water and Waste," USEPA, 1979, or "Methods for Organic Chemical Analysis of Municipal and Industrial Wastewater," USEPA, 1982. The Agency believes that these methods are acceptable for the analysis of Merck's fly ash.

The commenter stated that the detection limits achieved by Merck for the organic constituents exceed the practical quantification limits (PQLs) suggested in SW-846 for such a waste matrix. The commenter also noted that Merck was able to quantify concentrations of benzene in the range of 0.006 ppm to 0.22 ppm from carbon cake solids collected from a carbon cake pit near the lagoon, but could only achieve detection limits of 1.0 ppm for the lagoon fly ash.

As stated in the proposed exclusion, the Agency believes that the detection limits achieved by Merck, obtained using appropriate analytical methods, represented, at the time, the lowest quantifiable concentrations for the organic constituents. In addition, Merck provided mass balance demonstrations for methylene chloride, benzene, chloroform, and xylene to further show that these hazardous constituents could not be present in the waste at levels of concern. The commenter's comparison of the detection limits achieved for analyses of carbon cake solids and the fly ash is not valid because of the differences between the sample matrices. The Agency notes that it does request petitioners to collect and analyze additional representative samples when the Agency's evaluation indicates that reported PQLs were not the lowest quantifiable concentrations of hazardous constituents in the waste, and when the reported PQLs indicate that constituents could be present at hazardous levels. In Merck's case, however, EPA believes that the detection limits were adequate.

The commenter also stated that the Oily Waste Extraction Procedure (OWEP) should have been used in lieu of the standard Extraction Procedure (EP) for all leachate analyses, because 2 of 4 samples collected by Merck in 1985 had total oil and grease (TOG) levels that exceeded one percent. When the total oil and grease content exceeds one percent, petitioners are requested to modify the standard EP procedure in accordance with the OWEP methodology. (Wastes having more than one percent total oil and grease either may have significant concentrations of constituents of concern in the oil phase which may not be assessed using the standard EP leachate procedure, or the concentration of oil and grease may be sufficient to coat the solid phase of the sample and interfere with the leaching of metals from the sample.) The commenter suggested the possibility that these levels were not a result of laboratory error, as claimed by Merck, but were instead the result of unidentified discharges to the lagoon.

In 1987, after reviewing the 1985 TOG data and discussing the issue with Merck, the Agency allowed Merck to provide additional sampling data to demonstrate that TOG levels in the ash did not exceed one percent. As a matter of policy in cases such as this, the Agency allows petitioners to provide evidence to sufficiently demonstrate that a laboratory error has occurred. As noted by the commenter, the petitioner submitted data from analyses of ten samples of the waste that were analyzed for TOG in 1987. The TOG levels in these samples ranged from 0.0019 to 0.135 percent. Based on these results and the TOG levels (0.63, 0.33, and 0.49 percent) for the three representative samples of the waste that were collected and analyzed for TOG in 1984, the Agency maintains its belief that the 1985 TOG data were most likely a result of laboratory error. Regardless of the source of the oil and grease in the waste, which the Agency believes could be attributed to *de minimus* losses of oil and grease from normal manufacturing, maintenance, and transportation operations as suggested by the petitioner, we believe Merck has demonstrated that the TOG content of the waste is less then one percent. Furthermore, the Agency is not aware of any discharges to the lagoon which would contain significant levels of oil and grease, nor did the commenter suggest what the "unidentified sources of oil and grease" could be.

The commenter suggested that the analytical work requested of the petitioner was incomplete because *all* collected samples were not analyzed for the EP leachate and total constituent concentrations of the EP metals, nickel and cyanide; total constituent concentrations of hazardous organic constituents potentially present in the waste; TOG content; and the characteristics of ignitability, reactivity, and corrosivity.

Merk's fly ash lagoon dimensions are 100 feet by 200 feet. According to standard delisting protocol provided in "Petitions to Delist Hazardous Wastes—A Guidance Manual," U.S. EPS, Office of Solid Waste, (EPA/530-SW-85-003), April 1985, petitioners like Merck, with lagoons of less than 40,000 square feet, are required to conduct analyses on at

least four representative samples. The 1982 samples were determined not to be fully representative of the waste, therefore all of the analyses performed in 1982 were repeated on representative samples collected in 1984 and 1985. These analyses included: EP leachate and total constituent analysis for the EP toxic metals and nickel, total constituent analysis for cyanide, total constituent analysis for hazardous organic constituents potentially present in the waste, total oil and grease analysis, and the determination of ignitability, reactivity, and corrosivity. TOG analyses were only performed on the 1984 and 1985 samples because the Agency did not initiate the use of the OWEP for oily waste matrices until 1984. Additional TOG analyses were requested in 1987 to confirm that TOG did not exceed one percent. Therefore, the Agency believes that Merck's analyses are complete and fully characterize the waste.

c. *Mass Balance Calculations.* The commenter stated that the 96.1 percent Biochemical Oxygen Demand (BOD) removal rate assumed by Merck for the wastewater treatment system was not appropriate because of the changes in Merck's wastewater treatment processes which occurred between 1980 and 1985. Instead, the commenter believed the lowest BOD removal rate in effect during this period should be used in the mass balance calculations in order to quantify the maximum concentrations of constituents in the waste. (The Agency notes that Merck justified the use of this removal rate in the mass balance calculations by citing the EPA's Effluent Guidelines for the Pharmaceutical Industry, which states that the average removal rate for a direct discharge biological system for priority pollutant solvents is 96.1 percent. Furthermore, Merck claims that their wastewater treatment is state-of-the-art and consistently averages 96–98 percent removal for priority pollutant solvents.)

As a result of this comment, the Agency re-evaluated Merck's mass balance demonstration with respect to conditions of the wastewater treatment system as it existed in 1982, when the petition was submitted. The only process change that occurred prior to 1982 was the removal in March, 1981 of 1,1,1-trichloroethane from the list of materials influent to the wastewater treatment plant. Because no modifications were made to the operation of the wastewater treatment system between 1980 and 1982, the Agency believes that removal efficiency for priority pollutants would not have changed during this period. The process changes that occurred between 1982 and 1985 most likely would have increased the removal of the organic constituents which were considered in the mass balance demonstration. For example, Merck's removal of the primary sedimentation basin and rough trickling filters in 1983 eliminated those sludges influent to Merck's sludge handling system that would have had the highest concentrations of organic constituents. (See the RCRA public docket for the proposed notice for a detailed discussion of Merck's wastewater treatment process modifications.) In addition, the Agency believes that the 96.1 percent removal in the mass balances is acceptable for the entire period for the following reasons:

- Data from the sludge partitioning analysis for municipal wastewater treatment plants similar to Merck's, presented in the "Report to Congress on the Discharge of Hazardous Waste to POTWs," USEPA, Office of Water, 1986, shows that the following percentages of these constituents are transferred from influent to acclimated sludge: methylene chloride (14 percent), benzene (2 percent), chloroform (2 percent), and xylene (15 percent).
- Because all four constituents are volatile, it is highly likely that a significant percentage of these constituents were air stripped during the equalization and neutralization stages prior to biological treatment.
- Due to the volatility of these constituents, additional removal was undoubtedly achieved in the sludge handling system, where waste sludge was treated for several days in aeration basins.

The Agency also reexamined the mass balance for methylene chloride, the constituent that generated a compliance point concentration closest to its level of regulatory concern. To clearly understand the impact of BOD removal rate on the methylene chloride mass balance demonstration, the Agency back-calculated the BOD removal rate necessary to ensure that methylene chloride levels at the compliance point are below the corresponding health-based level used in delisting decisionmaking. The Agency calculated this "necessary" removal rate to be 72.5 percent, which is significantly less than the 96.1 percent removal rate expected to be achieved by Merck's wastewater treatment system. (See the RCRA public docket for today's notice for documentation of these calculations.)

The commenter stated that a destruction and removal efficiency (DRE) of 99.99 percent for hazardous waste incinerators is a RCRA performance goal that is not easily achieved and that most incinerators do not meet this level without modification.

The Agency believes that most incinerators can readily achieve a DRE of 99.99 percent for organic constituents in fly ash and many achieve 99.99 percent. For multiple-hearth incinerators such as Merck's, that are designed to both burn and volatilize organic constituents, the assumption of 99.99 percent destruction is reasonable, as documented in several sources, including the "Background Document for Kiln Regulatory Impact Analysis," USEPA, Office of Solid Waste, 1984. These sources verify that a 99.99 percent DRE is commonly achieved for volatile organic constituents such as methylene chloride, benzene, chloroform, and xylene, as measured in the resulting fly ash.

In order to address this comment further and to illustrate clearly the impact of DRE on Merck's mass balance demonstration, the Agency reexamined Merck's mass balance demonstrations using a less stringent DRE of 99.9. This DRE was achieved for volatile organic constituents by virtually all kiln incinerators tested to support preparation of the "Background Document for Kiln Regulatory Impact Analysis" described above. For this DRE, the compliance-point concentrations of methylene chloride, benzene, chloroform, and xylene were calculated as presented in Table 1.

TABLE 1

VHS Model: Compliance-Point Concentrations (ppm) Fly Ash (Assuming 99.9 Percent Destruction Efficiency)

Constituents	*Compliance-Point Concentrations*	*Levels of Regulatory Concern* [1]
Methylene Chloride	0.0010	0.0047
Chloroform	0.0001	0.0057
Benzene	0.0001	0.005
Xylene	0.0005	70.

[1] See "Docket Report on Health-based Regulatory Levels and Solubilities Used in the Evaluation of Delisting Petitions," June 8, 1988, located in the RCRA Public Docket.

As shown, the compliance-point concentrations of these constituents, assuming a DRE of 99.9 percent, are still below the delisting health-based levels of concern.

The commenter noted that the mass balance calculation for methylene chloride yields a total methylene chloride concentration in the waste that exceeds the level of regulatory concern.

The Agency recognizes that the total constituent concentration of methylene chloride exceeds the delisting health-based level and indirectly noted so by the data presented in the proposed exclusion (see 53 FR 37604). However, the Agency does not believe it is appropriate to evaluate Merck's waste by comparing the total constituent concentration of methylene chloride to the delisting health-based level used for consumption of ground water. The Agency's evaluation of Merck's waste is based on the leachability of hazardous constituents from the ash and the ultimate environmental fate and transport of these constituents. The Agency used the Organic Leachate Model (OLM) to predict the leachable portion of the organic constituents in the waste. The results of the OLM analyses were used with the Agency's vertical and horizontal spread (VHS) model to determine compliance-point concentrations. As presented in the September 27, 1988 proposed exclusion, the calculated compliance-point concentration for methylene chloride is 0.00019 ppm which is below the delisting health-based level of 0.0047 ppm.

d. *VHS Modeling Data versus Real Data.* The commenter stated that due to unreasonable assumptions in the mass balance calculations, the input data used by EPA for the OLM/VHS models led to an underestimation of the potential for contamination from the lagoon. To support this assertion, the commenter provided a comparison of the calculated compliance-point concentrations for chloroform, benzene, xylene, arsenic, lead, and nickel, and actual ground-water monitoring data for these constituents.

The Agency has already addressed the commenter's criticism of the mass balance calculations. As noted previously, the Agency believes that the mass balance calculations were valid and were appropriate input parameters for the OLM/VHS models.

The Agency uses models such as the OLM and VHS model to estimate the potential migration of hazardous constituents from the unregulated disposal of petitioned wastes. The Agency also considers any other available information, such as ground-water monitoring data relevant to the petitioned waste, to characterize the impact on ground-water quality (if any) from the disposal of the waste. Because of the differences between the hypothetical VHS landfill and Merck's fly ash lagoon and other site-specific conditions (*e.g.*, the compliance point assumed by the VHS is a well 500 feet downgradient from the unit, while the wells monitoring the unit are much closer), the Agency recognizes that the calculated compliance-point concentrations for Merck's waste would not necessarily correspond directly with ground-water monitoring data. Furthermore, the VHS model does not consider impacts on ground-water quality associated with wastes other than the petitioned waste (*e.g.*, alternate sources of contamination). In this case, the Agency believes that ground-water quality beneath the petitioned unit is being affected by releases from other solid waste management units at this facility. Therefore, the Agency used VHS model results in conjunction with actual ground-water monitoring data to fully evaluate (not to verify) the impacts of the disposal of Merck's waste. Both the calculated compliance-point concentrations for all constituents and the actual ground-water concentrations for all constituents except benzene (discussed below) are below the Agency's levels of regulatory concern.

e. *Interpretation of Ground-Water Monitoring Data.* In the proposed exclusion, the Agency stated that it had reviewed six rounds of ground-water monitoring data for Merck's fly ash lagoon. The ground-water monitoring data were collected from seven wells, three upgradient (MW-14 through MW-16) and four downgradient (MW-17 through MW-20) of the fly ash lagoon, that are monitored in compliance with 40 CFR Part 265, Subpart F requirements. (Figure 1 presents a map of the site, including the location of waste management units and ground-water monitoring wells.) The Agency stated that review of the six rounds of data indicated that the concentrations of all hazardous constituents analyzed pursuant to Subpart F, except benzene, were below the Agency's delisting health-based levels of concern or acceptable method detection limits. In the proposed exclusion, the Agency presented ground-water monitoring data for benzene which showed that a single ground-water sample collected from downgradient well MW-17 on December 15, 1986 contained benzene at a concentration of 0.006 ppm, which exceeds the Agency's 0.005 ppm level of concern for benzene.

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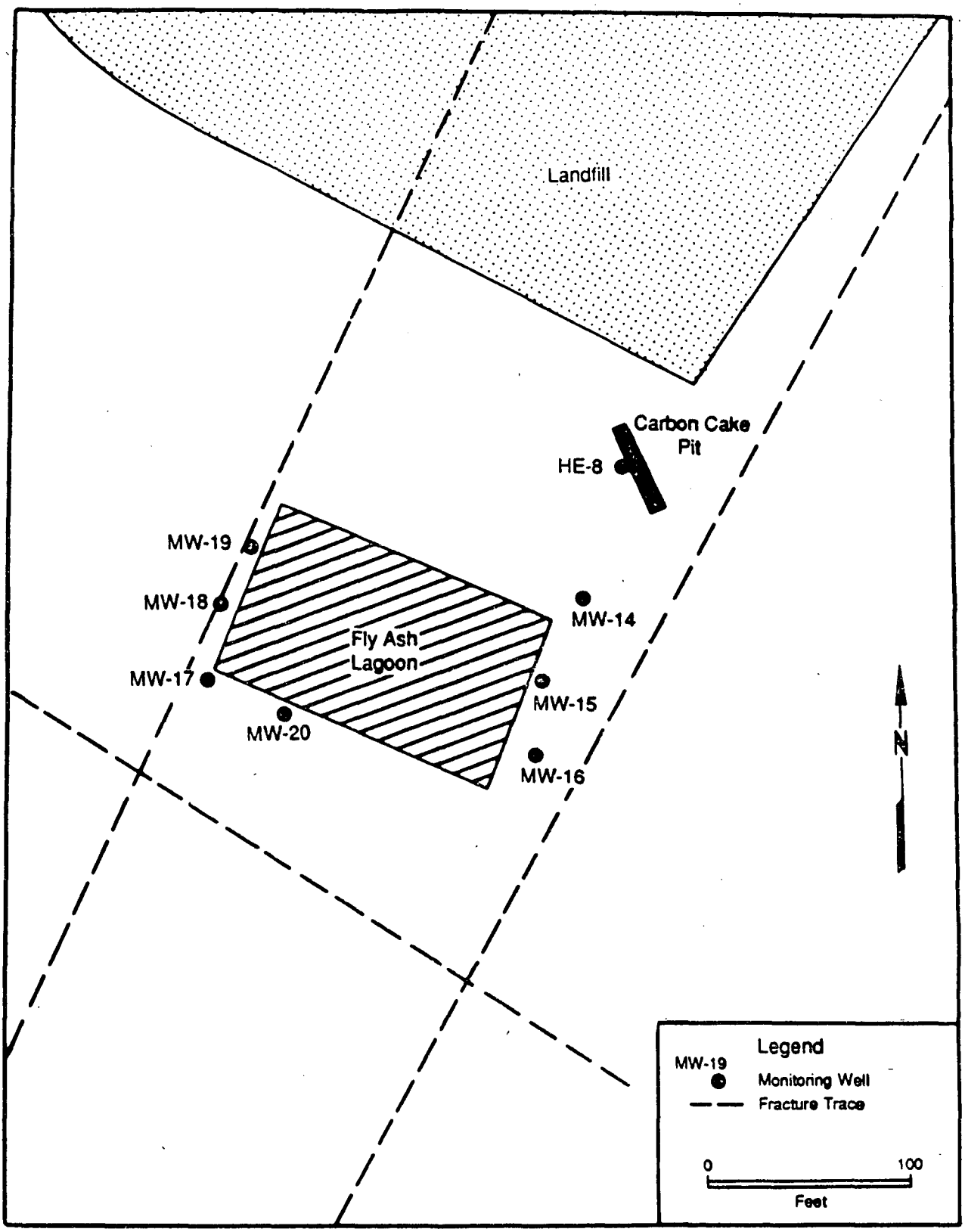

Figure 1. Location of Fly Ash Lagoon in Relation to Other Suspected Sources of Benzene

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In the proposed exclusion, the Agency stated that it believes that the petitioned waste is not the source of elevated concentrations of benzene in ground water. The Agency's justification for this conclusion is two-fold. First, benzene was not detected in representative samples of the petitioned waste and is not expected to be present in the petitioned waste at significant concentrations (based on mass balance calculations which consider both the destruction efficiency of the incinerator which generated the fly ash and the removal efficiency of Merck's wastewater treatment system). In addition, the Agency believes that Merck sufficiently demonstrated that other solid waste management units in the vicinity of the fly ash lagoon (*e.g.*, an unlined landfill and an unlined carbon cake pit) are likely sources of the benzene detected in ground water. The proposed exclusion presented benzene analyses for solid samples collected from the carbon cake pit and benzene analyses for ground-water samples collected from well HE-8, which is located adjacent to the carbon cake pit. The proposal further reported that benzene was detected in ground water collected from well HE-8 at concentrations exceeding the Agency's level of regulatory concern for benzene (0.005 ppm).

The single interested party commenting on the proposed exclusion submitted a number of comments regarding the Agency's interpretation of Merck's ground-water monitoring data. These comments, and the Agency's responses, are presented in the following discussions.

The Agency's Use of Ground-Water Monitoring Data from Well HE-8. The commenter believed that the Agency's conclusion regarding other likely sources of benzene in ground water must have been based on the fact that benzene was detected in well HE-8 at the 0.005 ppm level. The commenter maintained that this conclusion is unfounded for several reasons. First, the commenter stated that the petitioner was informed on September 15, 1986 "that well HE-8 was not an appropriate monitoring well because the water table map included in the Part B permit application indicated that this well was not upgradient of the lagoon". Second, the commenter suggested that comparisons between well HE-8 and the fly ash lagoon's monitoring well network are inappropriate because the well screens are not comparably situated and the well screens are of differing lengths. Third, the commenter claimed that well HE-8 is constructed in an area which is geologically different from that in which wells monitoring the fly ash lagoon (wells MW-14 through MW-20) are constructed.

The Agency wishes to clarify that its conclusion that other sources of benzene contamination exist at the facility is not based solely on ground-water monitoring data from well HE-8. The Agency believes that the landfill is a reasonable source of the benezene detected in the wells downgradient of the fly ash lagoon for two reasons. First, as stated in Merck's petition, Merck informed the Agency that from 1941 to 1980 the landfill received most of the solid waste generated at the Merck facility, including tar wastes from solvent recovery processes. Although Merck has not specifically determined that benzene is present in the landfill, the Agency believes there is reasonable basis to conclude that wastes containing benzene were disposed of in the landfill, because Merck's solvent recovery processes are known to produce wastes containing benzene. Second, the fly ash lagoon's downgradient wells are located on or near a subsurface fracture [1] on which the landfill is also located. The fracture could provide a preferential path along which contaminated ground-water emanating from the landfill could flow or migrate.

In response to the first comment concerning well HE-8, the Agency reviewed the water-level contour map [2] from Merck's Part B permit application referred to by the commenter. This review revealed that the water-level contour map was constructed using water levels measured in wells which comprise an older well system no longer used to monitor the fly ash lagoon. (The present monitoring system at the fly ash lagoon (wells MW-14 through MW-20) did not exist in September 1986 when Merck was informed by the State that well HE-8 was not an appropriate upgradient monitoring well.) The wells on which the water-level contour map is based have five-foot well screens that are placed within an interval from approximately 936 feet to 952 feet in elevation [3] (23 to 42 feet below land surface). Well HE-8 also has a five-foot screen, but the interval over which the screen is placed is much deeper (approximately 894 to 904 feet in elevation, or 74 to 84 feet below land surface). It is generally inappropriate to contour or compare water levels measured in wells that are screened at different elevation. Therefore, the Agency does not believe that it is useful to use the water-level contour map in the Part B permit application, which represents ground-water flow as measured in shallow monitoring wells, to establish whether well HE-8 is upgradient of the fly ash lagoon.

Nevertheless, the Agency re-evaluated whether the carbon cake pot is upgradient of the wells downgradient of the fly ash lagoon and again concluded that the pit is indeed upgradient. Based on water levels measured in the deeper (80-foot) wells presently used to monitor the fly ash lagoon (MW-14 through MW-20) and expected flow along the subsurface fracture, EPA believes that ground water flowing beneath the carbon cake pit could intercept the downgradient wells directly and/or via the subsurface fracture along which wells MW-17, MW-18 and MW-19 appear located.

The commenter's second concern is that comparisons between data from well HE-8 and the monitoring system for the fly ash lagoon are inappropriate due to differences in the way the wells are screened. The Agency agrees that ground-water monitoring data from the fly ash lagoon's present monitoring system cannot be strictly compared to data from well HE-8 because the length of HE-8's well screen (5 feet) is much shorter than those of the fly ash lagoon monitoring wells (40 feet). However, data for well HE-8 indicate that a source other than the fly ash lagoon (ostensibly the carbon cake pit) has contaminated the ground water in the geological unit in which (and to the depth at which) the downgradient wells monitoring the lagoon are screened. Specifically, samples collected from well HE-8 contained as much as 0.26 ppm benzene. Therefore, the Agency believes that the benzene contamination present in well HE-8 demonstrates the existence of a contaminant source which is apparently upgradient of the lagoon's downgradient wells.

[1] Fracture is a general term for any break in a rock. In karst terrains, fractures may be enlarged when water causes chemical dissolution of carbonate. Fractures are typically concentrated in zones. Fracture zones often have hydraulic conductivities greater than that of adjacent rock (*e.g.*, statistical studies of wells located in carbonate terrain have shown that wells located on fractures have greater yield than those not located on fractures) (see Siddiqui and Parizek, 1971, in the RCRA public docket.) In its petition, Merck provided confirmation of the existence of subsurface fractures at their Elkton facility. (For further detail, see correspondence from the petitioner to Suzanne Rudzinski, EPA, dated December 18, 1987, in the RCRA public docket.)

[2] A water-level contour map depicts lines (called equipotential lines) which connect points of equal water-level elevation or head. Ground-water flow is usually assumed perpendicular to equipotential lines. As a result, water-level contour maps can be used to determine direction of ground-water flow.

[3] All elevations are reported as elevation above mean sea level.

The Agency believes the commenter's third concern regarding the difference between the geology of the area in which well HE-8 is constructed and the geology of area in which wells MW-14 through MW-20 are constructed is unsupported. Well HE-8 is screened to approximately the same depth as the fly ash lagoon monitoring wells (84 feet). Furthermore, based on well logs, HE-8 is screened in the same geologic unit in which the downgradient wells MR-17, MW-18, MW-19, and MW-20 are screened (*i.e.*, the limestone/dolomite of the upper surface of the Elbrook formation).

Concerns Regarding the Ground-water Monitoring System. The commenter asserted that, when wells MW-14 through MW-20 were installed, both the Virginia Department of Waste Management (VDWM) and EPA Region III allowed longer (40-foot) screens stating that such wells would be suitable only for detection, not quantification, of ground-water contamination at the fly ash lagoon.

The Agency acknowledges that the screened intervals for the fly ash lagoon monitoring wells are long, and that the greater sampling interval allowed by the longer well screens may act to dilute contaminants associated with a vertically discrete contaminant plume. However, because ground-water flow in fractured karst terrain (like that at the Merck facility) is expected to occur primarily in fractures and solution channels, the longer screened intervals could make the detection of contaminants more likely by increasing the chance that the wells will potentially intercept paths of preferential flow from the fly ash lagoon.

The commenter claimed that because the monitoring system was installed in accordance with the Technical Enforcement Guidance Document (TEGD), the monitoring results should be "binding" (*i.e.*, the presence of contamination in downgradient wells compels the Agency to deny this petition). The commenter further explained that Merck's monitoring system includes upgradient wells to account for such factors as alternate contaminant sources, if upgradient contaminant sources exist. The commenter believed that if the Agency finds the system inadequate, the Agency should require Merck to install another monitoring system, not conclude that contamination stems from other contaminant sources.

The Agency believes that the commenter is concerned that the Agency chose not to interpret statistical increases in pH and total organic carbon (TOC) which were reported for Merck's downgradient wells as confirmation that there has been a hazardous release from the fly ash lagoon. Parameters such as pH and TOC are indicator parameters which are appropriately used to provide indications of a release of waste constituents to ground water. As discussed later, the Agency does not believe that the petitioned waste is likely to be the source of the increase in pH or TOC. Furthermore, the extensive analyses for hazardous constituents (*i.e.*, Appendix IC to 40 CFR Part 261) in samples collected from the monitoring system support the Agency's conclusion that the petitioned waste has not adversely impacted the ground water.

The Agency also believes that the commenter is concerned that the Agency chose not to interpret benzene data as confirmation that there has been a hazardous release from the fly and ash lagoon. The Agency acknowledged in the proposed exclusion that the concentration of benzene in one sample collected from a well that monitors the fly ash lagoon exceeds the Agency's health-based level of concern for benzene. As discussed in further detail above, however, the Agency believes that Merck has demonstrated that there is sufficient basis to conclude that the petitioned waste is not a source of the detected benzene. The Agency believes that Merck's mass balance calculations adequately demonstrate that benzene is not expected to be present in the petitioned waste and therefore is not the source of benzene detected in the fly ash lagoon's downgradient wells. In addition, the Agency believes that Merck has adequately shown that there are other sources for the benzene detected in downgradient wells.

In response to the commenter's statements regarding the adequacy of the ground-water monitoring system, the Agency agrees that the area upgradient of the fly ash lagoon is well monitored. However, the upgradient wells do not intercept all potential pathways for contaminant migration which could affect ground-water quality downgradient of the fly ash lagoon. Specifically, the upgradient wells do not monitor ground water which may migrate down the subsurface fracture located near the west end of the fly ash lagoon. Additionally, the upgradient wells are not likely to intercept contaminants emanating from the carbon cake pit. Nevertheless, the Agency believes that additional upgradient wells are not necessary to verify the existence of other potential sources of ground-water contamination. As stated previously in today's notice and the proposed rule, Merck's mass balance demonstration indicates that benzene concentrations in the fly ash lagoon waste are not of concern. Furthermore, Merck provided information which indicates that reasonable alternate sources of benzene in ground water exist at the facility. Consequently, the Agency does not believe that it is necessary for the petitioner to install additional monitoring wells at the fly ash lagoon for the purpose of making a delisting decision.

Consideration of Statistical Evaluations—Evaluation of pH. The commenter believes that the present monitoring system at the fly ash lagoon has not been able to demonstrate that the fly ash lagoon is not impacting ground-water quality. Specifically, the commenter stated that the present ground-water monitoring system for the fly ash lagoon indicates statistical increases for pH in all downgradient wells and for TOC in well MW-19. The commenter does not accept statements made in Merck's petition asserting that the landfill is the likely source of the significant increase in pH reported in the monitoring wells downgradient of the fly ash lagoon. (Merck contends that the pH of certain wastes disposed in the landfill ranges from 10 to 13.)

In support of the commenter's belief that the fly ash lagoon has caused the statistical increases in pH reported in the downgradient wells, and in rebuttal to Merck's claims that the landfill is a source of high pH, the commenter offered the following observations: (1) pH measurements of the petitioned waste made in 1982 (7.4 to 7.7 pH units) show that leachate from the petitioned waste is capable of increasing the pH of ground-water downgradient of the fly ash lagoon; (2) wells MW-18 and MW-19, based on the results of pumping tests, appear to be located on a subsurface fracture, but no effect in the pH is apparent; (3) if a subsurface fracture is affecting wells MW-17, MW-18, and MW-19, well MW-19 should probably yield the highest pH results, yet the highet pH is found in well MW-17, and (4) well MW-17, which the commenter feels is equivalent hydrogeologically to the upgradient wells, shows a statistical increase in pH, and therefore leakage from the fly ash lagoon.

In response to the commenter's first observation, the Agency believes that the 1982 pH data reported by Merck are invalid. The 1982 pH data were obtained as part of the analytical procedure for the EP toxicity analysis and were not intended to accurately characterize the pH of the petitioned waste. (See correspondence from the petitioner to

Suzanne Rudzinski, EPA, dated December 18, 1987, in the RCRA public docket.) Furthermore, the samples in which these pH values were measured were held for nine days prior to analysis (pH should be measured as soon as possible after sample collection), and were diluted with distilled water prior to being measured for pH. Therefore, the Agency does not believe the commenter's concerns that the petitioned waste could cause the increase in pH reported in the downgradient wells are valid. The Agency believes that the actual pH of the waste in the fly ash lagoon is between 6.8 and 7.1, as reported by the petitioner on June 1, 1987. The pH of ground water collected from the upgradient monitoring wells ranges from 6.8 to 8.2; whereas, the range for the downgradient wells is 7.3 to 9.0 (7.9 to 9.0 for well MW-17). Given that the pH of Merck's waste is between 6.8 and 7.1, the Agency does not believe that the petitioned waste caused the statistical increase in pH downgradient of the fly ash lagoon.

With regard to the commenter's second, third, and fourth observations concerning pH, the Agency believes that the commenter was concerned that: (1) Ground water from wells MW-18 and MW-19 should have higher pH levels than ground water from well MW-17 because wells MW-18 and MW-19 appear most directly located on the subsurface fracture (as stated previously, a subsurface fracture may act as a preferential ground water flow path from the landfill to the downgradient wells); (2) well MW-19 is closest to the landfill, therefore, the highest pH should be reported for well MW-19, yet the highest pH is reported for well MW-17 and; (3) well MW-17, which should be least affected by the subsurface fracture (and therefore the landfill), shows a statistical increase of pH, and therefore leakage from the fly ash lagoon.

In response to these three observations, the Agency does not believe that pH data can be used as a sole basis for confirming a source of contamination. Specifically, pH is dependent on a number of variables (*e.g.*, temperature and mixing of ground water) which can cause it to vary both spatially and temporally, regardless of the presence of a contaminant source. (See Hem, 1985, in the RCRA public docket for this rule.) The effect of these variables on pH might be even more pronounced in fractured karst terrain, such as at the Merck facility, where increased mixing of ground waters from different sources might be expected. (See Hanshaw and Back, 1979, in the RCRA public docket for this rule.) Consequently, the Agency believes pH data such as that presented in the commenter's observations cannot be used by itself to demonstrate whether the fly ash lagoon has adversely affected ground-water quality. The Agency notes not only that the landfill is a potential source of the high pH detected in ground-water, but also that the pH values reported for ground-water samples collected from well HE-8 (9.4 to 12.6 pH units) also indicate that a source of high pH may exist in the vicinity of well HE-8.

Evaluation of TOC. The commenter did not believe that the petitioner's mass balance demonstration, based on the operation and efficiency of the wastewater treatment plant and sludge incinerator, adequately eliminated the fly ash lagoon as a source of the elevated TOC observed in the downgradient monitoring wells.

As discussed previously in today's notice, the Agency agrees with the mass balance demonstrations submitted by the petitioner, and believes Merck's claims regarding the operation and efficiency of the wastewater treatment plant and the sludge incinerator, on which the mass balance demonstrations are partially based. In addition, the Agency believes that Merck fully characterized the organic carbon in ground water that can be attributed to hazardous constituents through the analyses of ground-water samples for the organic hazardous constituents listed in 40 CFR Part 264, Appendix IX. Moreover, the maximum TOC concentration reported in the upgradient wells (34 ppm) is much greater than the maximum reported in the downgradient wells (8 ppm), further supporting a conclusion that other sources of contamination may exist at the facility which are not associated with the fly ash lagoon.

Evaluation of Additional Well MW-20 Statistical Analyses. The commenter maintained that statistical comparisons between upgradient and downgradient wells that were to have been submitted to the Virginia Department of Waste Management after the installation of well MW-20 are vital in assessing the impact of the fly ash lagoon on ground-water quality and should be requested from the petitioner before any final decision regarding the delisting petition is made.

Merck reported the results of hazardous constituent analyses for ground-water samples collected from well MW-20, which the Agency believes fully characterized ground-water quality at the well. The Agency does not believe that it is necessary to obtain and review new statistical evaluations for well MW-20 because Merck has analyzed ground water collected from well MW-20 for over 200 hazardous constituents listed in 40 CFR Part 264, Appendix IX, satisfying delisting ground-water monitoring requirements.

The Agency's Consideration that Contamination Originated from Other Sources. The commenter noted that it is premature to suggest that constituents detected in the downgradient wells are derived solely from alternate sources, especially when these same constituents are those expected to be in the petitioned waste. Furthermore, the commenter also maintained that all ground-water monitoring systems installed for the fly ash lagoon have indicated ground-water contamination.

The Agency believes that data from the present monitoring system at the fly ash lagoon are more representative of ground-water quality at the fly ash lagoon than data from previous well systems. As stated in Merck's petition, when the State accepted Merck's proposal that an earlier shallow monitoring system for the fly ash lagoon could not adequately provide samples of background and downgradient water quality, Merck installed the present monitoring system for the fly ash lagoon. Monitoring of all previous well systems for the fly ash lagoon subsequently ceased. Consequently, in this case, the Agency focused its evaluation of Merck's delisting petition on results obtained from the approved monitoring system for the fly ash lagoon.

The Agency considered the commenter's concerns that monitoring data from the present monitoring system at the fly ash lagoon have indicated ground-water contamination. The Agency believes the commenter is concerned about pH and TOC data from the approved monitoring system which show statistical increases over background levels. The Agency believes that statistical analyses of indicator parameters are useful in determining whether waste constituents may be migrating to ground water. However, the concern to be addressed by a delisting evaluation is whether the petitioned waste is capable of releasing hazardous contaminants to the environment at concentrations that are of concern. EPA views analyses for specific hazardous constituents as a more direct indication of possible ground-water contamination. These analyses also assist the Agency in establishing whether any apparent statistical increase in indicator parameters is attributable to

unacceptable concentrations of hazardous constituents in ground water.

Merck provides the Agency with one round of ground-water monitoring results from the approved monitoring system which include analyses for the over 200 organic and inorganic constituents listed in 40 CFR Part 264 Appendix IX, and 5 additional rounds of ground-water monitoring results which include analyses for over 45 hazardous constituents. The Agency believes these analyses adequately characterize the composition of ground-water collected from the monitoring system at the fly ash lagoon. The monitoring data demonstrate that the concentrations of hazardous constituents in ground-water samples collected from the present monitoring system, with the exception of *one* benzene value, are below health-based levels of concern. The Agency believes that Merck's mass balance calculations adequately demonstrate that benzene is not expected in the petitioned waste and therefore is not the source of benzene detected in the fly ash lagoon's downgradient wells. In addition, the Agency believes Merck has adequately shown that there are other sources for the benzene detected in downgradient wells.

f. *Other Comments.* The commenter's final comment concerned the exact classification of the lagoon fly ash as hazardous. The commenter claimed that although the proposed notice focused exclusively on EPA Hazardous Waste No. F002 as the basis for the listing, the fly ash lagoon also received waste listed as EPA Hazardous Waste No. F003.

The Agency believes that the commenter was concerned that the Agency did not consider the listing criteria for EPA Hazardous Waste No. F003 when it evaluated Merck's petition. However, EPA notes that F003 wastes are only listed due to the characteristic of ignitability and the incinerator ash does not exhibit this characteristic. Furthermore, regardless of the specific listing criteria for Merck's waste, the Agency's evaluation considered all factors that could cause the waste to be hazardous.

3. Final Agency Decision

For the reasons stated in the proposal, the Agency believes that Merck's incinerator fly ash contained in the on-site fly ash lagoon should be excluded from hazardous waste control. The Agency, therefore, is granting a final one-time exclusion to Merck & Company, Incorporated, located in Elkton, Virginia, for its fly ash described in its petition as EPA Hazardous Waste No. F002.

Although management of the waste covered by this petition is relieved from Subtitle C jurisdiction, Merck must either (1) continue to manage the waste in the fly ash lagoon; or (2) treat, store or dispose of the waste in another on-site facility, or ensure that the waste is delivered to an off-site storage, treatment or disposal facility, either of which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste. Alternatively, the delisted waste may be delivered to a facility that beneficially uses or reuses, or legitimately recycles or reclaims the waste, or treats the waste prior to such beneficial use, reuse, recycling, or reclamation.

III. Limited Effect of Final Exclusion

The final exclusion being granted today is being issued under the Federal (RCRA) delisting program. States, however, are allowed to impose their own, non-RCRA regulatory requirements that are more stringent than EPA's, pursuant to section 3009 of RCRA. These more stringent requirements may include a provision which prohibits a Federally-issued exclusion from taking effect in the State. Because a petitioner's waste may be regulated under 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 the State law.

IV. 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. That is the case here because this rule reduces, rather than increases, the existing requirements for persons generating hazardous wastes. In light of the unnecessary hardship and expense that would be imposed on this petitioner by an effective date six months after promulgation and the fact that a six-month deadline is not necessary to achieve the purpose of Section 3010, EPA believes that this rule should be effective immediately. These reasons also provide a basis for making this rule effective immediately, upon promulgation, under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(d).

V. 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 rule to grant an exclusion 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 waste generated at a specific facility from EPA's lists of hazardous wastes, thereby enabling the facility to treat its waste as non-hazardous. There is no additional economic impact, therefore, due to today's rule.

VI. 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, or delegated representative 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 effect will be to reduce the overall costs of EPA's hazardous waste regulations and is limited to one facility. Accordingly, I hereby certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation, therefore, does not require a regulatory flexibility analysis.

VII. Paperwork Reduction Act

Information collection and recordkeeping requirements associated with this final rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (P.L. 96–511, 44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2050–0053.

List of Subjects in 40 CFR Part 261

Hazardous materials, Waste treatment and disposal, Recycling.

Date: May 3, 1989.

Jeffery D. Denit,

Deputy Director, Office of Solid Waste.

For the reasons set out in the preamble, 40 CFR Part 261 is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921, and 6922).

2. In Table 1 of Appendix IX, add the following wastestream in alphabetical order:

Appendix IX—Wastes Excluded Under §§ 260.20 and 260.22

TABLE 1.—WASTES EXCLUDED FROM NON-SPECIFIC SOURCES

Facility	Address	Waste description
* *	* *	* * * *
Merck & Company, Incorporated	Elkton, Virginia	One-time exclusion for fly ash (EPA Hazardous Waste No. F002) from the incineration of wastewater treatment sludge generated from pharmaceutical production processes and stored in an on-site fly ash lagoon. This exclusion was published on May 12, 1989.
* *	* *	* * * *

[FR Doc. 89-11483 Filed 5-11-89; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF DEFENSE

48 CFR Parts 204, 207, 208, 211, 215, 217, 219, 227, 232, 235, 242, 245, 252, and 253

[Defense Acquisition Circ. (DAC) 88-7]

Federal Acquisition Regulation Supplement; Regulatory and Miscellaneous Amendments

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comment; and final rules.

SUMMARY: Defense Acquisition Circular (DAC) 88-7 amends the DoD FAR Supplement (DFARS) with respect to taxpayer identification number (TIN) information; incentives for innovation; antifriction bearings; evaluation of contractor's estimating system; reporting official for the Office of the Secretary of Defense Director of the Small and Disadvantaged Business Utilization Office; exemption of commissary resale items from small disadvantaged business evaluation preference; contractor material management and accounting systems (MMAS); prompt payment; research and development bidders mailing lists; DD Form 1659, Application for U.S. Government Shipping Documentation/Instructions; and editorial corrections.

DATES: *Effective Date:* July 31, 1989, unless otherwise noted in the Supplementary Information.

Comment Date: July 11, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, Defense Acquisition Regulatory Council, ODASD(P)/DARS, OASD(P&L), c/o OUSD(A) (M&RS), Room 3D139, The Pentagon, Washington, DC 20301-3062, telephone (202) 697-7266.

SUPPLEMENTARY INFORMATION:

A. Background

The DoD FAR Supplement is codified in Chapter 2, Title 48 of the Code of Federal Regulations.

The October 1, 1987, revision of the CFR is the most recent edition of that title. It reflects amendments to the 1986 edition of the DoD FAR Supplement made by Defense Acquisition Circulars 86-1 through 86-5. Amendments made by DACs 86-6 through 86-16 were published in the **Federal Register** at 53 FR 38171, September 29, 1988, and will be included in the October 1, 1988, revision of the CFR.

B. Public Comments

DAC 88-7, Items I, IV, V, VIII, X, and XI

Public comments are not solicited with respect to these revisions since such revisions do not alter the substantive meaning of any coverage in the DFARS having a significant impact on contractors or offerors, or do not have a significant effect beyond agency internal operating procedures.

DAC 88-7, Item II

Public comments are not solicited with respect to the revisions to Parts 207 and 217 since such revisions do not alter the substantive meaning of any coverage in the DFARS having a significant impact on contractors or offerors, or do not have a significant effect beyond agency internal operating procedures.

With respect to the revisions to 227.473-2, an interim rule with request for comments was published in the **Federal Register** on December 22, 1988 (53 FR 51557). No comments were received.

DAC 88-7, Item III

An interim rule with request for comments was published in the **Federal Register** on August 4, 1988 (53 FR 29332). Comments received were considered in the development of this final rule which was published in the **Federal Register** on April 12, 1989 (54 FR 14654).

DAC 88-7, Item VI

Public comments are invited. An interim rule is published prior to receipt of comments because the Under Secretary of Defense for Acquisition has concluded that this program is having an immediate and detrimental effect on military personnel. Interested parties should submit written comments to be considered in developing a final rule on or before July 11, 1989 to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, ODASD(P)/DARS, c/o OUSD(A) (M&RS), Room 3D 139, The Pentagon, Washington, DC 20301-3062. Please cite DAR Case 89-34 in all correspondence related to this subject.

DAC 88-7, Item VII

A proposed rule with request for comments was published in the **Federal Register** on October 28, 1988 (53 FR 43738). Comments received were considered in the development of this final rule.

DAC 88-7, Item IX

Public comments were solicited on January 19, 1989 (54 FR 2166). No comments were received.

C. Regulatory Flexibility Act

DAC 88-7, Items I, IV, V, VIII, IX, X, and XI

These final rules do not constitute a significant revision within the meaning of Pub. L. 98-577 and publication for public comment is not required. Therefore, the Regulatory Flexibility Act does not apply. However, comments will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DAR Case 89-610D in correspondence.

DAC 88-7, Item II

The Department of Defense certifies that the final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because any small entities that might be affected by the change are already covered by the restrictions of 10 U.S.C. 2320(a)(2)(F), as implemented in the existing DFARS 227.473-2. With respect to 227.473-2, an interim rule was published in the **Federal Register** on December 22, 1988 (53 FR 51557). Comments were solicited and none were received.

DAC 88-7, Item III

The coverage at Subpart 208.79 will not have a significant impact on small businesses. It will impact only those small businesses that (a) manufacture antifriction bearings, or (b) use antifriction bearings in a subassembly, assembly, or end item sold to the DoD either directly or through a subcontract with a DoD contractor. Although there is no existing data to quantify the number of small businesses which may be impacted, it is estimated that only a small quantity will be affected. An interim rule was published in the **Federal Register** on August 4, 1988 (52 FR 29332), and public comments were solicited. No public comments were received that addressed the Regulatory Flexibility Act Statement.

DAC 88-7, Item VI

This interim rule is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

DAC 88-7, Item VII

The Department of Defense certifies that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. Although the rule applies to small businesses under certain circumstances, only large businesses meeting certain dollar thresholds are required to demonstrate the degree to which their material management and accounting systems conform to the standards contained in the final rule. A proposed rule with request for comments was published on October 28, 1988 (53 FR 43738) and comments were considered in developing this final rule.

DAC 88-7, Item IX

This final rule is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because indications are that most R&D entities are not using the DD Form 1630. An Initial Regulatory Flexibility Analysis has therefore not been performed. Comments were solicited and none were received.

D. Paperwork Reduction Act

DAC 88-7, Items I, II, IV, V, and VIII

These final rules do not contain information collection requirements which require the approval of OMB under 44 U.S.C. 3501 et seq.

DAC 88-7, Item III

A paperwork burden clearance for OMB Control Number 0704-0205 was approved by OMB on November 28, 1988. This clearance reflects an increase of 439,383 hours.

DAC 88-7, Item VI

This interim rule does not contain information collection requirements which require the approval of OMB under 44 U.S.C. 3501 et seq.

DAC 88-7, Item VII

On March 14, 1989, OMB approved paperwork burden clearance 0704-0246 in 2,124,550 hours. This reflects an increase of 1,687,000 hours as a result of this coverage.

DAC 88-7, Item IX

This rule will reduce the hours for OMB Control Number 0704-0215 to zero, a decrease of 600 hours, and the OMB Control Number will be discontinued.

DAC 88-7, Item X

A request for clearance, for an increase of 75,000 hours, was approved by OMB on February 7, 1989, under OMB Control No. 0704-0250, through January 31, 1992.

E. Determination To Issue an Interim Regulation

DAC 88-7, Item VI

A determination has been made under the authority of the Secretary of Defense that this coverage be issued as an interim rule. This action is necessary to excempt purchases for commissary resale from the evaluation preference at DFARS 219.7000 for small disadvantaged business concerns. The Under Secretary of Defense for Acquisition has concluded this program is having a detrimental effect on military personnel and that increased costs associated with making progress in the SDB area should not be passed on to military personnel.

List of Subjects in 48 CFR, Parts 204, 207, 208, 211, 215, 217, 219, 227, 232, 235, 252, and 253

Government procurement.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

(Defense Acquisition Circular No. 88-7)

May 31, 1989.

Unless otherwise specified, all DoD FAR Supplement and other directive material contained in this Defense Acquisition Circular is effective July 31, 1989.

Defense Acquisition Circular (DAC) 88-7 amends the DoD Federal Acquisition Regulation Supplement (DFARS) 1988 edition and prescribes procedures to be followed. The following is a summary of the amendments and procedures.

Item I—Taxpayer Identification Number (TIN) Information (Final Rule)

DFARS 204.203 is added to state that if the TIN or contractor status information has been obtained from a source other than the provision at FAR 52.204-3, the last page of the contract forwarded to the paying office will be annotated to provide that information. This rule is effective May 12, 1989.

Item II—Incentives for Innovation (Final Rule)

DFARS 207.106 is added, 217.7201-1 is revised, and revisions to 227.473-2 which were included in DAC #88-3 (Item VII) are finalized. These changes implement the FY 89 DoD Authorization Act, Pub. L. 100-456. The statute limits the Government's authority to require that prospective developers or producers of major systems provide proposals which would enable the Government to use technical data to obtain future competition when acquiring items or components of a weapon system, where the items or components were developed exclusively at private expense. With respect to the revisions to 227.473-2, an interim rule was published in the **Federal Register** on December 22, 1988 (53 FR 51557). No comments were received.

Item III—Antifriction Bearings (Final Rule)

DFARS 208.79 and the clause at 252.208-7006 are revised to provide coverage which restricts DoD bearing procurements to domestic sources in most instances. This restriction is deemed necessary to protect and strengthen the domestic industrial base for an industry critical to National security. An interim rule with request for

comments was published in the **Federal Register** on August 4, 1988 (53 FR 29332). Comments were considered in developing this final rule which was published in the **Federal Register** on April, 12, 1989 (54 FR 14564). This rule is effective July 11, 1989.

Item IV—Evaluation of Contractor's Estimating System (Final Rule)

DFARS 215.811-76(b)(9) is revised to clarify that historical experience includes historical vendor pricing information.

Item V—Reporting Official for the Office of the Secretary of Defense Director of the Small and Disadvantaged Business Utilization Office (Final Rule)

DFARS 219.201 is revised to implement Section 603 of Public Law 100-656 which changes the reporting official for the Office of the Secretary of Defense, Director of the Small and Disadvantaged Business Utilization Office.

Item VI—Exemption of Commissary Resale Items From Small Disadvantaged Business Evaluation Preference (Interim Rule)

DFARS 219.7000(a) is revised to exempt items purchased for commissary resale from the application of the small disadvantaged business 10 percent evaluation preference. This interim rule is effective May 12, 1989.

Item VII—Contractor Material Management and Accounting Systems (MMAS) (Final Rule)

The FY 89 Defense Authorization Act, Pub. L. 100-456, required the Secretary of Defense to prescribe regulations containing standards and appropriate certification and enforcement requirements for contractor inventory accounting systems. The following changes have been made to implement this requirement:

(a) A new Subpart 242.72, Contractor Material Management and Accounting Systems, is added.

(b) Paragraph 232.503-15(d) is added to identify the conditions under which the ACO may grant blanket approval for material transfers between contracts.

(c) Subparagraph 245.505-3(f)(2)(ii) is added to allow the contractor's material control system to physically commingle inventories that may include materials for which costs are charged or allocated to fixed-price, cost-reimbursement, and commercial contracts so long as the contractor has adequate controls to ensure that the requirements of 242.7206 are met.

(d) The clause at 252.242-7001 is added to incorporate the requirements of the new subpart into appropriate contracts.

(e) In addition, section 242.302, Contract Administration Functions, is revised to incorporate the evaluation of contractor MMAS's into the list of ACO responsibilities.

Contracting officers should note that the new standards and enforcement requirements are broadly worded and require the exercise of sound judgment to achieve effective implementation. Furthermore, the new coverage requires careful coordination, communication, and understanding among the DCAA auditor, the contractor, and the ACO staff.

This rule is effective May 12, 1989.

Item VIII—Prompt Payment (Final Rule)

DFARS Subpart 232.9 is revised to be consistent with the Federal Acquisition Regulation (FAR) incorporation of Pub. L. 100-496, Prompt Payment Act Amendments of 1988. The revisions change the number of days available for constructive acceptance of approval from 5 working days to 7 calendar days. Other editorial changes are made to conform the DFARS coverage to the FAR.

Item IX—Research and Development Bidders Mailing Lists (Final Rule)

DFARS 235.004 is revised to delete reference to DAR Supplement No. 4, which is hereby canceled, and to provide guidance for use of SF 129 which will be used in place of DD Form 1630. A proposed rule was published in the **Federal Register** on January 19, 1989 (54 FR 2166).

Item X—DD Form 1659, Application for U.S. Government Shipping Documentation/Instructions (Final Rule)

DD Form 1659, Application for U.S. Government Shipping Documentation/Instructions, used by contractors to obtain Government shipping documentation and/or instructions, has not been revised since 1978. Revision was necessary as a result of changes in the transportation environment. Block 20 has been added to clearly determine whether or not the proposed shipment is hazardous. Other changes have been made to coincide with the recent revision of SF 1103, U.S. Government Bill of Lading. Finally, the form incorporates format improvements, particularly column definitions and totals for container and commodity data (Block 21).

Item XI—Editorial Corrections (Final Rule)

(a) DFARS 211.002 is revised and 211.005 is deleted because the language provided in the coverage is no longer prescribed in Appropriations Acts subsequent to the 1983 Supplemental Appropriations Act (Pub. L. 98-63) or the 1984 DoD Appropriations Act (Section 779, Pub. L. 98-212).

(b) DFARS 215.804-3(i) is revised to reflect the correct citation for 10 U.S. Code.

Adoption of Amendments

Therefore, The DoD FAR Supplement is amended as set forth below:

1. The authority for 48 CFR Parts 204, 207, 208, 211, 215, 217, 219, 227, 232, 235, 252, and 253 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

PART 204—ADMINISTRATIVE MATTERS

3. Section 204.203 is added to read as follows:

204.203 Taxpayer Identification Number (TIN) Information.

For DoD, if the TIN or corporate status are derived from a source other than the provision at FAR 52.204-3, the last page of the copy of the contract forwarded to the paying office will be annotated to state the contractor's TIN and corporate status.

PART 207—ACQUISITION PLANNING

4. Section 207.106 is added to read as follows:

207.106 Additional requirements for major systems.

(b)(1) 10 U.S.C. 2305(d)(4)(A) provides that, except where the Government is otherwise entitled to unlimited rights in technical data (see 227.472-3(a)), in solicitations for development or production of major systems, the contracting officer shall not require offers that would enable the Government to use technical data to competitively reprocure identical items or components of the major system if the item or component was developed exclusively at private expense, unless the contracting officer determines that:

(i) The original supplier of the item or component will be unable to satisfy program schedule or delivery requirements; or

(ii) Proposals by the original supplier of the item or component to meet mobilization requirements are insufficient to meet the agency's mobilization needs.

(2) 10 U.S.C. 2305(d)(4)(B) provides in part that for competitive solicitations, if offers referred to in paragraph (b)(1)

above are required, the evaluation of items developed at private expense (other than items for which the Government is otherwise entitled to unlimited rights in technical data) shall be based on an analysis of the total value, in terms of innovative design, life-cycle costs, and other pertinent factors, of incorporating such items in the system.

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

5. The final rule published on April 12, 1989 (54 FR 14654) is corrected as follows:

208.7900 [Corrected]

6. On page 14654, section 208.7900 is corrected by reversing the order of the definitions "Bearing components" and "Bearings" to place them in alphabetical sequence.

208.7901 [Corrected]

7. On page 14655, section 208.7901 is corrected by removing at the end of paragraph (c) the listing "MIL B 8976".

PART 211—ACQUISITION AND DISTRIBUTION OF COMMERCIAL PRODUCTS

211.001 [Amended]

8. Section 211.002 is amended by adding a period after the word "needs" and by removing the remainder of the sentence.

211.005 [Removed]

9. Section 211.005 is removed.

PART 215—CONTRACTING BY NEGOTIATION

215.811-76 [Amended]

10. Section 215.811-76 is amended by adding in paragraph (b)(9) between the word "experience" and the word "where" the words ", including historical vendor pricing information,".

215.804-3 [Amended]

11. Section 215.804-3 is amended by substituting in the first sentence of paragraph (i) the citation "2306a(b)(2)" in lieu of the citation "2306(a)(5)"; and by substituting in the certificate following paragraph (i) the citation "2306a(b)(2)" in lieu of the citation "2306(a)(5)".

PART 217—SPECIAL CONTRACTING METHODS

217.7201 [Amended]

12. Section 217.7201-1 is amended by adding at the end of the section a sentence to read: "For major weapon systems, see also section 207.106."

PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

13. Section 219.201 is amended by adding paragraphs (c)(3) and (c)(9); by removing at the end of paragraph (d)(2)(xxvii) the word "and"; by adding to paragraph (d)(2) paragraphs (xxviii) and (xxix); by removing from the first sentence of paragraph (S-70)(1) between the word "Utilization" and the word "is" the words "reports directly to the Deputy Secretary of Defense and"; and by substituting in the first sentence of paragraph (S-70)(1) between the word "Defense" and the word "in" the words "or designee" in lieu of the words "and the Deputy Secretary of Defense"; to read as follows:

219.201 General policy.

* * * * *

(c)(3) The Department of Defense Director of Small and Disadvantaged Business Utilization is responsible only to and reports directly to the Secretary or the Secretary's designee.

(c)(9) The responsibility of the agency Director of Small and Disadvantaged Business Utilization for making recommendations as to whether a particular acquisition should be awarded under FAR Subparts 19.5, 19.8, or under one of the procedures authorized by section 1207 of Pub. L. 99-661 is delegated to small and disadvantaged business utilization specialists.

* * * * *

(xxviii) make recommendations to contracting officers as to whether a particular acquisition should be awarded under FAR Subpart 19.5 as a set-aside (including those involving Labor Surplus Areas), under FAR Subpart 19.8 as a Section 8(a) award, or under a procedure authorized by Section 1207 of Pub. L. 99-661; and

(xxix) assist small business concerns in obtaining payments under their contracts, late payment interest penalties, or information on contractual payments provisions.

* * * * *

219.7000 [Amended]

14. Section 219.7000 is amended, on an interim basis, by substituting at the end of paragraph (a) the word "making" in lieu of the word "using"; by adding at the beginning of paragraph (a)(1) the words "purchases using"; by removing at the end of paragraph (a)(6) the word "and"; by changing the period at the end of paragraph (a)(7) to a semi-colon and adding the word "and"; and by adding paragraph (a)(8) to read: "purchases for commissary resale."

PART 227—PATENTS, DATA AND COPYRIGHTS

15. The interim rule published on December 22, 1988 (53 FR 51557), is adopted as final without change.

PART 232—CONTRACT FINANCING

16. Section 232.503-15 is added to read as follows:

232.503-15 Application of government title terms.

(d) The approval requirements of FAR 32.503-15(d) are met when the ACO has determined that the contractor's material management and accounting system conforms to the standard at 242.7206(b)(7). ACO blanket approval of cost transfers between contracts should be contingent upon the contractor retaining records of the transfer activity that took place in the prior month and reporting, at least monthly, a summary of the transfer activity that took place in the prior month. The summary report should include as a minimum, the total number of transfers and their dollar value.

17. Section 232.905 is revised to read as follows:

232.905 Invoice payment.

(a)(1)(ii) It is expected that in the majority of cases, Government acceptance or approval can occur within the 7-day constructive acceptance period specified in the Prompt Payment clause at FAR 52.232-25(a)(6). However, the contracting officer should coordinate this provision with the Government office that will be responsible for the acceptance or approval function. The contracting officer should specify a longer period where 7 days is not reasonable or practical. Considerations include, but are not limited to, the nature of supplies or services being accepted, inspection and testing requirements, shipping and acceptance terms, and resources available at the acceptance activity. A period less than 7 days is not authorized.

(b)(4) It is expected that in the majority of cases, Government acceptance or approval can occur within the 7-day constructive acceptance period specified in the Prompt Payment for Fixed-Price Architect-Engineer Contracts clause at FAR 52-232-26(a)(5). However, the contracting officer should coordinate this provision with the Government office that will be responsible for the acceptance or approval function. The contracting officer should specify a longer period where 7 days is not reasonable or practical. Considerations include, but

are not limited to, the nature of supplies or services being accepted, inspection and testing requirements, shipping and acceptance terms, and resources available at the acceptance activity. A period less than 7 days is not authorized.

(c)(1) It is expected that in the majority of cases, payment of construction contract progress payments can be made within the 14 days specified in the Prompt Payment for Construction Contracts clause at FAR 52.232-27(a)(1). However, the contracting officer should coordinate this provision with the Government office that will be responsible for the acceptance or approval function. The contracting officer should specify a longer period where 14 days is not reasonable or practical. Considerations include, but are not limited to, the nature of the work, inspection and testing requirements, and resources available at the acceptance activity. A period less than 14 days is not authorized.

(c)(5) It is expected that in the majority of cases, Government acceptance or approval can occur within the 7-day constructive acceptance period specified in the Prompt Payment for Construction Contracts clause at FAR 52.232-27(a)(4). However, the contracting officer should coordinate this provision with the Government office that will be responsible for the acceptance or approval function. The contracting office should specify a longer period where 7 days is not reasonable or practical. Considerations include, but are not limited to, the nature of supplies or services being accepted, inspection and testing requirements, shipping and acceptance terms, and resources available at the acceptance activity. A period less than 7 days is not authorized.

232.906 [Amended]

18. Section 232.906 is amended by substituting in the second sentence of paragraph (a) between the word "Payment" and the word "at" the word "clauses" in lieu of the word "clause"; by substituting in the second sentence of paragraph (a) between the reference "FAR 52.232-25(b)(2)" and the word "is" the references ", 52.232.26(b)(2), and 52.232-27(b)(2)" in lieu of the words "and Alternate I at FAR 52.232-25(b)(2)".

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

19. Section 235.004 is amended by revising paragraph (a) and by adding paragraph (S-70) to read as follows:

235.004 Publicizing requirements and expanding research and development sources.

(a) In addition to the requirements of FAR 35.004(a), where the contracting mission warrants it, purchasing activities will use the SF 129 to establish and maintain Research and Development Bidders Mailing Lists.

* * * * *

(S-70) *Solicitation Mailing Lists.*

(1) Organizations interested in being solicited for research and development procurements will submit applications on SF 129. Such application may be submitted directly to the Department of Defense agencies, activities and installations engaged in the procurement of research and development in scientific and technological fields in which the applicant possesses demonstrable capabilities or actual technical competence.

(2) Annual Reports or Financial Statements may be submitted with the SF 129. Any additional information, such as organizational brochures, folders, flyers, and pictures, should not be provided unless requested by the Government.

(3) To assure retention on research and development solicitation mailing lists, prospective contractors should update information submitted in accordance with this section at least once a year.

PART 242—CONTRACT ADMINISTRATION

242.302 [Amended]

20. Section 242.302 is amended by adding paragraph (S-76) to read:

* * * * *

Evaluate contractor material management and accounting systems as prescribed in Subpart 242.72.

21. Subpart 242.72 is added to read as follows:

Subpart 242.72—Contractor Material Management and Accounting Systems

Sec.

242.7201 Scope of subpart.
242.7202 Definitions.
242.7203 Policy.
242.7204 Applicability.
242.7205 Responsibilities.
242.7206 Material management and accounting system standards.
242.7207 System disclosure, demonstration, and maintenance requirements.
242.7208 Procedures.
242.7209 Contract clause.

Subpart 242.72—Contractor Material Management and Accounting Systems

242.7201 Scope of subpart.

This subpart prescribes policies, procedures, and standards for use in the evaluation of a contractor's material management and accounting system (MMAS). It further prescribes the responsibilities of the contractor, the auditor, and the contracting officer regarding the assessment, demonstration, evaluation, and correction of deficiencies in a contractor's MMAS.

242.7202 Definitions.

"Contractor", for purposes of this subpart, means a business unit as defined in FAR 31.001.

"Material Management and Accounting System" (MMAS), as used in this subpart, means the contractor's system(s) for planning, controlling, and accounting for the acquisition, use, and disposition of material. MMAS's may be manual or automated and they may be integrated with planning, engineering, estimating, purchasing, inventory, and/or accounting systems, etc., or they may be essentially stand-alone systems.

"Valid Time-Phased Requirements" means material which is:

(a) Needed to fulfill the production plan, including reasonable quantities for scrap, shrinkage, yield, etc., and

(b) Is charged/billed to contracts or other cost objectives in a manner consistent with their need to fulfill the production plan.

242.7203 Policy.

It is the policy of the Department of Defense that all contractors have a MMAS that reasonably forecasts material requirements, assures the costs of purchased and fabricated material charged or allocated to a contract are based on valid time-phased requirements, and maintains a consistent, equitable, and unbiased logic for costing of material transactions. To assist contractors to comply with this policy, standards for MMAS's are prescribed at 242.7206. The Government has no preference among the various automated or manual systems, or among various methods of material transfer/allocation, as long as the contractor's MMAS complies with the standards at 242.7206.

242.7204 Applicability.

(a) All contractors who receive prime contracts, other than contracts awarded under the set-aside procedures of FAR Part 19, greater than the small purchase threshold set forth in FAR 13.000 and which are either (1) cost-reimbursement contracts, or (2) fixed-price contracts with progress or other financing payments, are expected to have a MMAS which conforms to the standards at 242.7206.

(b) The specific requirements of sections 242.7207 and 242.7208 apply to any large business contractor which in its preceding fiscal year received DoD prime contracts or subcontracts totaling $50 million or more.

(c) For a large business contractor not meeting the criteria in paragraph (b) of this section but which in its preceding fiscal year received DoD prime contracts or subcontracts totaling $10 million or more, the PCO may require compliance with paragraphs (d) and (e) of the clause at 252.245-7001 with the concurrence, or at the request, of the ACO when such compliance is in the best interest of the Government (e.g., significant material management and accounting system deficiencies are believed to exist).

(d) The demonstration and evaluation requirements of sections 242.7207 and 242.7208 do not apply to small businesses, educational institutions, or nonprofit organizations.

242.7205 Responsibilities.

(a) Contracting officers should note that the standards at 242.7206 and the enforcement requirements at 242.7208 are broadly worded and require the exercise of sound judgment to achieve effective implementation. Furthermore, this subpart requires careful coordination, communication, and understanding among the DCCA auditor, the contractor, and the ACO staff.

(b) Contractors shall assess their MMAS's and take reasonable action to comply with the standards at 242.7206.

(c) Contractors meeting the requirements in 242.7204 (b) or (c) shall, in accordance with 242.7207, disclose their MMAS to the cognizant ACO and shall, upon the request of the ACO, demonstrate the degree to which their MMAS complies with the standards at 242.7206.

(d) The ACO will neither approve nor disapprove a contractor's MMAS, but only determine whether it adequately conforms to the standards set forth in 242.7206. However, the approval requirements of FAR 32.503-15(d) and 52.245-5(d) are met when the ACO has determined that the MMAS conforms to the standard at 242.7206(b)(7). ACO blanket approval of cost transfers between contracts should be contingent upon the contractor retaining records of the transfer activity that took place in the prior month and reporting, at least monthly, a summary of the transfer activity that took place in the prior month. The summary report should include as a minimum, the total number of transfers and their dollar value.

(e) For a contractor meeting the requirements in 242.7204 (b) or (c) above, the cognizant ACO shall determine the adequacy of the contractor's MMAS and pursue appropriate corrections of deficiencies.

(f) On behalf of the ACO, the cognizant auditor will advise and assist the ACO in evaluating both the contractor's MMAS and the contractor's correction of any deficiencies thereto. Auditors shall assess the significance of contractor deficiencies and provide the ACO an estimate of the adverse material impact to the Government resulting from such deficiencies.

242.7206 Material management and accounting system standards.

(a) MMAS's must have adequate internal accounting and administrative controls to assure system and data integrity.

(b) MMAS's must comply with the following:

(1) Have an adequate system description including policies, procedures, and operating instructions complaint with the FAR and DFARS.

(2) Assure that costs of purchased and fabricated material charged or allocated to a contract are based on valid time-phased requirements as impacted by minimum/economic order quantity restrictions. A 98-percent bill of material accuracy and a 95-percent master production schedule accuracy are desirable as a goal in order to assure that requirements are both valid and appropriately time-phased. If systems have accuracy levels below those above, the contractor must demonstrate that (i) there is no material harm to the Government due to lower accuracy levels, and/or (ii) the cost to meet the accuracy goals is excessive in relation to the impact on the Government.

(3) Provide a mechanism to identify, report, and resolve system control weaknesses and manual overrides. Systems should identify operational exceptions such as excess/residual inventory as soon as known.

(4) Provide audit trails and maintain records necessary to evaluate system logic and to verify through transaction testing that the system is operating as desired. Both manual records and those in machine readable form will be maintained for the prescribed record retention periods.

(5) Establish and maintain adequate levels of record accuracy, and include reconciliation of recorded inventory quantities to physical inventory by part number on a periodic basis. A 95-percent accuracy level is desirable. If systems have an accuracy level below 95 percent, the contractor must demonstrate that (i) there is no material harm to the Government due to lower accuracy level, and/or (ii) the cost to meet the accuracy goal is excessive in relation to the impact on the Government.

(6) Provide detailed description(s) of circumstances which will result in manual or system generated transfers of parts.

(7) Maintain a consistent, equitable, and unbiased logic for costing of material transactions. The contractor will maintain and disclose a written policy describing the transfer methodologies. The costing methodology may be standard or actual cost, or any of the inventory costing methods in FAR 30.411-50(b). Consistency must be maintained across all contract and customer types, and from accounting period to accounting period for initial charging and transfer charging.

(i) The system should transfer parts and associated costs within the same billing period.

(ii) In the few circumstances where it may not be appropriate to transfer parts and associated costs within the same billing period, use of a "loan/payback" technique must be approved by the ACO. When the technique is used, there must be controls to ensure that parts are paid back expeditiously; procedures and controls are in place to correct any overbilling that might occur; at a minimum, the borrowing contract and the date the part was borrowed are identified monthly; and the cost of the replacement part is charged to the borrowing contract.

(8) Where allocations from common inventory accounts are used, have controls in addition to the requirements of standards in paragraphs (b) (2) and (7) above to ensure that:

(i) Reallocations and any credit due are processed no less frequently than the routine billing cycle;

(ii) Inventories retained for requirements which are not under contract are not allocated to contracts;

(iii) Algorithms are maintained based on valid and current data.

(9) Notwithstanding FAR 45.505-3(f)(2)(ii), have adequate controls to ensure that physically commingled inventories that may include material for which costs are charged or allocated to fixed-price, cost-reimbursement, and commercial contracts do not compromise requirements of any of the above standards.

(10) Be subjected to periodic internal audits to ensure compliance with established policies and procedures.

242.7207 System disclosure, demonstration, and maintenance requirements.

(a) A MMAS disclosure is adequate when the contractor has provided the cognizant ACO documentation which accurately describes those policies, procedures, and practices that the contractor currently uses in its MMAS in sufficient detail for the Government to reasonably make an informed judgment regarding the adequacy of the contractor's MMAS.

(b) A MMAS demonstration is adequate when the contractor has provided the cognizant ACO sufficient evidence to demonstrate the degree of conformance of its MMAS to the standards at 242.7206, including an estimate of the cost impact to the Government of any significant deficiencies and a comprehensive plan for correcting any significant deficiencies.

(c) Significant changes to the MMAS must be disclosed to the cognizant ACO within 30 days of their implementation.

(d) If the contractor notifies the Government representative to whom the information is submitted, i.e., the ACO or the auditor, that disclosed information relative to its MMAS contains commercial or financial information which it regards as privileged and confidential, such information shall be protected and shall not be released outside the Government without the permission of the contractor. The contractor should ensure an appropriate legend is on the face of the disclosed document at the time of submission.

242.7208 Procedures.

(a) *System Evaluation.* Cognizant audit and contract administration activities will jointly establish and manage programs for evaluating the MMAS's of contractors meeting the requirements of 242.7204 (b) or (c). Evaluations will be based on the disclosure/demonstrations provided by the contractors. Evaluations and reports shall be accomplished as a contract audit and contract administration office team effort. The ACO shall appoint a team leader and ensure representation of appropriate functional specialties. Evaluations shall be tailored to take full advantage of the day-to-day work done as an integral part of both the contract audit and contract administration activities. A system evaluation shall be conducted at least every three years, except where the ACO, in consultation with the auditor, determines that past experience and a current vulnerability assessment of the contractor discloses low risk. If the ACO determines that the Government is subject to high risk, MMAS evaluations should be done more frequently. To the extent possible, the evaluation team leader should inform the contractor and the ACO of significant findings during the conduct of the evaluation. The team leader should apprise the contractor during an exit conference of any significant findings.

(b) *Disposition of Evaluation Team Findings*—(1) *Reporting of Evaluation Team Findings.* The report shall address the evaluation team findings and recommendations. If there are significant MMAS deficiencies, the report shall provide an estimate of the adverse material impact to the Government resulting from those deficiencies and a recommendation as to the acceptability of the contractor's corrective action plan.

(2) *Field Pricing Reports.* When the report of an evaluation indicates that there is a significant MMAS deficiency, all field pricing reports for that contractor will contain a recommendation relating to proposed cost and pricing data adjustments necessary to protect the interest of the Government, until the deficiency(s) is corrected.

(3) *Initial Notification of Contractor.* Upon receipt of the system evaluation report, the ACO shall provide a copy to the contractor and allow 30 days, or a reasonable extension thereto, for submission of its written response. If no significant deficiencies are identified, the ACO will notify the contractor in a timely manner.

(i) *Contractor Agreement.* If the contractor agrees with the report findings and recommendations, the contractor should proceed with the execution of the corrective action plan.

(ii) *Contractor Disagreement.* If the contractor disagrees with the report findings and recommendations, the contractor's response should contain the rationale for each area of disagreement.

(4) *Evaluation of Contractor's Response.* The ACO, in consultation with the auditor, will evaluate the contractor's written response and determine whether—

(i) The MMAS contains deficiencies which need correction;

(ii) Any deficiencies are significant enough to result in the reduction or suspension of progress payments or of payments under public vouchers; and

(iii) Proposed corrective actions are adequate to correct the deficiencies.

(5) *Contracting Officer Responsibility.* (i) When the ACO determines that there is a significant MMAS deficiency, the ACO shall suspend, in accordance with FAR 32.503-6, an appropriate percentage of affected costs on progress payment claims and public vouchers proportionate to the adverse material impact to the Government until a corrective action plan is submitted and accepted. The percentage of the suspension will be impacted by the quality of the contractor's self-assessment, demonstration, and corrective action plan. After acceptance of the corrective action plan, but prior to complete implementation, the ACO will reduce the suspension as appropriate to reflect the contractor's progress. In no case, however, will total amounts of affected costs be approved for progress payments or public vouchers until the contractor's system is determined to be acceptable for Government contract costing purposes, or the amount of the impact is determined to be immaterial.

(ii) When the report of an evaluation indicates that there is a significant MMAS deficiency, the ACO should ensure that the effect of the deficiency(s) is considered in the review of the contractor's estimating system pursuant to DFARS 215.811.

(6) *Notification of ACO Determination.* The ACO will notify the contractor and the auditor of the determination and any decision to reduce or suspend progress payments or payments under public vouchers. The notice shall identify the deficiencies requiring correction and will indicate acceptance or rejection of the contractor's corrective action plan.

(7) *Monitoring Contractor's Corrective Action.* The auditor and ACO will monitor the contractor's progress toward correction of deficiencies. In the event the contractor fails to make adequate progress toward corrective action, the ACO shall take further appropriate action to ensure that the contractor corrects the deficiency. Actions which should be considered by the ACO include, but are not limited to, bringing the issue to the attention of higher level management, further reduction or suspension of progress payments in accordance with FAR 32.503-6, disapproval of the contractor's cost accounting system and/or cost estimating system, and/or recommendations concerning award of future contracts.

242.7209 Contract clause.

The contracting officer shall insert the clause at 252.242-7001 in all solicitations and resulting contracts which are greater than the small purchase threshold set forth in FAR 13.101 and are either (a) cost-reimbursement contracts or (b) are fixed-price contracts with progress or other financing payments.

However, the clause shall not be included in that portion of solicitations and contracts which are set aside for exclusive participation by small business and small disadvantaged business concerns.

PART 245—GOVERNMENT PROPERTY

22. Section 245.505–3 is added to read as follows:

245.505-3 Records of material.

(f)(2)(ii) For DoD contracts, the contractor's material control system may physically commingle inventories that may include materials for which costs are charged or allocated to fixed-price, cost-reimbursement, and commercial contracts so long as the contractor has adequate controls to ensure that the requirements of 242.7206 are met.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

23. The final rule published on April 12, 1989 (54 FR 14654) is corrected as follows:

252.208-7006 [Corrected]

24. On page 14655, section 252.208–7006 is corrected by reversing the order of the definitions "Bearing components" and "Bearings" in paragraph (a) of the clause, to place the definitions in alphabetical sequence; and by substituting in paragraph (e)(3) of the clause the word "by" in lieu of the word "in".

25. On page 14655, section 252.208–7006 is corrected by removing at the end of paragrah (e)(3) of the clause the listing "MIL B 8976".

26. Section 252.242–7001 is revised to read as follows:

252.242-7001 Material management and Accounting system Requirements and Standards.

As prescribed in 242.7209, insert the following clause.

Material Management and Accounting System Requirements and Standards (May 1989)

(a) *Definitions.*

"Contractor", for purposes of this clause, means a business unit as defined in FAR 31.001, i.e., any segment of an organization, or an entire business organization which is not divided into segments.

"Material Management and Accounting System" (MMAS), as used in this clause, means the contractor's system(s) for planning, controlling, and accounting for the acquisition, use, and disposition of material. MMAS's may be manual or automated and they may be integrated with planning, engineering, estimating, purchasing inventory, and/or accounting systems, etc., or they may be essentially standalone systems.

"Valid Time-Phased Requirements" means material which is (1) needed to fulfill the production plan, including reasonable quantities for scrap, shrinkage, yield, etc., and (2) is charged/billed to contracts or other cost objectives in a manner consistent with their need to fulfill the production plan.

(b) *General.* The Contractor agrees to maintain a material management and accounting system (MMAS) that reasonably forecasts material requirements, assures that costs of purchased and fabricated material charged or allocated to a contract are based on valid time-phased requirements, and maintains a consistent, equitable, and unbiased logic for costing of material transactions.

(c) *Applicability.* The Contractor will assess its MMAS and take reasonable action to comply with the standards set forth in section 242.7206 of the DoD FAR Supplement. Paragraphs (d) and (e) below are also applicable if the Contractor is a large business and, in its fiscal year preceding award of this contract, received Department of Defense (DoD) prime contracts or subcontracts totaling fifty million dollars ($50 million) or more. Paragraphs (d) and (e) below are also applicable if the Contractor is a large business which, in its fiscal year preceding award of this contract, received DoD prime contracts or subcontracts totaling ten million dollars ($10 million) or more and, during performance of this contract, the Contracting Officer notifies the Contractor in writing that paragraphs (d) and (e) of this clause apply.

(d) *System Disclosure, Demonstration, and Maintenance Requirements.*

(1) The Contractor shall disclose its MMAS to the cognizant ACO and shall, upon the request of the ACO, demonstrate the degree to which its MMAS conforms to the standards set forth in section 242.7206 of the DoD FAR Supplement. If the Contractor desires the Government to protect such information as privileged or confidential, the Contractor shall notify the Government representative to whom the information is submitted, i.e., the ACO, or the auditor, and the Contractor shall ensure an appropriate legend is on the face of the document(s) at the time of submission.

(i) A MMAS disclosure is adequate when the Contractor has provided the cognizant ACO documentation which accurately describes those policies, procedures, and practices that the Contractor currently uses in its MMAS in sufficient detail for the Government to reasonably make an informed judgment regarding the adequacy of the Contractor's MMAS.

(ii) A MMAS demonstration is adequate when the Contractor has provided the cognizant ACO sufficient evidence to demonstrate the degree of compliance of its MMAS with the standards at 242.7206 of the DoD FAR Supplement, including an estimate of the cost impact to the Government of any significant deficiencies and a comprehensive plan for correcting any significant deficiencies.

(2) Significant changes to the MMAS must be disclosed to the ACO within 30 days of their implementation.

(e) *MMAS Deficiencies.* (1) If during the period of performance of this contract, the Contractor receives a report of the evaluation of its MMAS, the Contractor agrees to respond as follows:

(i) If the Contractor agrees with the report findings and recommendations, the Contractor shall, within thirty (30) days of receipt of such report, indicate its agreement in writing and shall proceed to execute the corrective action plan, if any, agreed-to by the ACO.

(ii) If the Contractor disagrees with the report findings and recommendations, the Contractor shall respond in writing within thirty (30) days of receipt of the report, indicating its rationale for each area of disagreement.

(2) The ACO shall evaluate the Contractor's response to the report and notify the Contractor of his/her determination concerning any remaining deficiencies and/or the adequacy of any proposed or completed corrective action(s).

(End of clause)

PART 253—FORMS

27. The list of forms following section 253.204–70 is amended by changing the title for 253.303–70–DD–1659 to read "Application for U.S. Government Shipping Documentation/Instructions" in lieu of the title "Application for U.S. Government Bill(s) of Lading/Domestic Route Order/Export Traffic Release".

[FR Doc. 89–11307 Filed 5–11–89; 8:45 am]

BILLING CODE 3810-01-M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

48 CFR Part 733

[AIDAR Notice 89-3]

Procedures for Protests

AGENCY: Agency for International Development, IDCA.

ACTION: Final rule.

SUMMARY: The A.I.D. procedures for protests are being corrected to specify that protests will be submitted to the contracting officer but will be reviewed, considered and decided by the head of the contracting activity. Editorial changes were made to these procedures by an earlier AIDAR Notice, and all references to head of the contracting activity were mistakenly changed to references to the contracting officer.

EFFECTIVE DATE: May 12, 1989.

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

SUPPLEMENTARY INFORMATION: The changes being made by this Notice are not considered significant rules subject to FAR 1.301 or Subpart 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 does it establish any information collection as contemplated by the Regulatory Flexibility Act and Paperwork Reduction Act.

List of Subjects in 48 CFR Part 733

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 733—PROTESTS, DISPUTES AND APPEALS

1. The authority citation in Part 733 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 1979 Comp., p. 435.

2. Subpart 733.70 is revised as follows:

Subpart 733.70—A.I.D. Procedures for Protest

733.7001 Scope of subpart.
733.7002 Definitions.
733.7003 Filing of protest.
733.7004 Time for filing.
733.7005 Notice of protest.
733.7006 Protests excluded from consideration.
733.7007 Withholding of award and suspension of contract performance.
733.7008 Time for and notification of the decision on the protest.

Subpart 733.70—A.I.D. Procedures for Protests

733.7001 Scope of subpart.

A.I.D. follows the protest procedures in FAR 33.1, as implemented and supplemented by this Subpart.

733.7002 Definitions.

(a) "Interested party" is defined in FAR 33.101.

(b) "Head of the Contracting Activity" (HCA), is defined in AIDAR 702.170-10.

(c) All "days" referred to in this subpart are deemed to be "working days" of the federal government. In computing a period of time under this subpart, the time shall begin to run on the first working day after the occurrence of the event which is designated as the beginning of the time period in 733.7004(a)(2) or 733.7008(a). Time for filing any document with the Contracting Officer expires at 5:30 p.m. local time on the last day on which such filing may be made.

(d) The term "filed" means receipt of the protest submission by the Contracting Officer.

733.7003 Filing of protest.

(a) An interested party may protest to A.I.D. a solicitation issued by A.I.D. for the procurement of goods or services, or the proposed award or the award of such a contract, except that if an interested party protests a particular procurement or proposed procurement to the General Accounting Office, or initiates litigation before a court of competent jurisdiction with respect to such procurement, that procurement or proposed procurement may not be the subject of a protest to A.I.D.

(b) Protests must be in writing and addressed to the Contracting Officer for consideration by the HCA.

(c) A protest shall:

(1) Include the name, address, and telephone number of the protestor;

(2) Identify the issuing Mission or office and the solicitation and/or contract number;

(3) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents;

(4) Specifically request a decision by A.I.D.; and

(5) State the relief requested.

(d) An adverse decision on the protest may be made by the HCA for failure of the protest to comply with any of the requirements of this section.

733.7004 Time for filing.

(a)(1) Protests based upon alleged improprieties and/or deficiencies in a solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals.

(2) In cases other than those covered by paragraph (a)(1) of this section, protests shall be filed not later than 10 days after the basis of the protest is known or should have been known whichever is earlier.

(b) The HCA, for good cause shown, may consider a protest which is not timely filed.

733.7005 Notice of protest.

(a) When a protest against the making of an award is received and the HCA decides to withhold the award pending disposition of the protest, the offerors whose offers might become eligible for award may be notified of this protest by the Contracting Officer, and may be requested to extend the time for acceptance of their offers to avoid the need for resolicitation.

(b) Material submitted by a protestor will not be withheld from any interested party outside the government or from any government agency if the Contracting Officer decides to release such material, except to the extent that the withholding of such information is permitted or required by law or regulation.

733.7006 Protests excluded from consideration.

(a) *Contract administration.* Disputes between a contractor and A.I.D. are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978.

(b) *Small business size standards and standard industrial classification.* Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification are for review solely by the Small Business Administration.

(c) *Procurement under Section 8(a) of the Small Business Act.* Contracts are let under section 8(a) of the Small Business Act to the Small Business Administration solely at the discretion of the Contracting Officer, and are not subject to review.

(d) *Determinations of responsibility by the Contracting Officer.* A determination by the Contracting Officer that a bidder or offeror is or is not capable of performing a contract will not be reviewed by the HCA.

(e) *Protests filed in the General Accounting Office (GAO).* Protests filed with the GAO will not be reviewed.

(f) *Procurements funded by A.I.D. to which A.I.D. is not a party.* No protest of a procurement funded by A.I.D. shall be reviewed unless A.I.D. is a party to the acquisition agreement.

(g) *Subcontractor protests.* Subcontractor protests will not be considered.

(h) *Judicial proceedings.* Protests will not be considered when the matter involved is the subject of litigation before a court of competent jurisdiction or when the matter involved has been decided on the merits by a court of competent jurisdiction.

733.7007 Withholding of award and suspension of contract performance.

(a) When a protest is timely filed, an award shall not be made until the matter is resolved unless the HCA first determines that one of the following applies:

(1) The supplies or services to be contracted for are urgently required;

(2) Delivery or performance will be unduly delayed by failure to make award promptly;

(3) A prompt award will otherwise be advantageous to the Government.

(b) When a protest is received after award, the HCA need not decide to suspend contract performance or terminate the awarded contract unless it appears likely that an award may be invalidated and a delay in receiving the supplies or services would not be prejudicial to the Government's interest. In this event, the Contracting Officer shall consider seeking a mutual agreement with the contractor to suspend performance on a no-cost basis.

733.7008 Time for and notification of the decision on the protest.

(a) The HCA shall issue a decision on a protest within 45 days from the date a proper protest is filed unless the HCA determines that a longer period is necessary to resolve the protest, and so notifies the protestor in writing.

(b) The HCA shall notify the protestor of his or her decision in writing, which decision shall constitute the final decision of the Agency.

Date: May 2, 1989.

John F. Owens,

Procurement Executive.

[FR Doc. 89-11336 Filed 5-11-89; 8:45 am]

BILLING CODE 6116-71-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Status for the Anastasia Island Beach Mouse and Threatened Status for the Southeastern Beach Mouse

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service hereby determines the Anastasia Island beach mouse (*Peromyscus polionotus phasma)* to be an endangered species and the southeastern beach mouse (*Peromyscus polionotus niveiventris)* to be a threatened species pursuant to the Endangered Species Act of 1973, as amended (Act). These mice occur only on the Atlantic coast of Florida and have declined primarily due to the alteration and destruction of their habitat. In some areas competition from house mice and predation by house cats may also be affecting survival. This rule implements the protection and recovery provisions afforded by the Act for these two beach mice.

EFFECTIVE DATE: June 12, 1989.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Jacksonville Field Office, U.S. Fish and Wildlife Service, 3100 University Boulevard South, Suite 120, Jacksonville, Florida 32216.

FOR FURTHER INFORMATION CONTACT: Mr. David J. Wesley, Field Supervisor, at the above address (904/791-2580 or FTS 946-2580).

SUPPLEMENTARY INFORMATION

Background

Beach mice are pale-colored coastal subspecies of the oldfield mouse (*Peromyscus polionotus*), a wide-ranging species in the southeastern United States. Beach mice occur only along the Atlantic and Gulf coasts of Florida and the Gulf coast of Alabama. Three subspecies of Gulf coast beach mice, the Alabama beach mouse (*Peromyscus polionotus ammobates*), Perdido Key beach mouse (*P. p. trissyllepsis*), and the Choctawhatchee beach mouse (*P. p. allophrys*), have already been listed as endangered species pursuant to the Act (June 6, 1985; 50 FR 23872). The present rule lists two of the Atlantic coast subspecies. One of these, the Anastasia Island beach mouse (*P. p. phasma*), is listed as an endangered species; the other, the southeastern beach mouse (*P. p. niveiventris*), is listed as threatened. Both occur only in Florida. The Anastasia Island beach mouse was known historically from the mouth of the St. Johns River, Duval County, south to Matanzas Inlet, St. Johns County. The southeastern beach mouse formerly occurred from Ponce (Mosquito) Inlet, Volusia County, south to Hollywood Beach, Broward County (Humphrey 1987).

The Anastasia Island beach mouse (*Peromyscus polionotus phasma*) was named by Bangs in 1898 as a full species, *Peromyscus phasma*. Osgood (1909) relegated it to subspecific rank under the species *Peromyscus polionotus*. It is one of the largest of the beach mice, with ten adults from the type locality averaging 138.5 mm. in total length with an average tail length of 53 mm. (Osgood 1909). Like all beach mice, it is considerably paler than inland races of *P. polionotus*. The coloration is light ochraceous buff on the back, with pure white underparts, a unicolor tail, and rather indistinct white markings on the nose and face (Howell, unpubl. ms., *circa* 1940). The type locality is Point Romo, Anastasia Island, St. Johns County, Florida (Hall 1981).

The southeastern beach mouse (*Peromyscus polionotus niveiventris*) was named by Chapman as *Hesperomys niveiventris* in 1889. Bangs placed it in the genus *Peromyscus* in 1898, and Osgood (1909) relegated it to subspecies rank under *Peromyscus polionotus*. This is the largest of the beach mice, with 10 adults averaging 139 mm. in total length and 52 mm. in tail length (Osgood 1909). It is slightly darker and more buffy than *Peromyscus polionotus phasma*, but still considerably paler than most inland subspecies (it is similar in coloration to inland *P. p. rhoadsi*, but is much larger in size) (Howell, unpubl. ms., *circa* 1940). The type locality is Oak Lodge, east peninsula opposite Micco, Brevard County, Florida (Hall 1981).

Both *Peromyscus polionotus phasma* and *P. p. niveiventris* are restricted to sand dunes mainly vegetated by sea oats (*Uniola paniculata*) and dune panic grass (*Paspalum amarulum*), and to the adjoining scrub, characterized by oaks (*Quercus* sp.) and sand pine (*Pinus clausa*) or palmetto (*Serenoa repens*) (Humphrey and Barbour 1981, Humphrey 1987). Extine and Stout (1987) studied dispersion and movements of *Peromyscus polionotus niveiventris* on Merritt Island. The habitat of the mice consisted of three contiguous zones of vegetation running parallel with the beach and dune lines. Zone 1 was seaward and supported sea oats; Zone 2 was characterized by clumps of palmetto and sea grape (*Coccoloba uvifera*), and expanses of open sand; Zone 3 was interior and consisted of dense scrub dominated by palmetto, sea grape, and wax myrtle (*Myrica cerifera*). Zones 2 and 3 were found to be the preferred habitats of the beach mice, whereas Zone 1 was marginal.

The following information pertains mostly to Gulf coast beach mice, but probably applies to subspecies along the Atlantic coast, since all beach mice are morphologically similar and live in similar habitats.

Blair (1951) found that food plants most utilized by beach mice are various beach grasses and sea oats. The fruits of beach grass are readily available to the mice, but those of sea oats are usually obtainable only after they have been blown down by heavy winds. These foods are often found stored in mouse burrows. Beach mice also probably eat invertebrates from time to time, especially in late spring and early summer when seeds are scarce (Ehrhart *in* Layne, 1978).

Beach mice are burrow-inhabiting animals. Ehrhart (*in* Layne 1978), writing

about the Atlantic coast subspecies *P. p. decoloratus*, noted that burrow entrances are usually placed on the sloping side of a dune at the base of a shrub or clump of grass. Old burrows of ghost crabs are utilized, but more commonly the mice excavate their own burrows (Blair 1951). The home range may contain up to 20 burrows, which are used for refuge, nesting, and food storage.

Along the Gulf coast, much breeding activity was evident from November through early January, when many immature animals were present (Blair 1951). Litters ranged from two to seven, averaging four; mice reached reproductive maturity as early as 6 weeks of age. In the laboratory, Bowen (1968) found that a female beach mouse could produce over 80 young during her lifetime, with litters produced regularly at 26-day intervals. Mortality of the young is very high, however. Blair (1951) found that only 19.5 percent of beach mice on the Gulf coast survived more than 4 months. Similar breeding activity for the two beach mice considered under this rule can be expected.

Myers (1983) reported that raccoons, skunks, snakes, great blue herons, domestic dogs, and domestic cats could be beach mouse predators on the Gulf coast dunes. These species are also potential beach mouse predators on the Atlantic coast.

Hall (1981) cites two historical records for the Anastasia Island beach mouse: The type locality at Point Romo, Anastasia Island, St. Johns County; and the beach dunes at the border of the St. Johns and Duval County line. This subspecies, therefore, could have ranged along the ocean dunes from the mouth of the St. Johns River in Duval County south to the end of Anastasia Island at Matanzas Inlet, St. Johns County. A recent survey of this subspecies by Humphrey (1987) located the mouse only on Anastasia Island, where its remaining habitat is fragmented and discontinuous, and populations are small. Much former habitat on Anastasia Island has been converted to lawn or concrete associated with development of houses and condominiums.

The original distribution of the southeastern beach mouse was along beach dunes from Ponce (Mosquito) Inlet, Volusia County, south along the coast to Hollywood Beach, Broward County. Humphrey (1987) found the mouse common at Cape Canaveral and in smaller numbers at Cape Canaveral National Seashore. From Sebastian Inlet to Hutchinson Island, only a few small, scattered remnant populations survive. A survey of southeastern beach mouse habitat conducted at four State-owned recreation areas by the Florida Department of Natural Resources during the spring and summer of 1988 yielded the following results: one southeastern beach mouse was trapped at the Ft. Pierce Inlet State Recreation Area (St. Lucie County), four were taken at the Sebastian Inlet State Recreation Area (Indian River County), and none were caught at the MacArthur Beach State Park (Palm Beach County) or the St. Lucie Inlet State Park (Martin County). The latter two areas lie south of Hutchinson Island, where nearly all beach dunes have been destroyed by housing and condominium developments.

A third Atlantic coast beach mouse subspecies, *Peromyscus polionotus decoloratus*, formerly occurred between the ranges of *P. p. phasma* to the north and *P. p. niveiventris* to the south. This very pale race lived on the beach dunes from Matanzas Inlet, St. Johns County south to Ponce (Mosquito) Inlet, Volusia County. Humphrey and Barbour (1981) searched extensively for *decoloratus* but were unable to find any existing populations. They concluded that habitat destruction and alteration throughout its entire range had brought about its extinction. *Peromyscus polionotus decoloratus* appeared as a category 3A species, one that is probably extinct, in the notice of review for vertebrate animals published September 18, 1985, in the **Federal Register** (50 FR 37958). In this same notice, the other two beach mice were placed in category 2, indicating they were being considered as candidates for listing. A proposed rule for classifying the Anastasia Island beach mouse as endangered and the southeastern beach mouse as threatened was published on July 5, 1988 (53 FR 25185).

Summary of Comments and Recommendations

In the July 5, 1988, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices inviting general comment were published on July 23, 1988, in the "Fort Pierce News-Tribune;" on July 24, 1988, in the "Stuart News" and "Daytona Beach Journal;" and on July 30, 1988, in the "St. Augustine Record," "Florida Today" (Melbourne), the "Vero Beach Press-Journal," and the "Palm Beach Post." Eight comments were received: three were from Federal agencies, three from State agencies, one from a county department, and one from an individual. Only one expressed opposition to the listing.

The one opposing comment came from the U.S. Air Force's Patrick Air Force Base in Brevard County. In a letter dated August 19, 1988, the Acting Deputy Range/Base Civil Engineer stated that the Air Force was very concerned about the possible listing of the mice. He felt the listing of this "vermin" species would seriously hamper the Air Force with its mission accomplishment at Cape Canaveral Air Force Station. He further stated that the listing might not only delay or prevent future project development but could further obligate and impose mitigative and financial type actions on both the Fish and Wildlife Service and the Air Force. According to this commentor, the listing would also have a negative impact on future beach and dune restoration projects.

The Service responds with the following four points. (1) The southeastern beach mouse is not a "vermin" species since it is neither destructive to human interests nor annoying or injurious to human health. The Service believes that the Air Force is confusing this rare and totally innocuous mouse with the very common and often obnoxious house mouse *(Mus musculus)*. (2) The Service is required by law to list any species as endangered or threatened if it meets the Act's criteria for such listing; there being no alternative in such cases regardless of what effect the listing may have on Federal agencies and their activities. (3) There is very little likelihood that the listing will hamper the Cape Canaveral Air Force Station's mission accomplishment. The Service has found through many years of experience that the Section 7 consultation process of the Act almost invariably allows Federal activities to proceed (often with only minor alteration) while still providing necessary protection to endangered or threatened species. (4) The Service does not believe the listing will have a negative effect on beach and dune restoration projects; in fact the southeastern beach mouse should benefit from such activities since loss of this type of habitat has been a major threat to the species.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Anastasia Island beach mouse should be classified as an endangered

species, and the southeastern beach mouse as a threatened species. Procedures found at Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be endangered or threatened due to one or more of the five factors described in Section 4(a)(1). These factors and their application to the Anastasia Island beach mouse (*Peromyscus polionotus phasma*) and the southeastern beach mouse (*Peromyscus polionotus niveiventris*) are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range

(1) Anastasia Island beach mouse—Published literature records this subspecies from the type locality at Point Romo, Anastasia Island, St. Johns County, and along the beach dunes at the line between Duval and St. Johns Counties (Hall 1981). Therefore, this mouse probably occurred from the mouth of the St. Johns River in the north to Anastasia Island in the south. Much dune habitat along this beach has been developed around Jacksonville and St. Augustine, and is unsuitable for beach mice. Some suitable habitat occurs between Ponte Vedra Beach and South Ponte Vedra Beach, St. Johns County, in the Guana River Wildlife Management Area, but Humphrey (1987) was unable to find the mice there. In fact, Bangs reported in 1896 that these beach mice were absent from the beaches north of St. Augustine. Humphrey (1987) found populations distributed along the length of Anastasia Island, but reported that much of their former habitat has been lost due to development of houses and condominiums. As a result, the remaining habitat is fragmented and discontinuous, and the populations are small. The number of specimens caught by Humphrey (live-trapped and released) suggests that viable populations may remain only at the ends of Anastasia Island, along the publicly-owned dune grasslands of Anastasia State Recreation Area and Fort Matanzas National Monument. Proposed bridge replacement across the Matanzas Inlet, scheduled for construction early in the 1990's, would affect the small amount of habitat (about 25 acres) remaining on Fort Matanzas National Monument. Unless this bridge is carefully planned and constructed, it could be extremely detrimental to the survival of the mouse in this area.

(2) Southeastern beach mouse—This subspecies occurred on the sand dunes along the beach from Ponce (Mosquito) Inlet, Volusia County in the north to Hollywood Beach, Broward County, in the south (Hall, 1981). Bangs (1898) found it to be "extremely abundant on all the beaches of the east peninsula from Palm Beach at least to Mosquito (Ponce) Inlet," and Howell (unpubl. ms., *circa*, 1940) found that it was abundant in the 1930's. I.J. Stout (personal communications to Humphrey, 1987) also found it abundant in the middle and late 1970's on Cape Canaveral. However, by the early 1970's, M.H. Smith (personal communications to Humphrey, 1987) found that most other populations had disappeared. Humphrey (1987), during extensive trapping for the subspecies in 1986, captured southeastern beach mice on Cape Canaveral National Seashore, Merritt Island National Wildlife Refuge, Cape Kennedy Air Force Station, the southern half of Sebastian Inlet State Recreation Area and Pepper Park. He reported that the dune grassland at Cape Canaveral is excellent, extensive habitat for beach mice, and that the population density there is apparently high. Northward the habitat narrows to a single dune in Canaveral National Seashore, where population density appears to be lower. Humphrey's study suggested that beach mice no longer occur on East Peninsula, where the habitat has been severely disrupted by development. He found that only a few, small, fragmented populations of beach mice remain from Sebastian Inlet to Hutchinson Island. The subspecies apparently no longer occurs in the southern part of its range; beach development has destroyed its habitat at Jupiter Island, Palm Beach, Lake Worth, Hillsboro Inlet, and Hollywood Beach.

B. Overutilization for commercial, recreation, scientific, or educational purposes

Not applicable for either subspecies.

C. Disease or predation

(1) Anastasia Island beach mouse—House mice (*Mus musculus*) have colonized much, of the dune grassland on which the Anastasia Island beach mouse depends for survival. The inference that these two mice compete is speculative, but Humphrey and Barbour (1981) presented evidence for competitive exclusion of other subspecies of beach mice by house mice. The situation on Anastasia Island is unprecedented because for the first time beach mice and house mice have been found to co-occur locally. Also, house cats (*Felis catus*) are widespread on Anastasia Island. Blair (1951) and Bowen (1968) felt that house cats were extremely threatening to beach mouse populations on the Florida West Coast. The effects of house mice and house cats on the survival of beach mouse populations are speculative but may be quite important (Humphrey and Barbour, 1981). Either a competitor or a predator alone can eliminate another species, and the effects of a competitor and predator together would be additive. On the assumption that native beach mice and non-native house mice compete strongly enough to cause competitive exclusion of the former, Humphrey (1987) inferred that the survival status of the Anastasia Island beach mouse was precarious. The population on the northern end of Anastasia Island may soon disappear. The population appearing to be at least risk is at Fort Matanzas National Monument, where he recorded no house mice. Even there, however, Humphrey thought that the likelihood of colonization by house mice was high, and posed a threat to beach mice.

(2) Southeastern beach mouse—Humphrey (1987) found no evidence of house mice colonizing southeastern beach mouse habitat, but house cat activity was widespread in the areas studied. Although the effects of house cat predation on the southeastern beach mouse are unknown, house cats are a major threat to Gulf Coast beach mice. Blair (1951) felt that predation by house cats was the single most important factor affecting the chances of survival of beach mice on Santa Rosa Island in the Florida panhandle, and Bowen (1968) was so concerned about the role of domestic cats as predators on Gulf coast beach mice that he avoided trapping mice wherever he found cat tracks on the beaches. House cats pose as serious a threat to Atlantic coast beach mouse populations as they do to those on the Gulf coast.

D. The Inadequacy of Existing Regulatory Mechanisms

No current regulatory mechanisms provide protection to the Anastasia Island beach mouse, the southeastern beach mouse, or their habitat. Neither subspecies is listed by the State of Florida, and the Federal Government offers no protection on Federal lands beyond that which applies to wildlife in general on such lands. Federal listing will provide protection to the animals themselves through section 9 of the Act, and to their habitat on Federal lands or on private lands where Federal funding or Federal permits are involved. Federal listing of these mice will also effect State protection for them through Florida's Cooperative Agreement with

the Federal Government under section 6 of the Act.

E. Other Natural or Manmade Factors Affecting its Continued Existence

(1) Anastasia Island beach mouse—Except at each end of Anastasia Island (Fort Matanzas National Monument and the Anastasia State Recreation Area), the habitat is fragmented and discontinuous, and remaining populations are small. There is apparently little or no gene flow between these small disjunct populations and the probability of loss of genetic viability is high.

(2) Southeastern beach mouse—According to Humphrey (1987) beach erosion may soon become a threat to the population of this subspecies on the Canaveral National Seashore.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these subspecies in formulating this rule. Based on this evaluation, the preferred action is to list the Anastasia Island beach mouse as an endangered species, and the southeastern beach mouse as a threatened species.

Viable populations of Anastasia Island beach mice occur only on the northern and southern ends of Anastasia Island on the Fort Matanzas National Monument and Anastasia State Recreation Area. The remaining populations have either already been destroyed or face imminent threats from beachfront development. Even at the Anastasia State Recreation Area the mice are threatened by competition with house mice and predation by house cats. House cats are also present at the Fort Matanzas National Monument, and house mice may become established in the future. The proposed bridge replacement across Matanzas Inlet, if not carried out carefully, could be detrimental to the remaining habitat for this mouse at the Monument. This subspecies is in danger of extinction throughout all of its range and qualifies for listing as endangered.

The range of the southeastern beach mouse has been substantially reduced and fragmented by habitat conversion and invasion of exotic animals. These threats are anticipated to continue, and the range of this subspecies ultimately may be limited to public lands that are properly managed. Because substantial populations remain on the Canaveral National Seashore and on Merritt Island (both publicly owned), the subspecies is not likely to become extinct but rather may become an endangered species within the foreseeable future unless management and protective measures are instituted. It therefore qualifies for listing as a threatened species.

Based on current knowledge, all other alternatives to listing the Anastasia Island beach mouse as endangered and the southeastern beach mouse as threatened do not adequately reflect the biological facts and therefore have been rejected. Critical habitat is not determined for reasons described in the next section.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for the Anastasia Island beach mouse and the southeastern beach mouse at this time. The only viable populations of both subspecies occur on lands managed by Federal or State agencies. These agencies have been informed of the occurrence of the mice on lands they manage, and must take measures to provide necessary protection for both the mice and their habitat. Critical habitat designation would provide no benefits to the mice beyond that provided by the listing action. Outside Federal and State lands, these beach mice occur in very small, disjunct populations on a number of privately owned parcels of land. To determine each of the small parcels of land as critical habitat would be impossible from a practical standpoint, and might be detrimental to the populations that inhabit them by calling public attention to the presence of the mice. Publication of maps and precise descriptions delineating these areas, as required for a determination of critical habitat, could attract vandals and curiosity seekers to them, possibly damaging the habitat intended for protection. Since designation of critical habitat on public lands would not benefit the mice, and designation of critical habitat on private lands might be harmful to them, it is not prudent to determine critical habitat for the conservation of the Anastasia Island beach mouse or the southeastern beach mouse.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

The Federal agencies that might be affected by the Anastasia Island beach mouse and/or southeastern beach mouse listings include the U.S. Air Force (Cape Canaveral Air Force Station and Patrick Air Force Base), NASA (Kennedy Space Center), the U.S. Fish and Wildlife Service (Merritt Island and Hobe Sound National Wildlife Refuges) and the National Park Service (Canaveral National Seashore and Fort Matanzas National Monument), and, perhaps, the Federal Emergency Management Agency (FEMA).

With the publication of this rule, these Federal agencies need to insure that activities which they authorize, fund, or carry out, are not likely to jeopardize the continued existence of these animals. Except for the National Park Service at the Fort Matanzas National Monument, and perhaps FEMA, impacts on Federal agencies are expected to be minimal. In the case of the Fort Matanzas National Monument, the Park Service will need to insure that a new bridge proposed for the Matanzas Inlet will not jeopardize the survival of the Anastasia Island beach mouse on Monument lands.

Under the National Flood Insurance Program, FEMA is required to determine if communities are eligible for Federal flood insurance. If the determination of eligibility for flood insurance by the FEMA authorizes and/or in effect partially subsidizes construction activity that may affect a listed species, then the FEMA must request the initiation of formal section 7(a)(2) consultation.

Whether or not any future FEMA activities will be affected is unknown.

There will be no effect on private landowners from the listing unless their activities involve use of Federal funds or require Federal permits. In such cases, the funding or permitting agency must insure that the activities will not jeopardize the continued existence of the beach mice before they can provide the funds or issue the permits to the private landowner. However, the Service is not aware of any cases at the present time where activities of private landowners would be affected by this requirement.

The Act and implementing regulations found at 50 CFR 17.21 and 17.31 set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. These prohibitions, in part, would make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions would apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22, 17.23 and 17.32. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or incidental take in connection with otherwise lawful activities. For threatened species, there are also permits for zoological exhibition, educational purposes, or special purposes consistent with the purposes of the Act. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available.

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environment Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to Section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

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Extine, D.D., and I.J. Stout. 1987. Dispersion and habitat occupancy of the beach mouse *Peromyscus polionotus niveiventris*. J. Mammal. 68:297–304.

Hall, E.R. 1981. The mammals of North America. John Wiley and Sons, New York. 1175 pp.

Humphrey, S.R., and D.B. Barbour. 1981. Status and habitat of three subspecies of *Peromyscus polionotus* in Florida. J. Mammal. 62:840–844.

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Layne J.N. (ed.). 1978. Rare and endangered biota of Florida, Volume 1, Mammals. Univ. Presses of Florida, Gainesville, pp. 18–19.

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Osgood, W.H. 1909. Revision of the mice of the American genus *Peromyscus*. North American Fauna 28:85 pp.

Author

The primary author of this rule is John L. Paradiso (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Regulations Promulgation

Accordingly, Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, is hereby amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for Part 17 continues to read as follows:

Authority: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411; Pub. L. 100–478, 102 Stat. 2306; Pub. L. 100–653, 102 Stat. 3825 (16 U.S.C. 1531 *et seq.*); Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under MAMMALS, to the list of Endangered and Threatened Wildlife.

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*		
Mouse, Anastasia Island beach	*Peromyscus polionotus phasma*	U.S.A. (FL)	Entire	E	349	NA	NA
*	*	*	*	*	*		
Mouse, southeastern beach	*Peromyscus polionotus niveiventris*	U.S.A. (FL)	Entire	T	349	NA	NA
*	*	*	*	*	*		

Dated: April 6, 1989.

Becky Norton Dunlop,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 89-11426 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-SS-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 661 and 663

[Docket No. 80750-9050]

Ocean Salmon Fisheries off the Coasts of Washington, Oregon, and California and Pacific Coast Groundfish Fishery

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

ACTION: Final rule.

SUMMARY: NOAA issues this rule to modify the regulations implementing the fishery management plans (FMPs) for the ocean salmon and Pacific coast groundfish fisheries in the exclusive economic zone (3-200 nautical miles) off the coasts of Washington, Oregon, and California. The rulemaking is necessary to clarify certain provisions of the trip limit restrictions for Pacific coast groundfish and to provide consistency between the Pacific coast groundfish and ocean salmon regulations. It is intended to simplify enforcement of regional fisheries regulations.

EFFECTIVE DATE: June 12, 1989.

FOR FURTHER INFORMATION CONTACT: William L. Robinson (Northwest Region, NMFS), 206-526-6140; or Rodney R. McInnis (Southwest Region, NMFS), 213-514-6199.

SUPPLEMENTARY INFORMATION: Under the Magnuson Fishery Conservation and Management Act (Magnuson Act), the FMPs for the commercial and recreational salmon fisheries and the Pacific coast groundfish fishery off the coasts of Washington, Oregon, and California were prepared by the Pacific Fishery Management Council (Council) and approved by the Secretary of Commerce (Secretary). Implementing regulations governing the ocean salmon and Pacific coast groundfish domestic fisheries are codified at 50 CFR Parts 661 and 663, respectively.

This rulemaking changes the Federal ocean salmon and groundfish regulations to clarify landing restrictions in these fisheries, to provide consistency between regional fisheries regulations, and to facilitate enforcement. Following discussions at its March and April 1988 meetings, the Council recommended this rule to the Secretary.

The rule contains two changes to the groundfish regulations and one change to the ocean salmon regulations which are described below.

(1) The rule clarifies the definition of "land or landing" in the groundfish regulations so that a vessel operator arriving in port prior to the end of a fishing period, if he had already landed the legal maximum for that period, would not be in violation of trip limits unless he began to offload fish again before the next legal period.

(2) The rule also revises the definition of "land or landing" in the ocean salmon regulations to be consistent with the groundfish regulations.

(3) The rule modifies the definition of "fishing trip" in the groundfish regulations by eliminating the reference to leaving port, thus clarifying that trip limits apply to a fisherman who delivers to processing vessels at sea, whether or not the fisherman returns to port between deliveries.

This rule was proposed in the **Federal Register** on October 20, 1988 (53 FR 41214), and public comments were requested until November 18, 1988. No comments were received.

Classification

NOAA issues this rule under authority of section 305(g) of the Magnuson Act to clarify certain provisions of the trip limit restrictions for Pacific coast groundfish and to provide consistency between the Pacific coast groundfish and ocean salmon regulations.

This action is categorically excluded from the requirement to prepare an environmental assessment by NOAA Directive 02-10. This is because this action proposes only minor technical changes to the existing implementing regulations and does not result in a significant effect on the human environment. This action is not expected to alter the nature or intensity of environmental impacts which were addressed in: (1) The environmental impact statement for the Ocean Salmon FMP (and in environmental assessments prepared for subsequent FMP amendments), or (2) the supplemental environmental impact statement (SEIS) prepared by the Council for the Pacific Coast Groundfish FMP and the environmental assessments for the three amendments to the FMP.

The Under Secretary for Oceans and Atmosphere determined that this rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291.

The General Counsel of the Department of Commerce certified to the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities.

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

The Council determined that this rule does not directly affect the coastal zone of any state with an approved coastal zone management program. The Assistant Administrator for Fisheries concurs with this determination.

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

List of Subjects in 50 CFR Parts 661 and 663

Fisheries, Fishing.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: May 5, 1989.

James E. Douglas, Jr.,

Deputy Assistant Administrator For Fisheries, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR Parts 661 and 663 are amended as follows:

PARTS 661 AND 663—[AMENDED]

1. The authority citation for 50 CFR Parts 661 and 663 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 661.2, the definition of *land* or *landing* is revised to read as follows:

§ 661.2 Definitions.

* * * * *

Land or *landing* means to begin transfer of fish from a fishing vessel. Once transfer begins, all fish aboard the vessel are counted as part of the landing.

* * * * *

3. In § 663.2, the definitions of *fishing trip* and *land* or *landing* are revised to read as follows:

§ 663.2 Definitions.

* * * * *

Fishing trip means a period of time between landings when fishing is conducted.

* * * * *

Land or *landing* means to begin transfer of fish from a fishing vessel. Once transfer begins, all fish aboard the vessel are counted as part of the landing.

* * * * *

[FR Doc. 89-11417 Filed 5-11-89; 8:45 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 54, No. 91
Friday May 12, 1989

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 953

[Docket No. FV-89-048]

Southeastern Potatoes; Expenses and Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would authorize expenditures and establish an assessment rate under Marketing Order 953 for the 1989–90 fiscal period. Authorization of this budget would enable the Southeastern Potato Committee to incur expenses that are reasonable and necessary to administer the program. Funds to administer this program would be derived from assessments on handlers.

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

ADDRESS: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456, telephone 202–447–5331.

SUPPLEMENTARY INFORMATION: This rule is proposed under Marketing Agreement No. 104 and Marketing Order No. 953 [7 CFR Part 953], both as amended, regulating the handling of Irish potatoes grown in Southeastern States (Virginia and North Carolina). The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

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

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities.

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

There are approximately 60 handlers of Southeastern potatoes under this marketing order, and approximately 150 potato producers. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having annual gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual annual receipts are less than $3,500,000. The majority of the handlers and producers may be classified as small entities.

The budget of expenses for the 1989–90 fiscal year was prepared by the Southeastern Potato Committee (committee), the agency responsible for local administration of the order, and submitted to the Department of Agriculture for approval. The members of the committee are handlers and producers of Southeastern potatoes. They are familiar with the committee's needs and with the costs for goods, services, and personnel in their local area and are thus in a position to formulate an appropriate budget. The budget was formulated and discussed in a public meeting. Thus, all directly affected persons have had an opportunity to participate and provide input.

The assessment rate recommended by the committee was derived by dividing anticipated expenses by expected shipments of potatoes. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses.

The Southeastern Potato Committee met on April 20, 1989, and unanimously recommended a 1989–90 budget of $11,000 and an assessment rate of $0.01 per hundredweight. The proposed budget and assessment rate are the same as last year's. Major expense items include committee staff salaries, travel expenses, and utilities. The recommended assessment rate, when applied to anticipated fresh market potato shipments of 700,000 hundredweight, would yield $7,000 in assessment revenue which, when added to $4,000 from reserve funds, would be adequate to cover budgeted expenses.

While this proposed action would impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived from the operation of the marketing order. Therefore, the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

This action should be expedited because the committee needs to have sufficient funds to pay its expenses. The 1989–90 fiscal period begins on June 1, 1989, and the marketing order requires that the rate of assessment for the fiscal period apply to all assessable potatoes handled during the fiscal period. In addition, handlers are aware of this action which was recommended by the committee at a public meeting. Therefore, it is found and determined that a comment period of less than 30 days is appropriate because the budget and assessment rate approval for this program needs to be expedited. The committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis.

List of Subjects in 7 CFR Part 953

Marketing agreements and orders, Potatoes (Virginia and North Carolina).

For the reasons set forth in the preamble, it is proposed that § 953.246 be added as follows:

PART 953—IRISH POTATOES GROWN IN SOUTHEASTERN STATES

1. The authority citation for 7 CFR Part 953 continues to read as follows:

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

2. A new § 953.246 is added to read as follows:

§ 953.246 Expenses and assessment rate.

Expenses of $11,000 by the Southeastern Potato Committee are authorized, and an assessment rate of $0.01 per hundredweight of potatoes is established for the fiscal period ending May 31, 1990. Unexpected funds may be carried over as a reserve.

Dated: May 8, 1989.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division.

[FR Doc. 89–11401 Filed 5–11–89; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Parts 1079 and 1030

[Docket No. AO–295–A38; DA–88–111 and DA–89–009]

Milk in the Iowa Marketing Area; Extension of Time for Filing Exceptions on Proposed Amendments to Tentative Marketing Agreement and to Order; and Milk in the Chicago Regional Marketing Area; Extension of Time for Filing Comments on Proposed Termination of Rule

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Extension of time for filing exceptions and comments to proposed rules.

SUMMARY: This notice extends the time for filing exceptions to a recommended decision issued concerning proposed amendments to the Iowa milk marketing order, and for filing comments concerning a proposal to terminate a provision of the Chicago Regional milk marketing order. Both documents were issued on April 12, 1989. Central Milk Producers Cooperative requested the additional time in order to complete an analysis and prepare comments on both documents.

DATE: Exceptions now are due on or before May 30, 1989.

ADDRESS: Exceptions (four copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION: Richard A. Glandt, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456 (202) 447–4829.

SUPPLEMENTARY INFORMATION: Prior documents in the proceeding:

Notice of Hearing: Issued July 11, 1988; published July 13, 1988 (53 FR 26446).

Correction: Published July 20, 1988 (53 FR 27450).

Notice of Rescheduled Hearing: Issued July 21, 1988; published July 25, 1988 (53 FR 27863).

Recommended Decision: Issued April 12, 1989; published April 18, 1989 (54 FR 15417).

Correction: Published May 3, 1989 (54 FR 18979).

Proposed Termination: Issued April 12, 1989; published April 18, 1989 (54 FR 15413).

Notice is hereby given that the time for filing exceptions to the recommended decision with respect to the proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Iowa marketing area and for filing comments on the proposed termination of a provision of the order regulating the handling of milk in the Chicago Regional marketing area, which were issued April 12, 1989, is hereby extended to May 30, 1989.

This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

List of Subjects in 7 CFR Parts 1079 and 1030

Milk marketing orders, Milk, Dairy products.

The authority citation for 7 CFR Parts 1079 and 1030 continues to read as follows:

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

Signed at Washington, DC, on May 8, 1989.

J. Patrick Boyle,

Administrator.

[FR Doc. 89–11402 Filed 5–11–89; 8:45 am]

BILLING CODE 3410–02–M

Animal and Plant Health Inspection Service

[Docket No. 89–057]

9 CFR Part 11

Horse Protection Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are soliciting public comment on changes that we are considering proposing regarding the Horse Protection regulations (referred to below as the regulations). The amendments to the regulations would make more specific what Designated Qualified Person (DQP) inspectors must look for when examining horses at pre-show inspections.

DATE: Consideration will be given only to comments received on or before July 11, 1989.

ADDRESSES: To help ensure that your comments are considered, send an original and three copies to Helene R. Wright, Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 89–057. Comments received may be inspected at USDA, Room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Morley Cook, Senior Staff Veterinarian, Animal Care Staff, Regulatory Enforcement and Animal Care, APHIS, USDA, Room 269, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301–436–8790.

SUPPLEMENTARY INFORMATION: The practice known as "soring" is the injuring of show horses to improve their performance in the show ring. In 1970, Congress passed the Horse Protection Act (15 U.S.C. 1821–1831 (1982)), referred to below as the Act, to eliminate the practice of soring, by forbidding the showing or selling of sored horses. Exercising our rulemaking power under the Act, we issued regulations at 9 CFR Part 11, referred to below as the regulations, that prohibit soring devices and soring methods. In 1979, in response to congressional mandate, we established procedures under which, in addition to our personnel, other designated individuals are trained to conduct pre-show inspections. These individuals, referred to as Designated Qualified Persons (DQP's), are trained and licensed under industry-sponsored DQP programs that we certify and supervise.

The requirements for DQP licensing are set forth in § 11.7 of the regulations. As part of the licensing process, prospective DQP's are trained in the guidelines we have established for

examining a horse prior to exhibition. These inspection procedures include both palpation of the horse's pasterns and visual examination of the horse. However, representatives of both the horse industry and animal welfare organizations have suggested that the current guidelines for pre-show examination of a horse are not detailed enough to ensure a uniform and adequate inspection of all horses examined by DQP's. We agree that a clarification of inspection procedures would probably result in more thorough examination of horses inspected under the Act. Therefore, at this time we are soliciting comments on how best to clarify and make more specific pre-show inspection guidelines, so as to most effectively detect sore horses.

Authority: 15 U.S.C. 1823, 1824, 1825, and 1828; 44 U.S.C. 3506.

Done in Washington, DC, this 8th day of May 1989.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 89-11467 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-34-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[PS-001-89]

RIN 1545-AM88

Limitations on Passive Activity Losses and Credits—Definition of Activity

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations portion of this issue of the **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to the definition of "activity" for purposes of applying the limitations on passive activity losses and passive activity credits. The text of those temporary regulations also serves as the comment document for this notice of proposed rulemaking.

DATES: These regulations are proposed to be effective for taxable years beginning after December 31, 1986. Comments and requests for a public hearing must be delivered or mailed by August 31, 1989.

ADDRESS: Send comments and requests for a public hearing to: Internal Revenue Service, 1111 Constitution Avenue, NW., Room 4429, Washington, DC 20224 (Attn: CC:CORP:T:R (PS-001-89)).

FOR FURTHER INFORMATION CONTACT: Robert Stoddart or Michael J. Grace at 202-566-4751 (not a toll-free number), or at Internal Revenue Service, 1111 Constitution Avenue, NW., Room 4429, Washington, DC 20224 (Attn: CC:CO-RP:T:R (PS-001-89)).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

This notice of proposed rulemaking contains requirements for collecting information, which have been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the requirements should be sent to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer TR:FP, Washington, DC 20224.

The collections of information in this regulation are in § 1.469-4T (k) and (o). The Internal Revenue Service requires this information to identify certain undertakings that taxpayers elect to treat as separate activities and to ascertain that taxpayers have made proper, timely elections. This information will be used to verify that taxpayers have accounted for their interests in the separate activities as section 469 requires. The likely respondents are individuals, farms, and businesses.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require more or less time, depending on their circumstances.

The estimated figures below represent only the estimated time for the physical preparation of any writing requirement that may be imposed by § 1.469-4T (k) or (o). They do not represent an estimation of the actual time for making the decisions, judgments, computations, and studies that may be necessary to satisfy the requirements of section 469 or to determine whether an election should be made.

Estimated total annual reporting burden: 3,000 hours.

Estimated annual burden per respondent for making a written election varies from 5 minutes to 15 minutes, depending on individual circumstances, with an estimated average of 6 minutes.

Estimated number of respondents: 30,000.

Estimated annual frequency of responses: once (for each of two possible elections).

Submission to Small Business Administration

Pursuant to section 7805(f) of the Code, the rules proposed in this document will be submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Background

The temporary regulations in the Rules and Regulations portion of this issue of the **Federal Register** add rules under § 1.469-4T to Title 26 of the Code of Federal Regulations. Section 1.469-4T defines the term "activity" for purposes of applying the limitations on passive activity losses and passive activity credits. The temporary regulations also amend certain provisions of previously issued temporary regulations under section 469 (53 FR 5686, February 25, 1988 (T.D. 8175)).

The temporary regulations reflect the amendment of the Internal Revenue Code by sections 501 and 502 of the Tax Reform Act of 1988 (Pub. L. 99-514), section 10212 of the Revenue Act of 1987 (Pub. L. 100-203), and sections 1005(a) and 2004(g) of the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. 100-647). This document proposes to adopt the temporary regulations as final regulations. Accordingly, the text of the temporary regulations serves as the comment document for this notice of proposed rulemaking. In addition, the preamble to the temporary regulations explains the proposed and temporary rules.

For the text of the temporary regulations, see T.D. 8253, published in the Rules and Regulations portion of this issue of the **Federal Register**.

Special Analyses

These proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted, consideration will be given to any written comments that are submitted (preferably a signed original and seven copies) to the Internal Revenue Service. All comments will be available for public inspection and copying. A public hearing will be scheduled and held upon written request by any person who submits written comments on the proposed rules. Notice

of the time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Michael J. Grace, Office of the Assistant Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations on matters of both substance and style.

List of Subjects

26 CFR 1.441-1—1.483-2

Income taxes, Accounting, Deferred compensation plans.

26 CFR Part 602

OMB control numbers under the Paperwork Reduction Act.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 89-11335 Filed 5-11-89; 8:45 am]

BILLING CODE 4830-01-M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 250

RIN 1010-AA61

Oil and Gas and Sulphur Operations in the Outer Continental Shelf, California

AGENCY: Minerals Management Service, Interior.

ACTION: Reopening and extension of comment period.

SUMMARY: On January 17, 1989, the Minerals Management Service (MMS) published a notice of proposed rulemaking in the **Federal Register** which would establish special emission control requirements for Outer Continental Shelf (OCS) facilities off the coast of California under the provisions of section 5(a)(8) of the OCS Lands Act, as amended. The public comment period for this proposed rule closed April 17, 1989. The MMS has determined that an additional brief extension of the comment period is warranted. This notice extends the comment period for the proposed rulemaking until May 31, 1989.

DATE: Comments must be hand delivered or postmarked no later than May 31, 1989.

ADDRESS: Comments should be mailed or hand delivered to the Department of the Interior, Minerals Management Service; 381 Elden Street; Mail Stop 646; Herndon, Virginia 22070; Attention: Gerald D. Rhodes.

FOR FURTHER INFORMATION CONTACT: Gerald D. Rhodes; Chief, Branch of Rules, Orders, and Standards; Minerals Management Service; 381 Elden Street; Mail Stop 646; Herndon, Virginia 22070; telephone (703) 648-7816 or (FTS) 959-7816. Beginning May 22, 1989, telephone (703) 787-1600 or (FTS) 393-1600.

SUPPLEMENTARY INFORMATION: On January 17, 1989, MMS published in the **Federal Register** a notice of proposed rulemaking to establish requirements governing the control of emissions which may result from operations conducted on Federal oil and gas leases in the OCS off the coast of California. The comment period for this proposed rule was to close February 16, 1989. In response to several requests for additional time within which to submit comments on the proposed rule, a **Federal Register** Notice was published on February 9, 1989, which extended the comment period an additional 60 days until April 17, 1989.

The MMS has determined that an additional brief extension of the comment period is necessary to provide interested parties time to comment. Accordingly, the comment period is being reopened and extended until May 31, 1989. Comments previously submitted need not be resubmitted. Comments received after the close of the original comment period and prior to the publication of this notice will also be considered.

Comments should be sent to the address provided above and must be hand delivered or postmarked by May 31, 1989.

Date: May 5, 1989.

Carolita Kallaur,

Associate Director for Offshore Minerals Management.

[FR Doc. 89-11491 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-MR-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 09-89-02]

Special Local Regulations; Sohio Riverfest, Cuyahoga River, Cleveland, OH

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is considering a proposal to establish special local regulations for the Sohio Riverfest. This event will be held on 28, 29 and 30 July 1989 on the Cuyahoga River, Cleveland, Ohio. The regulations are needed to provide for the safety of life and property on navigable waters during the event.

DATES: Comments must be received on or before 2 June 1989.

ADDRESSES: Comments should be mailed to Commander (inc), Ninth Coast Guard District, 1240 East 9th Street, Cleveland, OH 44199. The comments will be available for inspection and copying at the Ice Navigation Center, Room 2007A, 1240 East 9th Street, Cleveland, OH. Normal office hours are between 7:30 a.m. and 4:30 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered.

FOR FURTHER INFORMATION CONTACT: MST1 SCOTT E. BEFUS, Office of Search and Rescue, Ninth Coast Guard District, 1240 E. 9th St., Cleveland, OH 44199, (216) 522-4420.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rulemaking by submitting written views, data or arguments. Persons submitting comments should include their names and addresses, identify this notice (CGD 09-89-02) and the specific section of the proposal to which their comments apply, and give reasons for each comment. Receipt of comments will be acknowledged if a stamped, self-addressed postcard or envelope is enclosed. The rules may be changed in light of comments received. All comments received before the expiration of the comment period will be considered before final action is taken on this proposal. No public hearing is planned, but one may be held if written requests for a hearing are received and it is determined that the opportunity to make oral presentations will aid the rulemaking process.

Drafting Information

The drafters of this regulation are MST1 SCOTT E. BEFUS, project officer, Office of Search and Rescue and LCDR C.V. MOSEBACH, project attorney, Ninth Coast Guard District Legal Office.

Discussion of Regulations

The Sohio Riverfest will be conducted on the Cuyahoga River on 28, 29 and 30 July 1989. Due to the nature of shoreside businesses and planned entertainment activities, it is anticipated that much vessel congestion will remain in the area even during times when specific marine events are not scheduled. The size of large vessels trying to transit the area and the effects of navigational

equipment of large vessels such as prop wash or turbulence caused by operation of main propulsion and bow thruster units would pose a threat to small craft by vessels of 100 gross tons or more during times of planned water-related events. Vessels desiring to transit the regulated area may do so only with prior approval of the Patrol Commander (Officer in Charge, Coast Guard Station Cleveland Harbor, OH).

Economic Assessment and Certification

This proposed regulation is considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. This event will draw a large number of spectator craft into the area for the duration of the event. This should have a favorable impact on commercial facilities providing services to the spectators. Any impact on commercial traffic in the area will be negligible.

Since the impact of this regulation is expected to be minimal, the Coast Guard certifies that it will not have a significant economic impact on a substantial number of small entities.

Federalism

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

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

Proposed Regulations

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations, is amended as follows:

PART 100—[AMENDED]

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

Authority: 33 U.S.C. 1233; 49 CFR 1.46 AND 33 CFR 100.35

2. Part 100 is amended to add a temporary section 100.35–0902 to read as follows:

§ 100.35–0902 Sohio Riverfest, Cuyahoga River, Cleveland, Ohio

(a) *Regulated Area:* The following area will be closed to vessel navigation or anchorage for vessels of more than 100 gross tons: That portion of the Cuyahoga River from the Conrail Railroad Bridge at Mile 0.8 above the mouth of the river to the Eagle Avenue Bridge.

(b) *Special Local Regulations:*

(1) The above area will be closed to vessel navigation or anchorage by vessels of more than 100 gross tons from 7:00 p.m. (local time) 28 July until 2:00 a.m. on 29 July 1989; 12:00 noon to 3:00 p.m. on 29 July 1989; 7:00 p.m. on 29 July until 2:00 a.m. on 30 July 1989; 1:00 p.m. until 7:00 p.m. on 30 July 1989.

(2) The Coast Guard will patrol the regatta area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on channel 16 (156.8 MHZ) by the call sign "Coast Guard Patrol Commander." Vessels desiring to transit the regulated area may do so only with prior approval of the Patrol Commander and when so directed by that officer. Vessels will be operated at a no wake speed to reduce the wake to a minimum, and in a manner which will not endanger participants in the event or any other craft. The rules contained in the above two sentences shall not apply to participants in the event or vessels of the patrol operating in the performance of their assigned duties.

(3) The Patrol Commander may direct the anchoring, mooring, or movement of any boat or vessel within the regatta area. A succession of sharp, short signals by whistle or horn from vessels patrolling the area under the direction of the U.S. Coast Guard Patrol Commander shall serve as a signal to stop. Vessels so signaled shall stop and shall comply with the orders of the Patrol Commander. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(4) The Patrol Commander may establish vessel size and speed limitations and operating conditions.

(5) The Patrol Commander may restrict vessel operation within the regulated area to vessels having particular operating characteristics.

(6) The Patrol Commander may terminate the marine event or the operation of any vessel at any time it is deemed necessary for the protection of life and property.

(7) This section is effective from 7:00 p.m. on 28 July 1989 to 7:00 p.m. on 30 July 1989.

Dated: May 2, 1989.

R.A. Appelbaum,

RADM. U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 89–11396 Filed 5–11–89; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Part 326

RIN 0710–AA15

Proposal to Amend Permit Regulations for Controlling Certain Activities in Waters of the United States

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Proposed rule.

SUMMARY: The Department of the Army is proposing to amend the Corps of Engineers permit regulations at 33 CFR Part 326 to adopt a new section to implement the Secretary of the Army's Class I administrative civil penalties authority under seciton 309(g) of the Clean Water Act, 33 U.S.C. 1319(g). The Army is taking this action in response to amendments to the Act made by the Water Quality Act of 1987, which authorize the Secretary of the Army to assess administrative civil penalties for a violation of any condition or limitation in a permit issued under section 404 of the Act. The provisions being proposed will provide a new enforcement tool offering Corps District Engineers the ability to bring timely, and cost efficient enforcement proceedings against Corps issued Clean Water Act permit condition violations.

DATE: Written comments must be received by June 12, 1989.

ADDRESS: Office of the Chief of Engineers, ATTN: CECW–OR, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Chowning, Regulatory Branch, (202) 272–1781 or Mr. Martin Cohen, Office of the Chief Counsel, (202) 272–0027.

SUPPLEMENTARY INFORMATION: Section 314 of the Water Quality Act of 1987, Pub. L. 100–4, added section 309(g) to the Act to provide for the assessment of administrative penalties. The statute established two "classes" of administrative penalties, Class I and Class II. Class I administrative penalty proceedings are not subject to the Administrative Procedure Act, 5 U.S.C. 554, 556, and assessments may not exceed $10,000 per violation, or exceed a total amount of $25,000. Class II penalty proceedings are subject to the Administrative Procedure Act, 5 U.S.C. 554, 556, and assessments may not exceed $10,000 per day for each day during which the violation continues, or exceed a total assessment of $125,000.

Administrative penalties may be assessed by the Secretary of the Army for violations of any permit condition or limitation in a permit issued under section 404 of the Act by the Secretary of the Army. Permits under section 404 are issued by the Corps of Engineers following the administrative regulations published in 33 CFR Parts 320 through 330. The regulation being proposed today provides only for the assessment of Class I penalties. Procedures for Class II administrative penalties are under development and will be published separately.

The Army has promulgated regulations governing the procedures to be followed in pursuing enforcement for its regulatory responsibilities, including enforcement or permit conditions and limitations, at 33 CFR Part 326. The procedural framework for Class I administrative penalties as proposed below would be added as a new section (33 CFR 326.6) in those regulations.

Statutory Requirements

A Class I penalty is assessed by the Secretary of the Army under section 309(g) of the Act by an administrative order. Before issuing the order, the Secretary must provide the person to be assessed a Class I penalty a written notice of the proposal to issue the order, and the opportunity to request, within 30 days of the date the notice is received by the person, a hearing on the proposed order. Section 326.6(b)(2) of the proposed regulation addresses this requirement. The hearing is not subject to the Administrative Procedures Act but must provide a reasonable opportunity to be heard and to present evidence. Sections 326.6(g), (h), and (i) of the proposed regulation would codify the reuqirements and procedures for Class I penalty hearings.

Under section 309(g)(1) of the Act, the Secretary must also consult with the State in which the violation occurs prior to assessing the penalty. Sections 326.6(b)(4), and (d) discuss the requirement and the process to satisfy the consultation requirement.

Under section 309(g)(1) of the Act, the Secretary must provide public notice and reasonable opportunity to comment upon the proposed assessment. The section also provides that if a hearing on the proposed assessment is conducted, the Secretary shall give any citizen who commented on the proposed assessment a reasonable opportunity to be heard and to present evidence at the hearing. The section further provides that the Secretary shall give any person who comments on a proposed assessment, notice of the order assessing the penalty. Sections 326.6(b)(3), and (c) of the proposed regulation set forth the public notice requirement, format, and comment process to meet this requirement of the Act. Section 326.6(j)(7), and (8) provide further information on notice requirements and rights to a hearing.

Under section 309(g) of the Act, if no hearing is held, any person who commented on the proposed assessment may petition the Secretary to set aside the order and to provide a hearing on the penalty. In addition, the section also provides that the Secretary must set aside the order and provide a hearing if the Secretary determines that the evidence presented by the petitioner is material and was not considered in the issuance of the order. Under section 309(g), if the Secretary denies a hearing, the Secretary shall provide to the petitioner and publish in the **Federal Register**, notice of the reasons for the denial. Sections 326.6(j)(7), and (8), and § 326.6(k)(iii) of the proposed regulations would codify requirements related to hearing, public notice, comments on Class I penalty orders.

Finally, section 309(g) of the Act provides that any person against whom a civil penalty is assessed may obtain review of such assessment by filing notice of appeal in the proper court within 30 days of the date the penalty order was issued. Section 326.6(l) of the proposed regulation provide for this judicial review.

Note 1.—The Department of the Army has determined that the proposed regulations do not contain a major proposal requiring the preparation of a regulatory impact analysis under E.O. 12291.

Note 2.—The term "he" and its derivatives used in these regulations is generic and should be considered as applying to both male and female.

List of Subjects in 33 CFR Part 326

Investigations, Intergovernmental relations, Law enforcement, Navigation, Water pollution control, Waterways.

Dated: May 8, 1989.

Approved:

John S. Doyle, Jr.,

Principal Deputy Assistant Secretary of the Army (Civil Works).

Accordingly, the Department of the Army is proposing to amend 33 CFR Part 326 as follows:

PART 326—ENFORCEMENT

1. The authority citation for Part 326 continues to read as follows:

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

2. Section 326.6 is added to read as follows:

§ 326.6 Class I administrative penalties.

(a) *Introduction.* (1) This subpart sets forth procedures for initiation and administration of Class I administrative penalty orders under Section 309(g) of the Clean Water Act. Section 309(g)(2)(A) specifies that Class I civil penalties may not exceed $10,000 per violation, except that the maximum amount of any Class I civil penalty shall not exceed $25,000.

(2) These procedures supplement the existing enforcement procedures at §§ 326.1 through 326.5. However, as a matter of agency enforcement discretion once the agency decides to proceed with an administrative penalty under these procedures it shall not subsequently pursue judicial action pursuant to § 326.5. Therefore, an administrative penalty should not be pursued if a subsequent judicial action for civil penalties is desired. An administrative civil penalty may be pursued in conjunction with a compliance order issued under § 326.3.

(3) *Definitions.* For the purposes of this regulation:

(i) "Agency" means the Department of the Army, acting through the Secretary of the Army or any of the Secretary's designees, including officials of the U.S. Army Corps of Engineers, with respect to the matters covered by this regulation.

(ii) "Interested person outside the agency" includes the respondent, any person who filed written comments on the proposed penalty order, and any other person not employed by the agency with an interest in the subject of proposed penalty order, and any attorney of record for those persons.

(iii) "Interested agency staff" means those agency employees, whether temporary or permanent, who may investigate, litigate, or present evidence, arguments, or the position of the Agency in the hearing or who participated in the preparation, investigation or deliberations concerning the proposed penalty order, including any employee, contractor, or consultant who may be called as a witness.

(iv) "Presiding Officer" means an agency official selected by the District Engineer (DE) to hold a hearing on a proposed administrative civil penalty order [hereinafter referred to as "proposed order"] in accordance with the rules set forth in this regulation and to make recommendations to the DE on proposed orders.

(v) "Ex parte communication" means any communication, written or oral, relating to the merits of the proceeding, between the Presiding Officer and an interested person outside the Agency or

the interested Agency staff, which was not originally filed or stated in the administrative record or in the hearing. Such communication is not an "ex parte communication" if all parties have received prior written notice of the proposed communication and have been given the opportunity to participate herein.

(b) *Initiation of action.* (1) If the DE or a delegatee of the DE finds that a recipient of a Department of the Army permit [hereinafter referred to as "the respondent"] has violated and condition or limitation contained in that permit, the DE is authorized to prepare and process a proposed order in accordance with these procedures. The proposed order shall specify the amount of the penalty which the respondent may be assessed and shall describe with reasonable specificity the nature of the violation.

(2) The respondent will be provided actual notice of the DE's proposal to issue an administrative civil penalty in writing and advised of the right to request a hearing and to present evidence on the alleged violation. Notice to the respondent will be provided by certified mail, return receipt requested. This notice will be accompanied by a copy of the proposed order, and will include the following information:

(i) A description of the alleged violation and copies of the applicable law and regulations;

(ii) An explanation of the authority to initiate the proceeding;

(iii) An explanation, in general terms, of the procedure for issuing administrative orders and assessing civil penalties, including opportunities for public participation;

(iv) A statement of the amount of the penalty that is proposed and a statement of the maximum amount of penalty which the DE is authorized to assess for the violations alleged;

(v) A statement that the respondent may within 30 calendar days of receipt of the notice provided under this subparagraph request a hearing prior to issuance of any final order, and that the respondent must request a hearing within 30 calendar days of receipt of the notice provided under this subparagraph in order for respondent to be entitled to receive such a hearing;

(vi) The name and address of the person to whom respondent must send a request for hearing;

(vii) Notification that the DE may issue the proposed order on or after 30 calendar days following receipt of the notice provided under these rules, if respondent does not request a hearing; and

(viii) An explanation that any final order issued under this subpart shall become effective 30 calendar days following its issuance unless a petition to set aside the order and to hold a hearing is filed by a person who commented on the proposed order and such petition is granted or an appeal is taken under section 309(g)(8) of the Clean Water Act.

(3) At the same time that actual notice is provided to the respondent, the DE shall give public notice of the proposed order, and provide a reasonable opportunity for public comment on the proposed order, prior to issuing a final order asessing an administrative civil penalty. Procedures for giving public notice and providing the opportunity for public comment are contained in § 326.6(c).

(4) At the same time that actual notice is provided to the respondent, the DE shall provide actual notice in writing to the appropriate state agency for the state where the violation occurred. Procedures for providing actual notice to and consulting with the appropriate state agency are contained in § 326.6(d).

(5) During the public comment period provided under paragraph (c) of this section, any person may submit written comments on the proposed administrative penalty order. The DE shall include all written comments in an administrative record relating to the proposed order. The public shall be advised of the location of the administrative record and its availability for inspection as provided in § 326.6(e).

(c) *Public Notice and Comment.* (1) At the same time the respondent and the appropriate state agency are provided actual notice, the DE shall provide public notice of and a reasonable opportunity to comment on the DE's proposal to issue an administrative civil penalty against the respondent.

(2) A 30 day public comment period shall be allowed. During this 30 day period, persons may comment on the issuance of the proposed order. Any person who comment on a proposed order shall be given notice of any hearing held on the proposed order. Such persons shall have a reasonable opportunity to be heard and to present evidence in such hearings.

(3) If no hearing is requested by respondent, any person who has submitted comments on the proposed order shall be given notice by the DE of any final order issued, and will be given 30 calendar days in which to petition the DE to set aside the order and to provide a hearing on the penalty. The DE shall set aside the order and provide a hearing in accordance with these rules if the evidence presented by the commenter in support of the commenter's petition for a hearing is material and was not considered when the order was issued. If the DE denies a hearing, the DE shall provide notice to the commenter filing the petition for the hearing, together with the reasons for the denial. Notice of the denial and the reasons for the denial shall be published in the **Federal Register** by the DE.

(4) The DE shall give public notice by placing a legal notice in a paper of general circulation in the are of the alleged violation and by mailing a copy of the information listed in paragraph (c)(5) of this section to:

(i) Any person who requests notice;

(ii) Other persons on a mailing list developed to include some or all of the following sources:

(A) Persons who request in writing to be on the list;

(B) Persons on "area lists" developed from lists of participants in past similar proceedings in that area, including hearings or other actions related to section 404 permit issuance; and

(C) Persons who request inclusion after notification of the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals.

The DE may update the mailing list from time to time by requesting written indication of continued interest from those listed. The DE may delete from the list the name of any person who fails to respond to such a request.

(5) All public notices under this subpart shall contain the following minimum information:

(i) A copy of the proposed administrative order;

(ii) Name and address of the Corps District office proposing to assess the administrative penalty for which notice is being given;

(iii) Location of the facility or activity against which the proposed penalty is addressed;

(iv) A brief description of the business or activity conducted at the facility or the operation described in the order, including permit number and issuance date of the permit at issue, and a description of the alleged noncompliance for which the civil penalty is being proposed;

(v) Name, address and telephone number of an Agency representative from whom interested persons may obtain further information, including copies of the proposed order, and to whom any comments must be submitted;

(vi) A statement of the opportunity to submit written comments on the proposed order and the deadline for submission of such comments;

(vii) A statement of the opportunity for the respondent to request a hearing and to present oral evidence related to the proposed order and the procedures to request a hearing;

(viii) Any procedures through which the public may comment on or participate in proceedings to reach a final decision on the order;

(ix) The location of the administrative record referenced in § 326.6(e), the times at which the administrative record will be available for public inspection, and a statement that all information submitted by the respondent and persons commenting on the proposed order is available as part of the administrative record, subject to provisions of law restricting the public disclosure of confidential information.

(d) *State consultation.* (1) At the same time that the respondent is provided actual notice, the DE shall send the appropriate state agency written notice of the proposal to issue an administrative civil penalty order. This notice will include the same information required pursuant to § 326.6(c)(5).

(2) For the purposes of this regulation, the appropriate state agency will be the agency administering the 401 certification program, unless another state agency is agreed to by the District and the respective state through formal/informal agreement with the state.

(3) The appropriate state agency will be provided the same opportunity to comment on the proposed order and participate in any hearing that is provided pursuant to § 326.6(c).

(e) *Availability of the administrative record.* (1) At any time after public notice of a proposed penalty order is given under § 326.6(c), the DE shall make available the administrative record at reasonable times for inspection and copying by any interested person, subject to provisions of law restricting the public disclosure of confidential information. Any person requesting copies of the administrative record or portions of the administrative record may be required by the DE to pay reasonable charges for reproducing the information requested.

(2) The administrative record shall include the following:

(i) Documentation relied on by the DE to support the violations alleged in the proposed penalty order with a summary of violations, if a summary has been prepared;

(ii) Proposed penalty order or assessment notice;

(iii) Public notice of the proposed order with evidence of notice to respondent and to the public;

(iv) Comments by respondent and/or the public on the proposed penalty order, including any requests for a hearing;

(v) All orders or notices of the Presiding Officer;

(vi) Subpoenas issued, if any, for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with any hearings;

(vii) All submittals or responses of any persons or comments to the proceeding, including exhibits, if any;

(viii) A complete and accurate record or transcription of any hearing;

(ix) The recommended decision of the Presiding Officer and the final decision and/or order of the Agency issued by the DE; and

(x) Any other appropriate documents related to the administrative proceeding.

(f) *Counsel.* A respondent may be represented at all stages of the proceeding by counsel. After receiving notification that a respondent or any other party or commenter is represented by counsel, the Presiding Officer and DE shall direct all further communications to that counsel.

(g) *Opportunity for hearing.* (1) The respondent may request a hearing and may provide written comments on the proposed administrative penalty order at any time within 30 calendar days after receipt of the notice set forth in § 326.6(b)(2). The respondent must request the hearing in writing, specifying in summary form the factual and legal issues which are in dispute and the specific factual and legal grounds for the respondent's defense.

(2) The respondent waives the right to a hearing to present evidence on the alleged violation or violations if the respondent does not submit the request for the hearing to the official designated in the notice of the proposed order within 30 calendar days of receipt of the notice. The DE shall determine the date of receipt of notice by respondent's signed and dated return receipt or such other evidence that constitutes proof of actual notice on a certain date. For good cause shown, the DE may grant a hearing if the respondent submits a late request.

(3) The DE shall promptly schedule requested hearings and provide reasonable notice of the hearing schedule to all participants, except that no hearing shall be scheduled prior to the end of the third day public comment period provided in § 326.6(c)(2). The DE may grant any delays or continuances necessary or desirable to resolve the case fairly.

(4) The hearing shall be held at the DE's office, except the respondent may request in writing upon a showing of good cause that the hearing be held at an alternative location. Action on the request is at the discretion of the DE.

(h) *Hearing.* (1) Hearings shall afford respondents with an opportunity to present evidence on alleged violations and shall be informal, adjudicatory hearings and shall not be subject to section 554 or 556 of the Administrative Procedure Act. Respondents may present evidence either orally or in written form in accordance with the hearing procedures specified in § 326.6(i).

(2) The DE shall give written notice of any hearing to be held under these rules to any person who commented on the proposed administrative penalty order under § 326.6(c). This notice shall specify a reasonable time prior to the hearing within which the commenter may request an opportunity to be heard and to present oral evidence or to make comments in writing in any such hearing. The notice shall require that any such request specify the facts or issues which the commenter wishes to address. Any commenter who files comments pursuant to § 326.6(c)(2) shall have a right to be heard and to present evidence at the hearing in conformance with these procedures.

(3) The DE shall select an Agency official to serve as President Officer of the hearing. The Presiding Officer shall exercise no other responsibility, direct or supervisory, for the investigation or prosecution of any case before him. The Presiding Officer shall conduct hearings as specified by these rules and make a recommended decision to the DE.

(4) The Presiding Officer shall consider each case on the basis of the evidence presented, and must have no prior connection with the case. The Presiding Officer is solely responsible for preparing and transmitting the recommended decision and order in each case to the DE.

(5) Ex Parte Communications:

(i) No interested person outside the Agency or member of the interested Agency staff shall make or knowingly cause to be made to the Presiding Officer, an ex parte communication on the merits of the proceeding.

(ii) The Presiding Officer shall not make or knowingly cause to be made to any interested person outside the Agency or to any member of the interested Agency staff, an ex parte communication on the proceeding.

(iii) The DE may replace the Presiding Officer in any proceeding in which it is demonstrated to the DE's satisfaction that the Presiding Officer has engaged in prohibited ex parte communications to the prejudice of any participant.

(iv) Whenever an ex parte communication in violation of this section is received by the Presiding Officer or made known to the Presiding Officer, the Presiding Officer shall immediately notify all participants in the proceeding of the circumstances and substance of the communication and may require the person who made the communication or caused it to be made, or the party whose representative made the communication or caused it to be made, to the extent consistent with justice and the policies of the Clean Water Act, to show cause why that person or party's claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(v) The prohibitions of this paragraph apply upon designation of the Presiding Officer and terminate on the date of final agency action or the final order.

(i) *Hearing procedures.* (1) The Presiding Officer shall conduct a fair and impartial proceeding in which the participants are given a reasonable opportunity to present evidence.

(2) The Presiding Officer is authorized to administer oaths and may subpoena witnesses and issue subpoenas duces tecum (i.e. subpoenas for documents) pursuant to the provisions of the Clean Water Act.

(3) The Presiding Officer shall provide a reasonable opportunity to be heard and to present evidence to the respondent, any person who filed a request to participate under § 326.6(c), and to any other person attending the hearing. The Presiding Officer may establish reasonable time limits for oral testimony.

(4) The respondent may not challenge the permit condition which is the subject matter of the administrative penalty order.

(5) Prior to the commencement of the hearing, the DE shall provide to the Presiding Officer the complete administrative record as of that date. During the hearing, the DE, or an authorized representative of the DE may summarize the basis for the proposed administrative order. Thereafter, the administrative record shall be admitted into evidence and the Presiding Officer shall maintain the administrative record of the proceedings and shall include in that record all documentary evidence, written statements, correspondence, the record of hearing, and any other relevant matter.

(6) The Presiding Officer shall cause a tape recording, written transcript or other permanent, verbatim record of the hearing to be made, which shall be included in the administrative record, and shall, upon written request, be made available, for inspection or copying, to the respondent or any person, subject to provisions of law restricting the public disclosure of confidential information. Any person making a request may be required to pay reasonable charges for copies of the administrative record or portions thereof.

(7) In receiving evidence, the Presiding Officer is not bound by strict rules of evidence. The Presiding Officer may determine the weight to be accorded the evidence.

(8) The respondent has the right to examine, and to respond to the administrative record. The respondent may offer into evidence, in written form or through oral testimony, a response to the administrative record including, any facts, statements, explanations, documents, testimony, or other exculpatory items which bear on any appropriate issues. The Presiding Officer may question the respondent and require the authorization of any written exhibit or statement, but no cross examination of the respondent will be allowed. The Presiding Officer may exclude any repetitive or irrelevant matter.

(9) At the close of the respondent's presentation of evidence, the Presiding Officer should allow the introduction of rebuttal evidence. The Presiding Officer may allow the respondent to respond to any such rebuttal evidence submitted and to cross-examine any witness.

(10) The Presiding Officer may take official notice of matters that are not reasonably in dispute and are commonly known in the community or are ascertainable from readily available sources of known accuracy. Prior to taking official notice of a matter, the Presiding Officer shall give the Agency and the respondent an opportunity to show why such notice should not be taken. In any case in which official notice is taken, the Presiding Officer shall place a written statement of the matters as to which such notice was taken in the record, including the basis for such notice and a statement that the Agency or respondent consented to such notice being taken or a summary of the objections of the Agency or the respondent.

(11) After all evidence has been presented, any participant may present argument on any relevant issue, subject to reasonable time limitations set at the discretion of the Presiding Officer.

(12) The hearing record shall remain open for a period of ten business days from the date of the hearing so that the respondent or any person who has submitted comments on the proposed order may examine and submit responses for the record.

(13) At the close of this 10 business day period, the Presiding Officer may allow the introduction of rebuttal evidence. The Presiding Officer may hold the record open for an additional 10 business days to allow the presentation of such rebuttal evidence.

(j) *The Decision.* (1) Within a reasonable time following the close of the hearing and receipt of any statements following the hearing and after consultation with the state pursuant to § 326.6(d), the Presiding Officer shall forward a recommended decision accompanied by a written statement of reasons to the DE. The decision shall recommend that the DE withdraw, issue, or modify and issue the proposed order. The recommended decision shall be based on a preponderance of the evidence in the administrative record. If the Presiding Officer finds that there is not a preponderance of evidence in the record to support the penalty or the amount of the penalty in a proposed order, the Presiding Officer may recommend that the order be withdrawn or modified and then issued on terms that are supported by a preponderance of evidence on the record. The Presiding Officer also shall make available to the DE for review the complete administrative record.

(2) The Presiding Officer provides a recommended decision solely to the DE. The recommended decision shall become part of the administrative record and shall be made available to the parties to the proceeding at the time the DE's decision is released pursuant to § 326.6(j)(5). The Presiding Officer's recommended decision shall not become part of the administrative record until the DE's final decision is issued, and shall not be made available to the respondent or public prior to that time.

(3) The rules applicable to Presiding Officers under 326.6(h)(5) regarding ex parte communications are also applicable to the DE and to any person who advises the DE on the decision or the order. Communications between the DE and the Presiding Officer do not constitute ex parte communications.

(4) The DE may request additional information on specified issues from the participants in whatever form the DE designates, giving all participants a fair opportunity to be heard on such

additional matters. The DE shall include this additional information in the administrative record.

(5) Within a reasonable time following receipt of the Presiding Officer's recommended decision, the DE shall withdraw, issue, or modify and issue the proposed order. The DE's decision shall be based on a preponderance of the evidence in the administrative record, shall consider the penalty factors set out in Section 309(g)(3) of the CWA, shall be in writing, shall include a clear and concise statement of reasons for the decision, and shall include any final order assessing a penalty. The DE's decision, once issued, shall constitute final agency action for purposes of judicial review.

(6) The DE shall issue the final order by sending the order, or written notice of its withdrawal, to the respondent by certified mail. Issuance of the order under this subparagraph constitutes final agency action for purposes of judicial review.

(7) The DE shall provide written notice of the issuance, modification and issuance, or withdrawal of the proposed order to every person who submitted written comments on the proposed order.

(8) The notice shall include a statement of the right to judicial review and of the procedures and deadlines for obtaining judicial review. The notice shall also note the right of a commenter to petition for a hearing pursuant to § 326.6(c)(3) if no hearing was previously held.

(k) *Effective Date of Order.* (1) Any final order issued under this subpart shall become effective 30 calendar days following its issuance unless an appeal is taken pursuant to Section 309(g)(8) of the CWA, or in the case where no hearing was held prior to the final order, a petition for hearing is filed by a prior commenter.

(2) If a petition for hearing is received, the DE shall:

(i) Review the evidence presented by the petitioner.

(ii) If the evidence is material and was not considered in the issuance of the order, the DE shall immediately set aside the proposed order and schedule a hearing. In that case, a hearing will be held, a new recommendation will be made by the Presiding Officer to the DE and a new final decision issued by the DE.

(iii) If the DE denies a hearing under this subparagraph, the DE shall provide to the petitioner, and publish in the **Federal Register** notice of, and the reasons for, such denial. If such a request for a hearing is denied, the order shall become effective 30 calendar days after such denial.

(l) *Judicial Review.* (1) Any respondent against whom a final order assessing a civil penalty under these regulations or any person who provided written comments on a proposed order may obtain judicial review of the final order.

(2) In order to obtain judicial review, the respondent or commenter must file a notice of appeal in the United States District Court for either the District of Columbia or the district in which the violation was alleged to occur within the 30 calendar day period beginning with the date of issuance of the final order.

(3) Simultaneous with the filing of the notice of appeal, the respondent or commenter must send a copy of such notice by certified mail to the DE and the Attorney General.

(4) Upon receipt of the notice, the DE shall promptly file in the district court a certified copy of the administrative record.

[FR Doc. 89-11448 Filed 5-11-89; 8:45 am]

BILLING CODE 3710-08-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3569-9]

Approval and Promulgation of Implementation Plans; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking.

SUMMARY: EPA is proposing to approve amendments to rule 10 CSR 10-2.230 as a revision to the Air Pollution Control State Implementation Plan (SIP) of the state of Missouri. The purpose of this rule is to control the emissions of volatile organic compounds (VOC) from industrial surface coating operations in the Kansas City area. VOCs react in the atmosphere to form ozone. A reduction in VOC emissions is necessary for the Kansas City area to meet the National Ambient Air Quality Standards for ozone. EPA's approval would make the rule requirements federally enforceable.

DATE: Comments must be received by June 12, 1989.

ADDRESSES: Comments should be sent to Larry A. Hacker, Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101. The state-submitted information and the EPA-prepared technical support document are available at the above address and at the Missouri Department of Natural Resources, Air Pollution Control Program, Jefferson State Office Building, 205 Jefferson Street, Jefferson City, Missouri 65101.

FOR FURTHER INFORMATION CONTACT: Larry A. Hacker at (913) 236-2893 (FTS 757-2893).

SUPPLEMENTARY INFORMATION: On February 20, 1985, EPA issued an ozone SIP call for the Kansas City area. In response to this SIP call, Missouri submitted its plan revision on May 26, 1986; a supplemental revision, including an amended industrial surface coating rule, was submitted on December 18, 1987. EPA proposed to approve these submittals on June 30, 1988 (53 FR 24735). Subsequent to this proposal, however, the state adopted further amendments to the Kansas City surface coating rule and submitted these amendments to EPA on December 19, 1988. Therefore, EPA prepared this proposed rulemaking to address both the original and subsequent amendments to this rule. Today's notice of proposed rulemaking entirely supersedes EPA's June 30 proposal insofar as it pertains to rule 10 CSR 10-2.230, Control of Emissions from Industrial Surface Coating Operations. The remaining Kansas City ozone plan components, i.e., the remainder of the VOC rules and the attainment demonstration, are the subject of separate **Federal Register** actions.

Review of State Submittal

On December 18, 1987, the state of Missouri submitted amendments to rule 10 CSR 10-2.230, Control of Emissions from Industrial Surface Coating Operations, to be approved as a revision to the SIP. The rule amendments were adopted by the Missouri Air Conservative Commission (MACC) after proper notice and public hearing, and became effective on December 24, 1987. On December 19, 1988, the state submitted further amendments to rule CSR 10-2.230. These amendments were adopted by the MACC after proper notice and public hearing, and became effective on November 24, 1988.

The state adopted these amendments in compliance with Section 172(b)(2) of the Clean Air Act, which requires SIPs to provide for the implementation of all reasonably available control measures as expeditiously as practicable. The amendments are consistent with EPA policy as outlined in "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations—Clarification to Appendix D of November 24, 1987 **Federal Register**", dated May 25, 1988.

The rule was revised to delete an applicability cutoff which exempted sources emitting less than 100 tons per year (TPY) of VOC. Consistent with EPA policy, the applicability level is now 2.7 TPY based on uncontrolled potential emissions. Several provisions were revised to improve clarity and enforceability. Also, recordkeeping and test method requirements were made more specific.

The state enacted emission limit and compliance date changes applicable to the Ford Motor Company. The emission limit of 3.2 pounds of VOC per gallon of coating minus water for spray prime was replaced with an emissions limit of 15.1 pounds of VOC per gallon of solids deposited for primer surfacer and the option of using spray prime instead of electrodeposition primer was eliminated. The final compliance date for the 15.1 prime surfacer limit is December 24, 1987. The 3.2 limit for spray prime resulted from a 1979 source specific reasonably available control technology (RACT) determination. The conclusion of this determination was that a 3.2 pound of VOC per gallon of coating minus water (55 volume percent solids) spray primer applied at 50 percent transfer efficiency, rather than the control techniques guideline (CTG) recommended combination of electrodeposition primer (1.2 pounds of VOC per gallon of coating minus water) and waterborne primer surfacer (2.8 pounds of VOC per gallon of coating minus water), was RACT for the Ford Kansas City truck line. This was documented in a May 24, 1979, memorandum from Richard G. Rhoades, Director of the Control Programs Development Division, to the EPA Regional Offices (copy available in docket). Under this source specific SIP revision, the truck line was not required to install an electrodeposition primer system. The Ford Kansas City passenger line installed an electrodeposition primer system in 1979. This operation has been subject to an emission limit of 1.2 pounds of VOC per gallon of coating minus water since the end of 1982. The 3.2 spray prime limit also applied to the primer surface operation on the passenger line.

Since 1979, an electrodeposition primer system has been installed on the truck line. This operation is also subject to the 1.2 limit noted above. The topcoat is applied directly over this electrodeposition primer. There is no intermediate primer surfacer operation. The passenger line still has a primer surfacer operation. This is the only operation that would be affected by the new 15.1 limit.

The presumptive RACT limit for primer surfacer, following electrodeposition primer, expressed on a solids applied basis, is 15.1 pounds of VOC per gallon of solids applied. This is the emission limit enacted by the state. In view of the facts that electrodeposition primer is now used on the truck line, and the category in the regulation has been changed from spray prime to primer surfacer (which thereby excludes the possibility of spray prime without electrodeposition being used again in the future), the primer surfacer limit of 15.1 pounds of VOC per gallon of solids deposited is proposed for approval.

On December 4, 1987, a 15.1 lb. VOC/gallon of solids applied emission limit became effective for Ford's passenger and truck topcoat operations with a final compliance date of December 31, 1988. The interim emission limit (until December 31, 1988) for both the truck and passenger topcoat operations is 3.6 lb. VOC/gallon of coating minus water. This interim limit is merely a continuation of the emission limits which applied to these processes prior to these rule amendments. Final compliance dates were December 31, 1985, for truck topcoat and December 31, 1986, for passenger top-coat.

The new topcoat limit is essentially equivalent to the prior limits. The prior limits were based on 3.6 pounds of VOC per gallon of coating minus water (50 volume percent solids) topcoats being applied at 50 percent transfer efficency. This is documented in Ford's April 6, 1979, presentation of a source specific RACT request to the state and the EPA. The new topcoat emission limit is written in terms of solids applied. In order to demonstrate compliance with this limit, Ford will need to determine its actual transfer efficency and other factors using the procedures specified in the regulation. Ford was granted one year (from December 24, 1987, to December 24, 1988) to make this demonstration.

The EPA's proposed approval of the new 15.1 topcoat limit is based on the facts that it is essentially equivalent to the prior limit.

The rule provides Ford an option regarding its truck topcoat painting operation. As discussed above, the emission limit for this operation will change to 15.1 lb. VOC/gallon of solids applied unless, prior to December 31, 1988, Ford submits to the state a formal commitment to modify its truck topcoat operation to meet the state or federal New Source Performance Standards (NSPS-Subpart MM), whichever is more stringent, by no later than December 31, 1990. If Ford submits such a commitment, the truck topcoat interims emission limit will remain 3.6 lb. VOC/gallon of coating minus water until December 31, 1990. (See note (2) to Section (4) of this rule.) The other provisions of Subpart MM would not be applicable, for example, the 30-day averaging time for compliance determinations and the tabled transfer efficiency values. The compliance determination provisions of rule 10 CSR 10–2.230 would continue to apply. EPA has not received formal notification of whether Ford intends to pursue its option.

EPA proposes approval of these rule amendments with the understanding that the NSPA commitment in note (2) does not supersede a more stringent emission limit which might be required in accord with the state's new source review rule, 10 CSR 10–6.060. The rule's test method for determining the volatile and solids content of the coatings is 40 CFR Part 60, Apppendix A, Reference Method 24. Compliance with the emission limits can be demonstrated: (1) On a daily weighted average per coating line basis; (2) through equivalency using a daily weighted average of VOC per gallon of coating solids per coating line; and (3) through an alternative compliance plan whereby compliance is determined by a daily weighted average of emissions from a single or combination of source operations. EPA proposes approval of these rules with the understanding that any such alternative compliance plans must be submitted and approved by EPA as individual SIP revisions. In the absence of such approval, the enforceable requirements of the SIP would be the emission limits stated in the rule. EPA ACTION: EPA proposes to approve the amendments to rule 10 CSR 10–2.230 as a revision to the Missouri SIP. The Administrator's decision to approve or disapprove this proposed SIP revision will be based on the comments received and on a determination of whether or not the revision meets the requirements of sections 110 and 172 of the Clean Air Act and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of State Implementation Plans. Comments received on the June 30, 1988, notice of proposed rulemaking, pursuant to rule 10 CSR 10–2.230, will be addressed in EPA's notice of final rulemaking as will the comments received on today's proposed rulemaking.

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

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

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, and Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7642.
Date: January 25, 1989.

Morris Kay,
Regional Administrator.

[FR Doc. 89–11484 Filed 5–11–89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 67

[Docket No. FEMA-6951]

Proposed Flood Elevation Determinations; Correction

AGENCY: Federal Emergency Management Agency

ACTION: Proposed rule; correction.

SUMMARY: This document corrects a Notice of Proposed Determinations of base (100-year) flood elevations previously published at 54 FR 10687 on March 15, 1989. This correction notice provides a more accurate representation of the Flood Insurance Study and Flood Insurance Rate Map for the Township of Bridgeton, Newaygo County, Michigan.

FOR FURTHER INFORMATION CONTACT: John L. Matticks, Chief, Risk Studies Division, Federal Insurance Administration, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2767.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency gives notice of the correction to the Notice of Proposed Determinations of base (100-year) flood elevations for selected locations in the Township of Bridgeton, Newaygo County, Michigan previously published at 54 FR 10687 on March 15, 1989, in accordance with Section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), 87 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90–448)), 42 U.S. C. 4001–4128, and 44 CFR Part 67.

List of Subjects in 44 CFR Part 67

Flood Insurance, Floodplains.

The proposed base (100-year) flood elevations for selected locations are:

Proposed Base (100-year) Flood Elevations

Source of Flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD)	
		Existing	Modified
Muskegon River.	At Maple Island Road.	None.....	*609
	About 1.8 miles upstream of Warner Avenue.	None.....	*622

Issued: May 8, 1989.

Harold T. Duryee,
Administrator, Federal Insurance Administration.

[FR Doc. 89–11469 Filed 5–11–89; 8:45 am]

BILLING CODE 6718-03-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[General Docket 88-441; FCC 89-69]

Trunking Compatibility Protocol Standards for 800 MHz Public Safety Equipment

AGENCY: Federal Communications Commission.

ACTION: Notice of inquiry; modification.

SUMMARY: The Commission has adopted a *Memorandum Opinion and Order* dealing with the matter of trunking compatibility protocol standards for equipment operating in the 800 MHz public safety bands. This action was taken following release of a *Notice of Inquiry*, 53 FR 35965 (September 15, 1988) requesting public comment on this issue. The Commission has decided not to adopt federally-mandated trunking standards for analog communications. Based on the comments received, the Commission has concluded that such standards are not needed to ensure adequate interoperability among public safety entities. The Commission, however, will continue this proceeding in a further notice to consider issues relating to the development of advanced public safety radio communications technologies.

DATE: May 12, 1989.

ADDRESS: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554

FOR FURTHER INFORMATION CONTACT: Marty Liebman, Private Radio Bureau, Land Mobile and Microwave Division, Policy and Planning Branch, (202) 632–6497.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order*, Gen. Docket No. 88–441, adopted February 22, 1989, and released May 1, 1989. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, NW, Suite 140, Washington, DC 20037.

Summary of Memorandum Opinion and Order

1. On September 7, 1988, the Commission released a *Notice of Inquiry* to obtain public comment on the issue of trunking standards for radio equipment operating in the 821–824/866–869 MHz public safety spectrum. The *Notice* raised questions concerning (1) the time that would be needed to develop standards, (2) the effect a uniform standard might have on the cost of equipment, (3) how the use of a common standard would enable interoperability among different trunked systems, and (4) the possible effect a trunking standard could have on the development of future land mobile radio communications technologies.

2. The Commission received comments from a number of parties representing the public safety equipment industry, the user community, and other interested organizations. While there was no clear consensus of opinion on any of the key issues, there was almost unanimous agreement among the commenters that regardless of the Commission's ultimate decision on trunking standards, licensing in the new 800 MHz public safety spectrum should begin without delay.

3. After careful consideration of the record, the Commission determined that a uniform trunking standard for analog communications is not needed to achieve adequate interoperability among 800 MHz public safety entities. Further, it concluded that the public safety community's concerns about interoperability and the Commission's ongoing objective of providing maximum spectrum efficiency will be best served by focusing future efforts on the development and use of advanced radio technologies (such as those using digital modulation techniques). Accordingly, the Commission will develop a further inquiry in this docket to explore ways in which advanced technologies can be used to meet the evolving operational

and spectrum needs of the public safety community.

4. The Notice will raise issues such as (1) the desirability of digital transmissions for achieving efficient use of the spectrum, (2) the prospects for the advancement of this technology by the industry, (3) the expected timeframe for development of digital technology, (4) the possible use of a common digital transmission standard, and (5) the proper role, if any, for the Commission to play in the development process.

Ordering Clause

5. Accordingly, *it is ordered* That the Commission's consideration of the matter of trunking compatibility protocol standards for current 800 MHz public safety equipment is *terminated*. This docket, however, will remain open for a further inquiry relating to the use of future, public safety radio technologies, as discussed herein.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 89-11523 Filed 5-11-89; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for Stahlia Monosperma

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Service proposes to determine *Stahlia monosperma* (cobana negra) to be a threatened species pursuant to the Endangered Species Act (Act) of 1973, as amended. Critical habitat is not proposed. *Stahlia monosperma* is a medium-sized evergreen tree endemic to the island of Puerto Rico and the nearby Dominican Republic. The species is found in brackish, seasonally flooded wetlands in association with mangrove communities. *Stahlia monosperma* is affected by coastal development and the elimination of these wetlands by both filling and dredging, cutting for use in furniture and as fenceposts, and grazing. This proposal, if made final, would extend the Federal protection and recovery provisions afforded by the Act to *Stahlia monosperma*. The Service seeks data and comments from the public on this proposal.

DATES: Comments from all interested parties must be received by July 11, 1989. Public hearing requests must be received by June 26, 1989.

ADDRESSES: Comments and materials, and requests for public hearing concerning this proposal should be sent to the Field Supervisor, Caribbean Field Office, U.S. Fish and Wildlife Service, P.O. Box 491, Boquerón, Puerto Rico 00622. Comments and materials received will be available for public inspection, by appointment, at this office during normal business hours, and at the Service's Southeast Regional Office, Suite 1282, 75 Spring Street, SW, Atlanta, Georgia 30303.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Silander at the Caribbean Field Office address (809/851-7297) or Mr. Tom Turnipseed at the Atlanta Regional Office address (404/331-3583 or FTS 242-3583).

SUPPLEMENTARY INFORMATION:

Background

Stahlia monosperma (cóbana negra) was placed in the genus *Stahlia* in 1881 in honor of Dr. Augustin Stahl, a physician and botanist of Puerto Rico who authored "Estudios sobre la flora dē Puerto Rico." It is the only species in this genus. It was initially thought to be endemic to Puerto Rico and the adjacent island of Vieques, but was later collected in eastern Hispaniola. While at one time it was rather common on the edges of salt flats and shallow lagoons, filling or draining of these areas, cutting for use in furniture and fenceposts, and grazing have left only scattered small populations in Puerto Rico and Vieques. The largest remaining population occurs in the extreme southwest of Puerto Rico, an area currently subject to intense pressure for residential and tourist development (Department of Natural Resources 1988). Botanists from the Dr. Rafael M. Moscoso National Botanical Gardens in the Dominican Republic indicate that the species has been similarly affected in that part of the range.

Stahlia monosperma is a medium-sized evergreen tree that may reach 25 to 50 feet (8 to 16 meters) in height and 1 to 1½ feet (.3 to .5 meters) in diameter. The pinnately compound, alternate leaves have from 6 to 12 opposite leaflets with scattered black dots or glands on the lower surface. Racemes (3 to 6 inches or 7 to 15 centimeters) of yellow flowers are produced in April to May. The fruits are about 1 inch (2 to 3 cm) in diameter and have a thin, red fleshy covering surrounding the single, large seed. These fruits have the noticeable odor of a ripe apple. Seeds are apparently animal dispersed and germinate after burial and when surface water has receded (Densmore 1987).

Only scattered populations are known to occur in Puerto Rico and the nearby island of Vieques. The largest population occurs on the southwestern coast of Puerto Rico near Boqueron. Here 23 mature trees have been observed along with a group of 35 seedlings, all on the edge of salt flats. It is found associated with black mangrove (*Avicennia germinans*) and buttonwood (*Conocarpus erectus*). Several more individuals, which have been planted, are known to occur in yards and roadways. Other mature trees are found near mangrove areas in Rio Grande on the northeast coast and on the edge of mangrove forest on Vieques, a 52 square mile island to the east of Puerto Rico. From 30 to 40 individuals occur on Vieques, all on U.S. Navy property. These populations are threatened by encroachment of development into these wetland areas and the elimination of mature trees. Establishment of seedlings is frequently difficult as they are either trampled or browsed by cattle grazing in the area.

Stahlia monosperma was recommended for Federal listing by the Smithsonian Institution (Ayensu and DeFilipps 1978). The species was included among the plants being considered as endangered or threatened species by the Fish and Wildlife Service, as published in the **Federal Register** (45 FR 82480) dated December 15, 1980; the November 28, 1983, update (48 FR 53640) of the 1980 notice; and the September 27, 1985, revised notice (50 FR 39526). The species was designated category 1 (species for which the Service has substantial information supporting the appropriateness of proposing to list them as endangered or threatened) in each of the three candidate notices.

In a notice published in the **Federal Register** on February 15, 1983 (48 FR 6752), the Service reported the earlier acceptance of the new taxa in the Smithsonian's 1978 book as under petition within the context of section 4(b)(3)(A) of the Act, as amended in 1982. The Service made subsequent petition findings in each October of 1983 through 1988 that listing *Stahlia monosperma* was warranted but precluded by other pending listing actions of a higher priority, and that additional data on vulnerability and threats were still being gathered. This proposed rule constitutes the final finding in accordance with section 4(b)(3)(B)(iii) of the Act.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations promulgated to implement the listing provisions of the Act (50 CFR Part 424) set forth the procedures for adding species to the Federal lists. A species may be determined to be endangered or threatened due to one or more of the five factors described in Section 4(a)(1). These factors and their application to *Stahlia monosperma* (cobana negra) are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range

The most significant factor reducing the numbers of *Stahlia monosperma* has been the destruction and modification of habitat. Coastal development continues to encroach on coastal mangrove forests and salt flats. Both residential and tourist development complexes are proposed for southwestern Puerto Rico. Many trees are known to have been eliminated in this way. Although in many of these areas the mangroves are part of the Commonwealth Forest System, the specimens of *Stahlia monosperma* lie just inland of black mangrove and are therefore not included within the Forest boundaries.

B. Overutilization for commercial, recreational, scientific, or educational purposes

Stahlia monosperma is highly valued for fenceposts and the species may have been greatly reduced in number by cutting of smaller size classes for this purpose. It is also suited for use in furniture.

C. Disease or predation

Disease has not been documented as a factor in the decline of this species. However, seedlings are apparently often short-lived in the wild, as those accessible to cattle are usually either trampled or browsed within one year following establishment. Some large trees have also been observed to be damaged by heavy browsing (Densmore 1987).

D. The inadequacy of existing regulatory mechanisms

The Commonwealth of Puerto Rico has adopted a regulation that recognizes and provides protection for certain Commonwealth listed species. However, *Stahlia monosperma* is not yet on the Commonwealth list. Federal listing would provide interim protection and, if the species is ultimately placed on the Commonwealth list, enhance its protection and possibilities for funding needed research.

E. Other natural or manmade factors affecting its continued existence

Other natural or manmade factors are not known to be significantly affecting the species at present.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to propose this rule. Based on this evaluation the preferred action is to list *Stahlia monosperma* as threatened. Since the species appears to produce large quantities of viable seed, protection from the effects of grazing may increase natural colonization. Planting of this species has been successful and propagation efforts are ongoing by the Puerto Rico Department of Natural Resources. Therefore, threatened rather than endangered status seems an accurate assessment of the species' condition. The reasons for not proposing critical habitat for this species are discussed below in the "Critical Habitat" section.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate any habitat of a species which is considered to be critical habitat at the time the species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for this species at this time. The number of individuals of *Stahlia monosperma* is sufficiently small that vandalism could seriously affect the survival of the species. Publication of critical habitat descriptions and maps in the **Federal Register** would increase the likelihood of such activities. The Service believes that Federal involvement in the areas where this plant occurs can be identified without the designation of critical habitat. All involved agencies and key landowners have been notified of the location and importance of protecting this species' habitat. Protection of this species' habitat will also be addressed through the recovery process and through the Section 7 jeopardy standard. Therefore, it would not be prudent to determine critical habitat for *Stahlia monosperma* at this time.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, Commonwealth and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the Commonwealth, and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. No critical habitat is being proposed for *Stahlia monosperma*, as discussed above. Federal involvement relates to the Army Corps of Engineers' regulatory program in areas under jurisdiction of Section 404 of the Clean Water Act, as well as internal actions taken by the Corps relative to U.S. Navy property.

The Act and its implementing regulations found at 50 CFR 17.71 and 17.72 set forth a series of general trade prohibitions and exceptions that apply to all threatened plants. All trade prohibitions of Section 9(a)(2) of the Act, implemented by 50 CFR 17.71, would apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export any threatened plant, transport it in interstate or foreign commerce in the course of a commercial activity, sell or offer it for sale in interstate or foreign commerce, or to remove and reduce the species to possession from areas under Federal

jurisdiction. Seeds from cultivated specimens of threatened plant species are exempt from these prohibitions provided that a statement of "cultivated origin" appears on their containers. In addition, for listed plants the 1988 amendments (Pub. L. 100-478) to the Act prohibit their malicious damage or destruction on Federal lands, and their removal, cutting, digging up, or damaging or destroying in knowing violation of any State (Commonwealth) law or regulation, including State (Commonwealth) criminal trespass law. Certain exceptions can apply to agents of the Service and Commonwealth conservation agencies. The Act and 50 CFR 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving threatened species under certain circumstances. It is anticipated that few trade permits for *Stahlia monosperma* will ever be sought or issued since the species is not known to be in commercial cultivation and is uncommon in the wild. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Office of Management Authority, U.S. Fish and Wildlife Service, P.O. Box 27329, Central Station, Washington, DC 20238-7329 (202/343-4955).

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning any aspect of this proposed rule are hereby solicited. Comments are particularly sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to *Stahlia monosperma;*

(2) The location of any additional populations of *Stahlia monosperma*, and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range and distribution of this species; and

(4) Current or planned activities in the subject areas and their possible impacts on *Stahlia monosperma*.

Final promulgation of the regulation on *Stahlia monosperma* will take into consideration the comments and any additional information received by the Service, and such communications may lead to adoption of a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be filed within 45 days of the date of this proposal. Such requests must be made in writing and addressed to the Field Supervisor, Caribbean Field Office, U.S. Fish and Wildlife Service, P.O. Box 491, Boquerón, Puerto Rico 00622.

National Environmental Policy Act

The Fish Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to Section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Ayensu, E.S., and R.A. DeFilipps. 1978. Endangered and Threatened Plants of the United States. Smithsonian Institution and World Wildlife Fund, Washington, DC. xv + 403 pp.

Densmore, R. 1987. Status report on *Stahlia monosperma* (cobana negra) in southwestern Puerto Rico. Unpublished report submitted to the Caribbean Field Office, U.S. Fish and Wildlife Service, Boquerón, Puerto Rico.

Department of Natural Resources, Natural Heritage Program. 1988. Status information on *Stahlia monosperma* in Puerto Rico and adjacent islands. San Juan, Puerto Rico.

The primary author of this proposed rule is Ms. Susan Silander, Caribbean Field Office, U.S. Fish and Wildlife Service, P.O. Box 491, Boqueron, Puerto Rico 00622 (809/851-7297).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Proposed Regulation Promulgation

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for Part 17 continues to read as follows:

Authority: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411; Pub. L. 100-478, 102 Stat. 2306; Pub. L. 100-653, 102 Stat. 3825 (16 U.S.C. 1531 *et seq.*); Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. It is proposed to amend § 17.12(h) by adding the following, in alphabetical order under Fabaceae, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
Fabaceae—Pea family:						
*	*	*	*	*	*	
Stahlia monosperma	Cóbana negra	U.S.A. (PR), Dominican Republic	T		NA	NA
*	*	*	*	*	*	

Dated: March 22, 1989.

Susan Recce Lamson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 89-11427 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-55-M

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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for Apios priceana

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Service proposes to determine a plant, *Apios priceana* (Price's potato-bean), to be a threatened species under the authority contained in the Endangered Species Act (Act) of 1973, as amended. *Apios priceana* is currently thought extant at only 13 sites including 4 sites in Mississippi and 3 sites each in Alabama, Kentucky and Tennessee. Approximately 40 percent of its populations have not been relocated in recent years. Only 5 of the extant sites support populations of any significant size (50+ individuals). Many of these populations are declining and are threatened by the adverse modification or loss of habitat through cattle grazing/trampling, clear-cutting and succession. Those sites near roadsides or powerline rights-of-way are potentially threatened by herbicide application. This proposed rule, if made final, will extend the Act's protection to *Apios priceana*. The Service seeks data and comments from the public on this proposed rule.

DATES: Comments from all interested parties must be received by July 11, 1989. Public hearing requests must be received by June 26, 1989.

ADDRESSES: Comments and materials concerning this proposal, and requests for public hearing, should be sent to the Jackson, Mississippi, Field Office, U.S. Fish and Wildlife Service, Jackson Mall Office Center, Suite 316, 300 Woodrow Wilson Avenue, Jackson, Mississippi 39213. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Cary Norquist at the above address (601/965-4900 or FTS 490-4900).

SUPPLEMENTARY INFORMATION:

Background

Apios priceana, a member of the pea family, is a twining perennial vine, climbing to 5 meters (5.4 yards) from a large, thickened tuber. Leaves are alternate, pinnately compound with typically five to seven leaflets which are ovate lanceolate to broadly ovate in shape. The inflorescence is borne in the leaf axils and consists of racemes or compact panicles, 5-15 centimeters (cm) (1.97-5.91 inches) long. Individual flowers are about 2 cm (0.78 inches) in length and greenish-white tinged with purplish-pink in color. The fruit is a cylindrical legume 13-20 cm (5.12-7.87 inches) in length. Flowering occurs from mid-June through August, with fruits present from late August through September (Kral 1983, Medley 1980, Woods 1988).

This species can be distinguished from *Apios americana*, the only other North American species of *Apios*, on several taxonomic characters. Most notable is the single large tuber of *Apios priceana*, as compared to the multiple small tubers in *Apios americana* (ground-nut). *Apios priceana* typically has larger leaves, more leaflets, and longer fruits. The standard petal (uppermost petal) is more yellow-green than purplish-maroon (as in *Apios americana*), and has a fleshy mucro-like appendage at its tip (Kral 1983, Medley 1980, Woods 1988).

Apios priceana is of potential economic importance as a food crop. Its large single tuber is edible (National Academy of Sciences 1979, Walter *et al.* 1986) and it may have been a food source for Indians and pioneers (Medley 1980), as was the more common *Apios americana* (Yanovsky 1936, National Academy of Sciences 1979, Seabrook and Dionne 1976). Walter (*et al.* 1986) suggests that *Apios priceana* is perhaps most valuable as a source of germ plasm for breeding with other *Apios* species. Such hybridization would increase tuber size and expand land occupied, since *Apios priceana* can grow in highly alkaline, wooded habitats (Walter *et al.* 1986).

This species was first collected by Sadie Price near Bowling Green in Warren County, Kentucky in 1896 and later described by Robinson (1898). *Apios priceana* was transferred to *Glycine priceana* by Britton and Brown in 1913, a transfer which was invalid since *Apios* had already been conserved over *Glycine* (Woods 1988).

Apios priceana is thought to be a native of forest openings (Medley 1980). Populations occur in open woods and along wood edges in limestone areas, often where bluffs grade into creek or river bottoms (Kral 1983, Medley 1980). Several populations reportedly extend onto roadside or powerline rights-of-way. The soils are described as well drained loams on old alluvium or over limestone (Kral 1983). Habitat is described as mixed hardwoods with such common associates as *Quercus muhlenbergii, Lindera benzoin, Campanula americana, Arundinaria gigantea, Tilia americana, Fraxinus americana, Acer saccharum, Ulmus rubra, Cercis canadensis*, and *Parthenocissus quinquefolius* (Medley 1980).

Apios priceana has been reported from 21 sites in 5 states; however, approximately 40 percent of these are apparently no longer thought extant. Currently, this species is known to exist at only 13 sites with populations in Alabama, Kentucky, Mississippi, and Tennsessee. A summary of the information currently available on the status of *Apios priceana* throughout its range is given below.

Alabama: There are three populations of *Apios priceana* in Alabama. Modest populations (15-30 individuals) occur in Madison County and in Autauga County. The third site, located in Marshall County, supports a poor population (less than five individuals) which was reportedly etiolated due to excessive shading (Medley 1980).

Illinois: Apios priceana was discovered in Union County, Illinois, in 1941 (Kurz and Bowles 1981). This population has not been relocated since the 1970s despite extensive searches by many individuals (Kurz and Bowles 1981, Woods 1988). It is possible that this particular population was destroyed by flooding from a beaver dam; however, suitable habitat still exists in the area, so *Apios priceana* could be rediscovered there in the future (J. Schwegmann, Illinois Natural Heritage Inventory, personal communication).

Kentucky: Eight records of *Apios priceana* are reported for Kentucky (Medley 1980); however, only three of these are thought extant today and all of these are declining (R. Athey, botanist, personal communication; Woods 1988). The Livingston County population, which was estimated as having 50-65 plants in 1984, has been severely degraded since cattle were introduced into the area in 1986 (Woods 1988). At the Trigg County and Lyon County sites, plants extend onto a roadside or powerline right-of-way. The number of plants at the Lyon County site is estimated at 25-30 individuals and only a few plants are reported for the Trigg County population (Woods 1988).

Mississippi: This State supports the largest number of populations, with four sites in three counties (Oktibbeha, Clay, Lee). Two moderate-sized populations (50-80 individuals) are known to occur

in Oktibbeha County (W. Morris, Mississippi State University, personal communication; K. Gordon, Mississippi Museum of Natural Science, personal communication). The Clay County site contains a declining population of 15–20 individuals. The largest population in the State is in Lee County, where several hundred plants are estimated to occur over an acre of area.

Tennessee: Apios priceana has been reported from five sites in Tennessee (Medley 1980, Woods 1988) but only three of these have been verified as extant in recent years (Woods 1988; P. Somers, Tennessee Ecological Services Division, personal communication). A large, vigorous population of *Apios priceana* occurs in Marion County where hundreds of plants are reportedly scattered on a bluff near a roadside (Woods 1988). A small but vigorous population (20–30 individuals), is located along a creek in Montgomery County (W. Chester, Austin Peay State University, personal communication). The Williamson County population, located near a roadside right-of-way, consists of only two plants (Woods 1988).

In summary, of the 13 known extant sites, only 5 support populations of any significant size (50+ individuals). Three of the sites have only 5 or fewer individuals and the remaining 5 populations have no more than 30 plants. Most populations occur on privately owned land, including one site owned by The Nature Conservancy (Montgomery County, Tennessee). Several populations extend onto State maintained roadside or powerline rights-of-way. Two extant sites occur on lands under Federal jurisdiction, including the Trigg County, Kentucky, site, which is on Tennessee Valley Authority land, and the Autauga County, Alabama, site, which is on U.S. Army Corps of Engineers' land. The historical Illinois site is located on U.S. Forest Service land. *Apios priceana* is currently or potentially jeopardized by a multitude of threats including cattle grazing/trampling, clearcutting, excessive shading/weedy competition due to succession, and adverse right-of-way maintenance practices (herbicide application).

Federal actions involving *Apios priceana* began with Section 12 of the Endangered Species Act of 1973, which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27823) of its acceptance of the report of the Smithsonian Institution as a petition within the context of Section 4(c)(2), now Section 4(b)(3)(a), of the Act, and of its intention thereby to review the status of those plants. On June 16, 1976, the Service published a proposed rule in the **Federal Register** (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered species pursuant to Section 4 of the Act. *Apios priceana* was included in the Smithsonian petition and the 1976 proposal. General comments received in relation to the 1976 proposal were summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909).

The Endangered Species Act Amendments of 1978 required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to proposals already over 2 years old. In the December 10, 1979, **Federal Register** (44 FR 70796), the Service published a notice of withdrawal of the June 16, 1976, proposal, along with four other proposals that had expired. *Apios priceana* was included as a category 1 species in a revised list of plants under review for threatened or endangered classification published in the December 15, 1980, **Federal Register** (45 FR 82480). *Apios priceana* was maintained in category 1 in the Service's updated plant notice of September 27, 1985 (50 FR 39526). Category 1 comprises taxa for which the Service presently has sufficient biological information to support their being proposed to be listed as endangered or threatened species.

Section 4(b)(3) of the Endangered Species Act, as amended in 1982, requires the Secretary to make certain findings on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 Amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. This was the case for *Apios priceana* because of the acceptance of the 1975 Smithsonian report as a petition. In October of 1983, 1984, 1985, 1986, and 1987, the Service found that the petitioned listing of *Apios priceana* was warranted, but that listing of this species was precluded due to other higher priority listing actions, and that additional data on vulnerability and threats were still being gathered. Publication of the present proposal constitutes the final 1-year finding that is required.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal lists. A species may be determined to be endangered or threatened due to one or more of the five factors described in Section 4(a)(1). These factors and their application to *Apios priceana* Robins (Price's potato-bean) are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range

Apios priceana occurs as small disjunct populations throughout its range. As stated in the "Background" section, only 13 of the 21 reported populations are believed extant today. Several populations are threatened by the potential destruction or adverse modification of their habitat. At five sites, plants extend onto or near roadside or powerline rights-of-way and are vulnerable to accidental disturbances. Any future road improvements (expansion) or right-of-way maintenance activities (herbicide treatment) at these sites could adversely impact or destroy populations if proper planning does not occur. One population, located near a roadside in Trigg County, Kentucky, has not been seen since the 1960s (Woods 1988) and may have been destroyed by such activities. The Service will work with those agencies responsible for maintaining these rights-of-way in order to provide these sites with protection. The Madison County, Alabama, site is threatened due to its close proximity to a suburban area (Kral, personal communication). The type locality (Warren County, Kentucky) was also located near a rapidly developing area and may have been destroyed by development (Woods 1988).

Two populations, which are enclosed in pastureland, have been adversely impacted due to soil compaction and trampling by cattle. At the Livingston County, Kentucky, site, 50–60 plants were reported in 1984; however, most of these have been destroyed by cattle which were introduced into the area in 1986 (Woods 1988). The Clay County, Mississippi, population has been similarly impacted.

Apios priceana is so rare that little is known about its response to disturbance (Kral 1983). Apparently, this species can withstand some logging in its habitat, as it has been collected in second growth hardwood forest (Kral 1983). Being a native of forest openings, it is thought that selective logging would probably enhance this species; however, heavy

logging or clearcutting would destroy it (Medley 1980, Kral 1983). R. Athey (personal communication) has observed the reappearance of plants in a site when the canopy was opened by light logging. A historical population from Callaway County, Kentucky (Medley 1980), could not be relocated in an area which had been heavily timbered (Woods 1988). Many of the remaining populations occur in hardwood forests which have a potential of being logged in the near future (Medley 1980). Biologically this species may require specific seral stages or seasonal perturbation (Kentucky Nature Preserves Commission 1982). Further investigation into this aspect of the species' biology is needed in order to perpetuate appropriate habitat conditions.

B. Overutilization for commercial, recreational, scientific, or educational purposes

As discussed under "Background", *Apios priceana* produces a large edible tuber which may have been a food source for Indians and pioneers. It has been suggested that such utilization in the past could have contributed to its decline and present day rarity (Medley, personal communication; Somers, personal communication). *Apios priceana* is currently not a component of the commercial trade in native plants; however, publicity from its listing could generate a demand.

C. Disease and predation

Cattle grazing appears to pose a threat to this species in those areas enclosed in pastureland (Woods, personal communication). However, this is probably secondary to the damage they receive from cattle trampling (see "Factor A" above). *Apios priceana* is not known to be threatened by disease.

D. The inadequacy of existing regulatory mechanisms

Apios priceana is officially listed as endangered in Illinois and Tennessee. Illinois law protects listed species on State property; prohibits the sale of State endangered plants; and prohibits taking without the written permission of the landowner. However, *Apios priceana* is not currently known to exist in this State. Under Tennessee legislation, taking is prohibited without the permission of the landowner. This State legislation does not provide protection against habitat destruction and has been inadequate in preventing the decline of this species at several sites. The remaining States in this species' range have no official protective legislation (Alabama, Mississippi, Kentucky).

The Nature Conservancy owns and provides protection to the Montgomery County, Tennessee, population (Barnett Woods Natural Area). A second population (Trigg County, Kentucky) on Tennessee Valley Authority land is afforded some protection since it occurs within an area designated as a Conservation Education Center (W. Chester, Austin Peay State University, personal communication). However, no protection is given to those plants at this site which extend onto the roadside right-of-way. Habitat which once supported a population of *Apios priceana* in Illinois is within an area designated as an "Ecological Area" by the U.S. Forest Service and would therefore be protected in the event the species is rediscovered in the area.

The Act would enhance the existing protection, provide Federal protection (see "Available Conservation Measures" below), provide an avenue of protection for plants on private land through voluntary Conservation Agreements, and encourage active management for this species.

E. Other natural or manmade factors affecting its continued existence

Apios priceana is vulnerable due to its limited distribution and low numbers at many sites. Three populations contain no more than five individuals. The extreme rarity of this plant indicates a narrow ecological amplitude (Kral 1983). As discussed in the "Background" section, *Apios priceana* is believed to be a native of forest openings (Medley 1980). Plants under a completely closed canopy do not appear as vigorous, as they are stunted and mostly vegetative (Medley 1980; Athey, personal communication; Woods 1988). Four populations are believed declining due to a heavy canopy closure and weedy competition associated with natural succession. The loss of many of the historical populations is perhaps attributable to this factor. This species appears to need some sort of disturbance to arrest succession.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining this rule. Based on this evaluation, the preferred action is to list *Apios priceana* as a threatened species. This species is not in imminent danger of extinction. It has a wide geographic range and two populations are in designated preserves. However, a downward trend is clearly indicated for this species (approximately 40 percent of populations not relocated), and it could become endangered in the foreseeable future if protective measures are not taken. Critical habitat is not being designated for reasons discussed in the following section.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extend prudent and determinable, the Secretary designate any habitat of a species which is considered to be critical habitat at the time the species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for this species at this time. Publication of critical habitat descriptions and maps would increase public interest and possibly lead to additional threats for this species from collecting and vandalism, activities difficult to enforce against (see threats factor "B" above). No benefit can be identified through critical habitat designation that would outweight these potential threats. All involved agencies and private landowners will be informed of the locations and importance of protecting this species' habitat. Protection of this species' habitat will be addressed through the recovery process and through the section 7 jeopardy standard. Therefore, it would not be prudent to determine critical habitat for this species at this time.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions by carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

One extant population occurs on land under jurisdiction of the Tennessee Valley Authority. This site is within an area designated for ecological study and is protected. A second site is on U.S. Army Corps of Engineers land. A historical population from Illinois occurred on U.S. Forest Service land. Suitable habitat still exists in this area so there is possibily that a population could be rediscovered here in the future. However, this area is designated as an ecological preserve (LaRue Hills Ecological Area) and protected accordingly. Currently, no activities to be authorized, funded, or carried out by Federal agencies are known to exist that would affect *Apios priceana*.

The Act and its implementing regulations found at 50 CFR 17.71 and 17.72 set forth a series of general trade prohibitions and exceptions that apply to all threatened plants. All trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.71, would apply. These prohibitions, in part, would make it illegal for any person subject to the jurisdiction of the United States to import or export *Apois priceana*, transport it in interstate or foreign commerce in the course of a commercial activity, sell or offer it for sale in interstate or foreign commerce, or to remove it and reduce it to possession from areas under Federal jurisdiction. Seeds from cultivated specimens of threatened plant species are exempt from these prohibitions provided that a statement of "cultivated origin" appears on their containers. In addition, for listed plants the 1988 Amendments (Pub. L. 100-478) to the Act prohibit their malicious damage or destruction on Federal lands, and their removal, cutting, digging up, or damaging or destroying in knowing violation of any State law or regulation, including State criminal treaspass law. Certain exceptions can apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving threatened species under certain circumstances. It is anticipated that few trade permits would ever be sought or issued since the species is not common in cultivation or in the wild. Request for copies of the regulations on plants and inquires regarding them may be addressed to the Office of Management Authority, U.S. Fish and Wildlife Service, P.O. Box 27329, Central Station, Washington, DC 20038-7329 (202/343-4955).

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning any aspect of this proposal are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to this species;

(2) The location of any additional populations of this species and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range and distribution of this species; and

(4) Current or planned activities in the subject area and their possible impacts of this species.

Final promulgation of the regulation on this species will take into consideration the comments and any additional information received by the Service, and such communications may lead to adoption of a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be filed within 45 days of the date of the proposal. Such requests must be made in writing and addressed to Field Supervisor (see "**ADDRESSES**" section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Kentucky Nature Preserves Commission. 1982. Summary status report on *Apios priceana* in Kentucky. Unpublished. 1 pp.

Kral, R. 1983. A report on some rare, threatened, or endangered Forest-related vascular plants of the south. USDA, Forest Service, Tech. Pub. R8-1305 pp.

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Author

The primary author of this proposed rule is Cary Norquist (see **"ADDRESSES"** section) 601/965–4900 or FTS 490–4900.

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine Mammals, Plants (agriculture).

Proposed Regulation Promulgation

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for Part 17 continues to read as follows:

Authority: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411; Pub. L. 100–478, 102 Stat. 2306; Pub. L. 100–653, 102 Stat. 3825 (16 U.S.C. 1531 *et seq.*); Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. It is proposed to amend § 17.12(h) by adding the following, in alphabetical order under Fabaceae, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
Fabaceae—Pea family:						
*	*	*	*		*	
Apios priceana	Price's potato-bean	U.S.A. (AL, IL, KY, MS, TN)	T		NA	NA
*	*	*	*		*	

Dated: March 22, 1989.

Susan Recce Lamson,

Acting Secretary for Fish and Wildlife and Parks.

[FR Doc. 89–11428 Filed 5–11–89; 8:45 am]

BILLING CODE 4310–55–M

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50 CFR Parts 32 and 33

RIN 1018–AB25

Addition of Three National Wildlife Refuges to the Lists of Open Areas for Migratory Game Bird and Big Game Hunting, and One to the List for Sport Fishing

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service (Service) proposes to add three national wildlife refuges (NWRs) to the lists of open areas for migratory game bird and/or big game hunting, and one NWR to the list for sport fishing. The Service has determined that such uses would be compatible with and, in some cases, enhance the major purposes for which each refuge was established. The Service has further determined that this action would be in accordance with the provisions of all applicable laws, would be consistent with the principles of sound wildlife management, and would otherwise be in the public interest by providing additional recreational opportunities.

DATE: Comments must be received on or before June 12, 1989.

ADDRESS: Address comments to: Assistant Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, Room 3248, 18th and C Streets, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Larry LaRochelle, Division of Refuges, MS 670–ARLSQ, U.S. Fish and Wildlife Service, 18th and C Streets NW., Washington, DC 20240; Telephone (703) 358–2036.

SUPPLEMENTARY INFORMATION: National wildlife refuges are generally closed to hunting and sport fishing until opened by rulemaking. The Secretary of the Interior (Secretary) may open refuge areas to hunting and/or fishing upon a determination that such uses are compatible with the major purpose(s) for which the refuge was established, and that funds are available for development, operation, and maintenance of a hunting or fishing program. The action must also be in accordance with provisions of all laws applicable to the areas, must be consistent with the principles of sound wildlife management, and must otherwise be in the public interest. This rulemaking proposes to open three refuges to hunting and one to sport fishing. Some of the proposed hunting and fishing programs require refuge-specific hunting or fishing regulations. The DF regulations will be included in a separate rulemaking document on refuge-specific hunting and fishing regulations.

Department of the Interior policy is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. It is, therefore, the purpose of this proposed rulemaking to seek public input regarding the opening of the refuges cited below to migratory game bird hunting, big game hunting, or sport fishing. Accordingly, interested persons may submit written comments concerning this proposal to the Assistant Director—Refuges and Wildlife (address above) by the end of the comment period. All relevant comments will be considered by the Department prior to issuance of a final rule.

Conformance With Statutory and Regulatory Authorities

The National Wildlife Refuge System Administration Act of 1966, as amended (NWRSAA)(16 U.S.C. 668dd), and the Refuge Recreation Act of 1962 (16 U.S.C. 460K) govern the administration and public use of national wildlife refuges. Specifically, section 4(d)(1)(A) of the NWRSAA authorizes the Secretary to permit the use of any area within the Refuge System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access, when he determines that such uses are compatible with the major purposes for which each refuge was established. The Service administers the Refuge System on behalf of the Secretary.

The Refuge Recreation Act gives the Secretary additional authority to administer refuge areas within the Refuge System for public recreation as an appropriate incidental or secondary use only to the extent that it is

practicable and not inconsistent with the primary purposes for which the refuges were established. In addition, prior to opening refuges to hunting or fishing under this act, the Secretary is required to determine that funds are available for the development, operation, and maintenance of these permitted forms of recreation.

In accordance with the NWRSAA and the Refuge Recreation Act, the Secretary has determined that the proposed openings for hunting and fishing would be compatible and consistent with the primary purposes for which each of the refuges listed below was established, and that funds are available to administer these programs. The hunting and fishing programs will be within State and Federal (migratory game bird) regulatory frameworks. A discussion of the compatibility of the hunting and fishing programs with the purpose(s) for which each refuge was established and the availability of funding for each program follows:

Lake Ophelia National Wildlife Refuge is being established in east central Louisiana to preserve wintering habitat for mallards, pintails and wood ducks and production habitat for the latter. The refuge is scheduled to encompass about 40,000 acres and will serve as the core of the Three Rivers Waterfowl Habitat Conservation Plan, a project initiative of the Lower Mississippi River Delta Joint Venture of the North American Waterfowl Management Plan. Some 9,500 acres have been acquired to date. Other objectives are to provide and maintain optimum habitat for migratory waterfowl of the Mississippi Flyway and endangered species including the Arctic peregrine falcon and bald eagle, to provide habitat for a natural diversity of wildlife and plant species and to provide opportunities for wildlife-oriented recreation and environmental education. The proposed sport fishing program has been designed to be compatible with and contribute to refuge objectives. Fish numbers and species are adequate to support the proposed fishing program which is estimated to attract some 5,000 visits per year. Refuge regulations would minimize time and space conflicts. A section 7 consultation under the Endangered Species Act concluded that the proposed program "will not affect" any species listed. Opening the refuge to fishing would contribute to the attainment of refuge objectives in terms of wildlife-oriented recreation, would be compatible with the purposes for which the refuge was established and thus, be in compliance with the NWRSAA. The annual cost to administer the program is estimated at $5,000 for the first year and $3,000 for subsequent years. The current annual refuge budget is $47,600 and provides adequate funds to administer the proposed fishing program. Therefore, opening the Lake Ophelia Refuge to sport fishing would be in compliance with the Refuge Recreation Act.

Mason Neck National Wildlife Refuge was established in 1959 as the Nation's first bald eagle refuge. Eagles have nested and wintered on the peninsula since before the 1700's. The refuge currently supports one active nest and 30 to 40 eagles during the winter. The refuge is located in northern Virginia, 18 miles south of Washington, DC, and consists of 2,227 acres. Major objectives are the protection of the bald eagle and its habitat and environmental education. It is proposed to open about 485 acres to archery white-tailed deer hunting by some 20 hunters per day for a maximum of six days and 1,250 acres for shotgun deer hunting by 35 hunters per day for nine days. The objective of the deer hunt is to reduce the population on the refuge now estimated to be between 185 to 235 deer to a level compatible with the biological carrying capacity of the habitat estimated to be from 90 to 120 deer. Public use conflicts would be precluded by closing the refuge to all forms of public use on hunt days. A section 7 consultation under the Endangered Species Act concludes that the proposed hunts "will not affect" any species listed as endangered or threatened. Conflicts with waterfowl populations would be minimal because the areas normally used by them would not be impacted by the two hunts. The proposed hunts would provide wildlife-oriented recreation, would be compatible with the purposes for which the refuge was established and thus be in compliance with the NWRSAA. The annual cost to administer the hunting program is estimated at $11,750 within an annual budget of $243,171. Therefore, the opening of the refuge to white-tailed deer hunting would be in compliance with the Refuge Recreation Act.

Quivera National Wildlife Refuge, located in south-central Kansas, was established in 1955 by authority of the Migratory Bird Conservation Act to provide protection and adequate food, water and resting areas for Central Flyway waterfowl during their semi-annual migrations. Secondary purposes are to improve nesting habitat for dabbling ducks and to provide an opportunity for public enjoyment of fish and wildlife resources insofar as populations warrant and those activities do not interfere with primary objectives. It is proposed to open the refuge to big game hunting for wild turkey, mule deer and white-tailed deer. Present numbers of the species proposed for hunting are large enough to support the proposed hunting program and provide for the beneficial use of a renewable resource. Refuge regulations would limit time and space conflicts. A Section 7 consultation under the Endangered Species Act concluded that the proposed hunts "will not affect" any species listed as threatened or endangered. Opening the refuge to hunting would contribute to the attainment of refuge objectives in terms of wildlife-oriented recreation, would be compatible with the purposes for which the refuge was established and thus be in compliance with the NWRSAA. The annual cost to administer the programs is estimated at $1,250 for the first year and $750 for subsequent years. The current annual refuge budget is $299,000 and provides adequate funds to administer the proposed hunts. Therefore, opening the Quivera NWR to big game hunting would be in compliance with the Refuge Recreation Act.

Trustom Pond National Wildlife Refuge, located in southern Rhode Island was established in 1974 through a 365 acre donation and several purchases for a total of 641 acres. The primary objective of the Refuge is "to preserve, restore, and enhance in their natural ecosystem (when practicable) all species of animals and plants that are endangered or threatened with becoming endangered." To that end, a Section 7 evaluation under the U.S. Endangered Species Act was conducted to determine the extent, if any, that the proposed hunting program might affect endangered or threatened species. The evaluation found that the proposed hunt "will not affect" listed species. The hunting area consists of one 52 acre parcel on which at different times either one goose hunting party or not more than 12 dove hunters would be allowed to hunt. This would be an extremely high quality hunt in an area of very limited hunting opportunity, would be compatible with refuge objectives in providing high quality recreational experiences and thus be in compliance with the NWRSAA. There is virtually no public use on the area proposed for hunting. However, to avoid possible conflicts with the public the hunting area would be closed, except to hunters during the open hunting season. The annual cost to administer the program is estimated at $2,700. The current annual budget is $357,000 and provides adequate funds to administer the proposed hunts. Therefore, opening the

Trustom Pond NWR to dove and migratory bird hunting would be in compliance with the Refuge Recreation Act.

Economic Effect

Executive Order 12291, "Federal Regulation," of February 17, 1981, requires the preparation of regulatory impact analyses for major rules. A major rule is one likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or significant adverse effects on the ability of United States-based enterprises to compete with foreign-based enterprises. The Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*) further requires the preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which include small businesses, organizations or governmental jurisdictions.

It is estimated that the proposed opening of these refuges to hunting and fishing will generate approximately 6,650 annual visits. Using data from the 1980 National Survey of Hunting, Fishing, and Wildlife-Associated Recreation, and the 1988 Economic Report of the President (Consumer Price Index), total annual receipts generated from purchases of food, transportation, hunting equipment, fishing gear, fees, and licenses associated with these programs are expected to be approximately $199,533, or substantially less than $100 million. In addition, since these estimated receipts will be spread over four states, the implementation of this rule should not have a significant economic impact on the overall economy, or a particular region, industry, or group of industries, or level of government.

With respect to small entities, this rule would have a positive aggregate economic effect on small businesses, organizations, and governmental jurisdictions. The proposed openings would provide recreational opportunities and generate economic benefits that would not otherwise exist, and will impose no new costs on small entities. While the number of small entities likely to be affected is not known, the number is judged to be small. Moreover, the added cost to the Federal government of law enforcement, posting, etc., needed to implement activities under this rule would be considerably less than the income generated from the implementation of these hunting and/or sport fishing programs.

Accordingly, the Department of the Interior has determined that this rule is not a "major rule" within the meaning of Executive Order 12291 and would not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

Environmental Considerations

Pursuant to the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), environmental assessments have been prepared for these proposed openings. Section 7 evaluations have been prepared pursuant to the Endangered Species Act. These documents are available for public inspection and copying in Room 670, 4401 North Fairfax Drive, Arlington, Virginia, or by mail, addressing the Director at the address listed in the section "**ADDRESSES**" above.

Larry LaRochelle, Division of Refuges, U.S. Fish and Wildlife Service, Washington, DC 20240, is the primary author of this proposed rulemaking document.

List of Subjects

50 CFR Part 32

Hunting, National Wildlife Refuge System, Wildlife, Wildlife refuges.

50 CFR Part 33

Fishing, National Wildlife Refuge System, Wildlife refuges. Accordingly, it is proposed to amend Parts 32 and 33 of Chapter I of Title 50 of the Code of Federal Regulations as set forth below:

PART 32—[AMENDED]

1. The authority citation for Part 32 would continue to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, and 715i.

2. Section 32.11 would be amended by adding Trustom Road NWR, RI, alphabetically by State as follows:

§ 32.11 List of open areas; migratory game birds.

* * * * *

Rhode Island

Trustom Pond National Wildlife Refuge

* * * * *

3. Section 32.31 would be amended by adding Quivera NWR, KS and Mason Neck NWR, VA alphabetically by State and refuge as follows:

§ 32.31 List of open areas; big game.

* * * * *

Kansas

* * * * *

Quivera National Wildlife Refuge

* * * * *

Virginia

Mason Neck National Wildlife Refuge

PART 33—[AMENDED]

1. The authority citation for Part 33 would continue to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, 715i.

2. Section 33.4 would be amended by adding Lake Ophelia NWR, LA, alphabetically by State and refuge as follows:

§ 33.4 List of open areas; sport fishing.

* * * * *

Louisiana

* * * * *

Lake Ophelia National Wildlife Refuge

* * * * *

Dated: April 12, 1989.

Becky Norton Dunlop,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 89-11432 Filed 05-11-89; 8:45 am]

BILLING CODE 4310-55-M

Notices

Federal Register
Vol. 54, No. 91
Friday, May 12, 1989

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

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Counties Designated as Suitable for Growing Extra Long Staple Cotton; Arizona et al.

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice of determination of counties designated as suitable for growing extra long staple cotton during marketing year 1989.

SUMMARY: This notice affirms the list of counties designated as suitable for growing extra long staple cotton during marketing year 1989 as determined by the Executive Vice President, Commodity Credit Corporation. In accordance with 7 CFR 1413.3(n), the following counties have been designated as suitable for growing extra long staple cotton during marketing year 1989:

Arizona: Cochise, Gila, Graham, Greenlee, Maricopa, Mohave, Pima, Pinal, Santa Cruz, Yavapai, and Yuma. (La Paz County was created from Yuma County as a result of an action of the Arizona State legislature and is approved for ELS.)

California: Fresno, Imperial, Kern, Kings, and Riverside.

Florida: Alachua, Hamilton, Jefferson, Madison, Marion, Suwanee, and Union.

Georgia: Berrien and Cook.

Mississippi: Bolivar, Coahoma, Panola, Quitman, and Tunica.

New Mexico: Chaves, Dona Ana, Eddy, Hildalgo, Luna, Otero, and Sierra.

Texas: Andrews, Bee, Bexar, Brewster, Culberson, Dimmit, El Paso, Frio, Gaines, Hudspeth, Jeff Davis, Kinney, La Salle, Loving, Medina, Pecos, Presidio, Reeves, Refugio, Uvalde, Ward, and Zavala.

Authority: 7 U.S.C. 1444(h).

FOR FURTHER INFORMATION CONTACT: Charles V. Cunningham, Leader, Fibers Group, Commodity Analysis Division, USDA-ASCS, Room 3758 South Building, P.O. Box 2415, Washington, DC 20013 or call (202) 447-7954.

Signed at Washington, DC on May 3, 1989.

Vern Neppl,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 89-11468 Filed 5-11-89; 8:45 am]

BILLING CODE 3410-05-M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Briefing

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a subcommittee of the United States Commission on Civil Rights will convene a briefing at 2:00 p.m. on May 18, 1989, and adjourn at 5:00 p.m. the same day, in the Commission's conference room, 1121 Vermont Avenue, NW., Room 512, Washington, District of Columbia. The purpose of the briefing is to receive presentations on the subject of bigotry and violence on college campuses.

Persons desiring additional information should contact Melvin L. Jenkins, Acting Staff Director, (202) 523-5571. Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Staff Director's office at least five (5) days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, on May 8, 1989.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 89-11434 Filed 5-11-89; 8:45 am]

BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of the Census
Title: 1989 Company Organization Survey
Form Number: NC-9901, NC-9907
Agency Approval Number: 0607-0444
Type of Request: Revision of a currently approved form
Burden: 76,899
Number of Respondents: 93,000
Avg Hours Per Response: 50 minutes
Needs and Uses: The data collected are used by various government agencies for program development and by the private sector for forecasting, analysis, and allocation of resources
Affected Public: Businesses or Other For-profit Institutions, Small Businesses or Organizations, Non-profit Institutions
Frequency: Annually
Respondent's Obligation: Mandatory
OMB Desk Officer: Don Arbuckle 395-7340

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, Room H6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Don Arbuckle, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated May 5, 1989.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 89-11384 Filed 5-11-89; 8:45 am]

BILLING CODE 3510-07-M

National Oceanic and Atmospheric Administration

Mid-Atlantic Fishery Management Council; Correct Public Meeting Location

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

A correction has been made regarding the location for the public meeting on May 17-18, 1989, of the Mid-Atlantic Fishery Management Council. The meeting will not take place at the Ramada Inn, as previously published on April 28, 1989, at 54 FR 18322. Instead, the meeting will take place at the Sheraton Inn, Route 18, East Brunswick, NJ.

All other information previously published remains unchanged. For more information contact John C. Bryson,

Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19901; telephone: (302) 674-2331.

Alan Dean Parsons,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

Date: May 8, 1989.

[FR Doc. 89-11418 Filed 5-11-89; 8:45 am]

BILLING CODE 3510-22-M

North Pacific Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The North Pacific Fishery Management Council's Habitat Committee and the Council's Fishery Planning Committee will hold public meetings.

On May 17, 1989, at 1 p.m., the *Habitat Committee* will meet at 1 p.m., at the Federal Building, Room 461, 709 W. 9th Avenue, Juneau, AK. The Committee will receive a status report from the National Oceanic and Atmospheric Administration, National Marine Fisheries Service, on the Prince William Sound oil spill and clean-up efforts, and a discussion by the Alaska Department of Fish and Game on the effects of the spill on Gulf of Alaska fisheries. The *Fishery Planning Committee* will meet on May 17 at 7 p.m., at the Alaska Department of Fish and Game Conference Room, 1255 W. 8th Street, second floor, Juneau, AK, and will continue meeting on May 18-19. The Committee will discuss and work on defining open access management systems for all fisheries in the Gulf of Alaska and Bering Sea/Aleutian Islands. Limited access systems for the longline sablefish and the halibut fisheries will be further defined for analysis. For more information contact Dick Tremaine, North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99501; telephone: (907) 271-2809.

Date: May 8, 1989.

Alan Dean Parsons,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-11419 Filed 5-11-89; 8:45 am]

BILLING CODE 3510-22-M

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council's groundfish fishery management plan (FMP) Rewrite Oversight Group will hold a public meeting on May 22-23, 1989. The meeting will begin at 1 p.m., on May 22 at the Red Lion Inn/Portland Center, Astoria Room, 310 SW. Lincoln, Portland, OR. The Group will make final revisions to the draft Groundfish FMP Amendment #4 document for review by the Pacific Council at its July meeting in San Diego, CA.

For more information contact Lawrence D. Six, Executive Director, Pacific Fishery Management Council, 2000 SW. First Avenue, Portland, OR 97201; telephone: (503) 326-6352.

Date: May 8, 1989.

Alan Dean Parsons,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-11420 Filed 5-11-89; 8:45 am]

BILLING CODE 3510-22-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Amendment of Import Restraint Period and Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Mexico

May 8, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending an import restraint period and limits.

EFFECTIVE DATE: May 16, 1989.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits; refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 535-9481. For informaltion on embargoes and quota re-openings, call (202) 377-3715.

SUPPLEMENTARY INFORMATION: *Authority.* Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Memorandum of Understanding dated April 12, 1989.

During negotiations between the Governments of the United States and the United Mexican States, agreement was reached, effected by a Memorandum of Understanding (MOU) dated April 12, 1989, to amend further the current bilateral textile agreement. A formal exchange of diplomatic notes will follow.

Under the terms of the MOU, the current limits are being amended for certain cotton and man-made fiber textile products, produced or manufactured in Mexico and exported to the United States. Also, the current limit for Category 239 is being amended to two separate periods. For the period January 1, 1989 through July 31, 1989, Category 239 will be a designated consultation level. For the period August 1, 1989 through December 31, 1989, Category 239 will be a specific limit under the Special Regime, with a sublimit for products not made of U.S. formed and cut fabric.

The amendments to the limits for Categories 239, 359-O, 359-C/659-C and 659-O reflect reclassification of trade as a result of implementation of the Harmonized Commodity Code.

Beginning on May 16, 1989, for goods produced or manufactured in Mexico and exported from Mexico during the period August 1, 1989 through December 31, 1989, U.S. Customs will start signing the first section of the form ITA-370P for shipments of U.S. formed and cut fabric in Category 239 that are destined for Mexico and subject to the Special Regime. These products which are assembled in Mexico from parts cut in the United States from fabric formed in the United States, are governed by Harmonized Tariff item number 9802.00.8010 and Chapter 62 Statistical Note 3 of the Harmonized Tariff Schedule. Interested parties should be aware that shipments of cut parts in Category 239 must be accompanied by a form ITA-370P, signed by a U.S. Customs officer, prior to export from the United States for assembly in Mexico in order to qualify for entry under the Special Regime.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 53 52461, published on December 28, 1988.

Requirements for participation in the Special Regime are available in **Federal Register** notices 53 FR 15724, published on May 3, 1988; and 53 FR 32421, published on August 25, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the Memorandum of Understanding dated April 12, 1989, but

are designed to assist only in the implementation of certain of its provisions.

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

May 8, 1989.

Commissioner of Customs
Department of the Treasury
Washington, DC 20229

Dear Mr. Commissioner:

This directive amends, but does not cancel, the directive issued to you on December 22, 1988 by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textiles and textile products, produced or manufactured in the United Mexican States and exported during the period which began on January 1, 1989 and extends through December 31, 1989.

Effective on May 16, 1989, the restraint period for Category 239 is amended to end on July 31, 1989. The level for Category 239 is being amended as follows:

Category	Amended Seven-month Limit [1] (Jan. 1, 1989–July 31, 1989)
239	320,833 kilograms

[1] The limit has not been adjusted to account for any imports exported after December 31, 1988.

Also effective on May 16, 1989 you are directed to amend the limits for the following categories (the sublimit for Categories 359–C/659–C remains the same):

Category	Amended Twelve-month Limit [1] (Jan. 1, 1989–Dec. 31, 1989)
350	25,000 dozen
359–C/659–C [2]	758,815 kilograms
359–O [3]	878,219 kilograms
650	28,725 dozen
659–O [4]	822,554 kilograms
Non-Special Regime Category Sublimit:	
359–C/659–C	158,667 kilograms

[1] The limits have not been adjusted to account for any imports exported after December 31, 1988.

[2] In Category 359–C/659–C, only HTS numbers 6103.42.2025, 6103.49.3034, 6104.62.1020, 6104.69.3010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010 in Category 359–C; and 6103.23.0055, 6103.43.2020, 6103.49.2000, 6103.49.3038, 6104.63.1020, 6104.69.1000, 6104.69.3014, 6114.30.3040, 6114.30.3050, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.4020, 6211.33.0010, 6211.33.0017 and 6211.43.0010 in Category 659–C.

[3] In Category 359–O, all HTS numbers except 6103.42.2025, 6103.49.3034, 6104.62.1020, 6104.69.3010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010 in Category 359–C.

[4] In Category 659–O, all HTS numbers except 6103.23.0055, 6103.43.2020, 6103.49.2000, 6103.49.3038, 6104,63.1020, 6104.69.1000, 6104.69.3014, 6114.30.3040, 6114.30.3050, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49 1090, 6204.63.1510, 6204.49.1010, 6210.10.4020, 6211.33.0010, 6211.33.0017 and 6211.43.0010 in Category 659–C; 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5060, 6505.90.6060, 6505.90.7060 and 6505.90.8075 in Category 659–H; and 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020 in Category 659–S.

Beginning on May 16, 1989, U.S. Customs is directed to start signing the first section of the form ITA–370P for shipments of U.S. formed and cut parts in Category 239 that are destined for Mexico and re-exported to the United States during the period August 1, 1989 through December 31, 1989.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89–11525 Filed 5–11–89; 8:45 am]

BILLING CODE 3510–DR–M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List 1989; Proposed Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to Procurement List 1989 commodities to be produced and services to be provided by workshops for the blind or other severely handicapped.

Comments Must Be Received on or Before: June 12, 1989.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodities and services listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodities and services to Procurement List 1989, which was published on November 15, 1988 (53 F.R. 46018):

Commodities

Drawers, Cold Weather

8415–01–227–9542
8415–01–227–9543
8415–01–227–9544
8415–01–227–9545
8415–01–227–9546

Services

Commissary Shelf Stocking

Naval Air Station, Cecil Field, Florida

Food Service Attendant

Little Rock Air Force Base, Arkansas

Beverly L. Milkman,

Executive Director.

[FR Doc. 89–11451 Filed 5–11–89; 8:45 am]

BILLING CODE 6820–33–M

Procurement List 1989; Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to procurement list.

SUMMARY: This action adds to Procurement List 1989 a commodities to be produced and a service to be provided by workshops for the blind or other severely handicapped.

EFFECTIVE DATE: June 12, 1989.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman, (703) 557–1145.

SUPPLEMENTARY INFORMATION: On February 3, 17 and March 3, 1989, the Committee for Purchase from the Blind and Other Severely Handicapped published notices (54 FR 5542, 7248 and 9077) of proposed additions to Procurement List 1989, which was published on November 15, 1988 (53 FR 46018).

No comments were received concerning the proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified workshops to produce the commodities and provide the service at a fair market price and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities and service listed below are suitable for procurement by the Federal Government

under 41 U.S.C. 46–48c and 41 CFR 51–2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The actions will not have a serious economic impact on any contractors for the commodities and service listed.

c. The actions will result in authorizing small entities to produce the commodities and provide the service procured by the Government.

Accordingly, the following commodities and service are hereby added to Procurement List 1989:

Commodities

Strap, Webbing

5340–00–477–3700
5340–00–494–8238
5340–00–494–8239

Dressing, First Aid, Field, Camouflaged

6510–00–201–7425
6510–00–201–7430

Service

Grounds Maintenance

Hill Air Force Base, Utah

Beverly L. Milkman,

Executive Director.

[FR Doc. 89–11450 Filed 5–11–89; 8:45 am]

BILLING CODE 6820-33-M

COMMODITY FUTURES TRADING COMMISSION

Agricultural Advisory Committee; Third Renewal

The Commodity Futures Trading Commission has determined to renew again for a period of two years its advisory committee designated as the "Commodity Futures Trading Commission Agricultural Advisory Committee." The Commission certifies that renewal of the advisory committee is in the public interest in connection with duties imposed on the Commission by the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, as amended.

The objectives and scope of activities of the Agricultural Advisory Committee are to conduct public meetings and submit reports and recommendations on issues affecting agricultural procedures, processors, and lenders and others interested in or affected by the agricultural commodities markets, and to facilitate communications between the Commission and the diverse agricultural and agriculture-related organizations represented on the committee.

Commissioner Kalo A. Hineman serves as Chairman and Designated Federal Official of the Agricultural Advisory Committee. The Committee's membership represents a cross-section of interested and affected groups including representatives of producers, processors, lenders and other interested agricultural groups.

Interested persons may obtain information or make comments by writing to the Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581.

Issued in Washington, DC, this 9th day of May, 1989 by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 89–11486 Filed 5–11–89; 8:45 am]

BILLING CODE 6351-01-M

Agricultural Advisory Committee Meeting

This is to give notice, pursuant to section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. I, Section 10(a) and 41 CFR 101–6.1015(b), that the Commodity Futures Trading Commission's Agricultural Advisory Committee will conduct a public meeting in the Fifth Floor Hearing Room at the Commission's Washington, DC headquarters located at Room 532, 2033 K Street, NW., Washington, DC 20581, on June 2, 1989, beginning at 9:00 a.m. and lasting until 3:30 p.m. The agenda will consist of:

Agenda

1. Opening remarks by Commissioner Kalo Hineman and CFTC Chairman Wendy Gramm;
2. Futures-style margining of options;
3. Large order execution systems (block trading/upstairs trading) as applied to agricultural futures;
4. Registration responsibilities of feedlot operators, grain elevators, etc. and other issues relating to minimum price guarantee contracts;
5. Commodity swaps in agricultural commodities;
6. Recent regulatory and self-regulatory initiatives in futures markets and status report on CFTC reauthorization; and
7. Other issues for potential Committee consideration; timing of next meeting; other Committee business.

The purpose of this meeting is to solicit the views of the Committee on the above-listed agenda matters. The Advisory Committee was created by the Commodity Futures Trading Commission for the purpose of receiving advice and recommendations on agricultural issues. The purposes and objectives of the Advisory Committee are more fully set forth in the May 9, 1989 third renewal charter of the Advisory Committee.

The meeting is open to the public. The Chairman of the Advisory Committee, Commissioner Kalo A. Hineman, is empowered to conduct the meeting in a fashion that will, in his judgment, facilitate the orderly conduct of business. Any member of the public who wishes to file a written statement with the Advisory Committee should mail a copy of the statement to the attention of: the Commodity Futures Trading Commission Agricultural Advisory Committee c/o Charles O. Conrad, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581, before the meeting. Members of the public who wish to make oral statements should also inform Mr. Conrad in writing at the latter address at least three business days before the meeting. Reasonable provision will be made, if time permits, for an oral presentation of no more than five minutes each in duration.

Issued by the Commission in Washington, DC on May 9, 1989.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 89–11487 Filed 5–11–89; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Information Collection in support of the DoD Acquisition Process (Solicitation Phase); DD Forms 1155 and 1155C–1; and OMB Control Number 0704–0187.

Type of Request: Revision.

Average Burden Hours/Minutes per Response: 2.8515 hours.

Frequency of Response: On occasion.

Number of Respondents: 13,066,099.

Annual Burden Hours: 72,996,295.

Annual Responses: 25,599,008.

Needs and Uses: This request concerns information collection

requirements related to the solicitation of offers to sell to the Government.

Affected Public: Businesses or other for-profit; Small businesses or organizations.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Eyvette R. Flynn.

Written comments and recommendations on the proposed information collection should be sent to Ms. Eyvette R. Flynn at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

Written request for copies of the information collection proposal should be sent to Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

May 8, 1989.

[FR Doc. 89-11405 Filed 5-11-89; 8:45 am]

BILLING CODE 3810-01-M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Department of Defense National Agency Questionnaire, DD Form 398-2, and No OMB Control Number.

Type of Request: New.

Average Burden Hours/Minutes Per Response: 1.2 hours.

Frequency of Response: On occasion, one response per respondent.

Number of Respondents: 700,000.

Annual Burden Hours: 840,000.

Annual Response: 700,000.

Needs and uses: The Department of Defense National Agency Questionnaire, DD Form 398-2 is used by the Defense Investigative Service to conduct National agency checks on individuals being assigned to sensitive National security positions, to allow access to classified information, sensitive areas or equipment; to make reliability and security determinations; or to ensure that enlistment and retention in the Armed Forces is clearly consistent with National security.

Affected Public: Individuals or households, Federal agencies or employees.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Dr. J. Timothy Sprehe. Written comments and recommendations on the proposed information collection should be sent to Dr. J. Timothy Sprehe at Office of Management and Budget, Desk Officer, Room 3225, New Executive Office Building, Washington, DC 20503.

DOD Clearance Office: Ms. Pearl Rascoe-Harrison. Written request for copies of the information collection proposal should be sent to Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

May 8, 1989.

[FR Doc. 89-11406 Filed 5-11-89; 8:45 am]

BILLING CODE 3810-01-M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Department of Defense Personnel Security Questionnaire; DD Form 398; and No OMB Control Number.

Type of Request: New.

Average Burden Hours/Minutes per Response: 1.5 hours.

Frequency of Response: One response per respondent.

Number of Respondents: 195,000.

Annual Burden Hours: 292,500.

Annual Responses: 195,000.

Needs and Uses: The Department of Defense Personnel Security Questionnaire, DD Form 398, is used by the Defense Investigative Service to conduct personnel security investigations on individuals requiring access to classified information, sensitive areas or equipment; or to permit assignment to sensitive national security positions.

Affected Public: Individuals or households; Federal agencies or employees.

Frequency: On occasion.

Respondents Obligation: Voluntary.

OMB Desk Officer: Dr. J. Timothy Sprehe.

Written comments and recommendations on the proposed information collection should be sent to Dr. J. Timothy Sprehe at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

Written request for copies of the information collection proposal should be sent to Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

May 8, 1989.

[FR Doc. 89-11407 Filed 5-11-89; 8:45 am]

BILLING CODE 3810-01-M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: DoD FAR Supplement, Appendix I, Material Inspection and Receiving Report; DD Forms 250, 250-C, 250-1; and OMB Control Number 0704-0248.

Type of Request: Extension.

Average Burden Hours/Minutes per Response: 35 min.

Frequency of Response: On occasion.

Number of Respondents: 1,640,416.

Annual Burden Hours: 956,909.

Annual Responses: 1,640,416.

Needs and Uses: This request concerns information collection requirements supporting Material Inspection and Receiving Reports.

Affected Public: Businesses or other for-profit; Non-profit institutions; Small businesses or organizations.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ms. Eyvette Flynn.

Written comments and recommendations on the proposed information collection should be sent to Ms. Eyvette R. Flynn at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

Written request for copies of the information collection proposal should be sent to Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

May 8, 1989.

[FR Doc. 89-11408 Filed 5-11-89; 8:45 am]

BILLING CODE 3810-01-M

The Joint Staff; National Defense University Transition Planning Committee (Long Committee)

AGENCY: Joint Staff, Department of Defense.

ACTION: Notice of meeting.

SUMMARY: The Chariman, Joint Chiefs of Staff, has scheduled a meeting of the Long Committee.

DATE: The meeting will be held on May 31 and June 1, 1989.

ADDRESS: The meeting will be held at the Center for Naval Analysis, 4401 Ford Avenue, Suite 571, Alexandria, Virginia 22302.

FOR FURTHER INFORMATION CONTACT: Colonel Tom Berta, Executive Assistant, Long Committee, 4401 Ford Avenue, Suite 571, Alexandria, Virginia 22302. To reserve space, interested persons should phone 703-756-0573.

SUPPLEMENTARY INFORMATION: The committee will be examining the desirability and feasibility of establishing a National Center for Strategic Studies. The meeting is open to the public, but the limited space available for observers will be allocated on a first-come, first served basis.

Linda Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

May 8, 1989.

[FR Doc. 89-11410 Filed 5-11-89; 8:45 am]

BILLING CODE 3810-01-M

Office of the Secretary

DOD Advisory Group on Electron Devices; Advisory Committee Meeting

SUMMARY: Working Group C (Mainly Opto Electronics) of the DoD Advisory Group on Electron Devices (AGED) announces a closed session meeting.

DATE: The meeting will be held at 0900, Tuesday and Wednesday, 6 & 7 June 1989.

ADDRESS: The meeting will be held at Palisades Institute for Research Services, Inc., 2011 Crystal Drive, Suite 307, Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: Gerald Weiss, Aged Secretariat, 201 Varick Street, New York, 10014.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide the Under Secretary of Defense for Acquisition, the Director, Defense Advanced Research Projects Agency and the Military Departments with technical advice on the conduct of economical and effective research and development programs in the area of electron devices.

The Working Group C meeting will be limited to review of research and development programs which the military propose to initiate with industry, universities or in their laboratories. This opto-electronic device area includes such programs as imaging devices, infrared detectors and lasers. The review will include classified program details throughout.

In accordance with Section 10(d) of Pub. L. No. 92-463, as amended, [5 U.S.C. App. II § 10(d) (1982)], it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly, this meeting will be closed to the public.

May 8, 1989.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 89-11409 Filed 5-11-89; 8:45 am]

BILLING CODE 3810-01-M

Office Of The Secretary

Military Court Appeals; Practice and Procedure Rules; Proposed Changes

AGENCY: U.S. Court of Military Appeals.

ACTION: Notice of proposed changes to the rules of practice and procedure of the United States Court of Military Appeals.

SUMMARY: This notice announces the following proposed changes (italicized) to Rule 4 (Jurisdiction) and Rule 21 (Supplement to Petition for Grant of Review) of the Rules of Practice and Procedure, United States Court of Military Appeals:

Rule 4. Jurisdiction.

* * * * *

(c) *Certification of Questions of State Law.*

(1) *The Court may, in its discretion—*

(A) *answer a question of military law certified to it by the Supreme Court of the United States, a United States Court of Appeals, a United States District Court, the United States Claims Court, or an appellate court of a state if the question may be determinative of a case pending in the certifying court and it appears to the certifying court that there is no controlling precedent in the decisions of this Court; and*

(B) *on its own motion or on motion of a party, certify to the highest court of a state, where authorized by such state's law, a question of the law of that state which may be determinative of a case pending in the Court if it appears to the Court that there is no controlling precedent in the decisions of the courts of the state.*

(2) *A certificate under this paragraph shall state the question of law to be answered and the relevant facts. Unless transmitted with the certificate, portions of the record necessary to answer the question shall, upon request of the receiving court, be forwarded by the certifying court.*

(3) *In cases arising under subparagraph (1)(A), the Court will enter an order as to briefing and oral argument. In cases arising under subparagraph (1)(B), certification shall be in accordance with the procedures provided by the state's legislature or highest state court rules and shall stay the proceedings in this Court pending the state court's decision whether to accept the certification and its decision of the certified question.*

(4) *For purposes of this paragraph, the term "state" shall include the District of Columbia, Puerto Rico, the Virgin Islands, Guam and American Samoa.*

[Reletter (c) as (d).]

Rule 21. Supplement to Petition for Grant of Review.

* * * * *

(b) The supplement to the petition shall be filed in accordance with the applicable time limited set forth in Rule 19(a)(5) (A) or (B), shall include an Appendix required by Rule 24(a), shall conform to the provisions of Rule 24 (b), (c), and (d), shall contain:

* * * * *

(4) A direct and concise argument showing why there in good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to the substantial rights of the applicant. *Where applicable, the supplement to the petition shall also indicate whether the court below has:*

(A) decided a question of law which has not been, but should be, settled by this Court;

(B) decided a question of law in a way in conflict with applicable decisions of (i) this Court, (ii) the Supreme Court of the United States, (iii) another Court of Military Review, or (iv) another panel of the same Court of Military Review;

(C) adopted a rule of law materially different from that generally recognized in the trial of criminal cases in the United States district courts;

(D) decided the validity of a provision of the Uniform Code of Military Justice or other act of Congress, the Manual for Courts-Martial, a service regulation, a rule of court or a custom of the service the validity of which was directly drawn into question in that court;

(E) decided the case (i) en banc or (ii) by divided vote;

(F) so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a court-martial or other person acting under the authority of the Uniform Code of Military Justice, as to call for an exercise of this Court's power of supervision; or

(G) taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that appellant wished to seek review from the Supreme Court of the United States; and * * *

DATE: Comments on the proposed changes must be reviewed by (60 days from date of publication).

ADDRESS: Forward comments to Thomas F. Granahan, Clerk of Court, United States Court of Military Appeals, 450 E Street, Northwest, Washington, DC 20442-0001.

FOR FURTHER INFORMATION CONTACT: Thomas F. Granahan, Clerk of Court, telephone (202) 272-1448.

May 8, 1989.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 89-11411 Filed 5-11-89; 8:45 am]

BILLING CODE 3810-01-M

Department of the Air Force

USAF Scientific Advisory Board; Meeting

May 3, 1989.

The USAF Scientific Advisory Board Division Advisory Group (AG) for Aeronautical Systems Division (ASD) will meet on 6 Jun 89 from 8:00 AM to 5:00 PM and on 7 Jun 89 from 8:00 AM to 3:00 PM at Wright-Patterson AFB, OH, Area B, Building 14, Conference Rooms 222 and 203.

The purpose of this meeting is to receive classified briefings and hold classified discussions on selected Air Force Programs. This meeting will involve discussions of classified defense matters listed in Section 55b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

FOR FURTHER INFORMATION CONTACT: The Scientific Advisory Board Secretariat at (202) 697-4648.

Patsy J. Conner,

Air Force Federal Register, Liaison Officer.

[FR Doc. 89-11443 Filed 5-11-89; 8:45 am]

BILLING CODE 3910-01-M

Department of the Army

Science Board; Open Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB)

Dates of the Meeting: 5-6 June 1989

Time: 0800-1700 hours, 5 June 1989 and 0800-1200 hours, 6 June 1989

Place: Fort Leavenworth, Kansas

Agenda: The Army Science Board 1989 Summer Study on Maintaining State-of-the-Art in the Army Command and Control System will meet to study the role of the Combined Arms Center in ACCS, the process for determining future requirements, and discuss the Future Battle Lab and Battle Commanders Training Program. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202)-695-3039 or 695-7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 89-11444 Filed 5-11-89; 8:45 am]

BILLING CODE 3710-8-M

Science Board; Open Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB)

Dates of the Meeting: 6-7 June 1989

Time: 0800-1700 hours each day

Place: Fort Huachuca, Arizona

Agenda: The Army Science Board 1989 Summer Study on Maintaining State-of-the-Art in the Army Command and Control System will meet to study the plans and progress of testing activities on the Army Data Distribution System as well as other communications systems supporting command and control. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202)-695-3039 or 695-7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 89-11445 Filed 5-11-89; 8:45 am]

BILLING CODE 3710-8

Science Board; Open Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB)

Dates of Meeting: 8-9 June 1989

Time of Meeting: 0900-1600 hours, 8 June 1989 and 0900-1400 hours, 9 June 1989

Place: Aberdeen Proving Ground, Maryland

Agenda: The Army Science Board Ad Hoc Subgroup on the U.S. Army Chemical, Research, Development and Engineering Center will visit the Chemical Center and School for the purpose of gathering additional data for the conduct of the effectiveness review. The meeting will consist of interviews with a cross-section of technical employees, and planning for preparation of the final report. This meeting is open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695-3039/7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 89-11446 Filed 5-11-89; 8:45 am]

BILLING CODE 3710-8-M

Corps of Engineers, Department of the Army

Inland Waterways Users Board; Meeting

April 27, 1989.

AGENCY: Department of the Army, DOD.

Subagency: Corps of Engineers.

ACTION: Notice of open meeting.

SUMMARY: 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 Committee: Inland Waterways Users Board.

Date of Meeting: June 7, 1989.

Place: Holiday Inn—Highway 80 East and Interstate 20 Vicksburg, Mississippi 39180.

Time: 9 a.m. to 5 p.m.

Proposed Agenda

A.M. Session
9:00 Business Session
—Call to Order
—Disposition of Prior Meeting Minutes
9:15 Presentation of Information to Board
—Lower Mississippi River Inland Navigation Program
—Montgomery Point Lock and Dam, Arkansas River
—Trust Fund Analysis
—Status of Appropriations Activities
11:30 Lunch
P.M. Session
12:30 Modernization of Waterways Statistics Program
1:00 Overview of Investment Planning Process
1:30 Business Session
—Increased Non-Federal Oversight
—Other Business
3:30 Public Comment Period
4:00 Adjournment

This meeting is open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee.

FOR FURTHER INFORMATION CONTACT: Mr. William C. Holliday, Headquarters, U.S. Army Corps of Engineers, CECW-P, Washington, DC. 20314-1000 at (202) 272-0146.

Patrick J. Kelly,

Brigadier General, USA, Executive Director to the Inland Waterways Users Board.

[FR Doc. 89-11190 Filed 5-11-89; 8:45 am]

BILLING CODE 3710-92-M

DEPARTMENT OF ENERGY

Office of Energy Research

Magnetic Fusion Advisory Committee; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770), notice is hereby given of the following meeting.

Name: Magnetic Fusion Advisory Committee (MFAC).

Date and Time: Tuesday, June 6, 1989, 8:30 a.m.-5:00 p.m.; Wednesday, June 7, 1989, 8:30 a.m.-12:00 p.m.

Location: General Atomics, Fusion and Advanced Technology, 10955 John Jay Hopkins Drive (Main Entrance), Bldg. 7, Room T-217, San Diego, California 92121.

Contact: Michael Crisp, Office of Fushion Energy (OFE), Office of Energy Research, ER-51, U.S. Department of Energy, Mail Stop J-204, Washington, DC 20545, Phone: (301)-353-4941.

Purpose of the Committee: To provide advice to the Secretary of Energy on the Department's Magnetic Fusion Energy Program, including periodic reviews of elements of the program and recommendations of changes based on scientific and technological advance or other factors; advice on long-range plans, priorities, and strategies to demonstrate the scientific and engineering feasibility of fusion; advice on recommended appropriate levels of funding to develop those strategies and to help maintain appropriate balance between competing elements of the program.

MFAC Agenda Outline

June 6, 1989

1. 8:30 a.m. Welcome and Announcements—N. Blue, Tihiro Okkawa
2. OFE Program—A. Davies
3. Final Report of Panel 22—K. Molvig
4. MFAC Discussion—F. Ribe
5. Public Comments (Lunch 12:30-1:30 p.m.
6. National Academy of Sciences Report—I. White, R. Conn
7. GA Program Presentation—T. Ohkawa
8. Tour of Diiid Facility (Adjourn 5:30 p.m.)

MFAC 2nd Day

June 7, 1989

1. 8:30 a.m. Cold Fusion Status—R. Linford
2. CIT Status—H. Furth
3. Possible New Charge—F. Ribe
4. Finalization of Panel 22—F. Ribe
5. MFAC Discussion—F. Ribe
6. Public Comments (Adjourn 12:30 p.m.)

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Michael Crisp at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. The Chairperson of the Comnmittee is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: Available for public review and copying approximately 30 days following the meeting at the Public Reading Room, Room 1E190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on May 9, 1989

J. Robert Franklin,

Deputy Avisory Committee, Management Officer.

[FR Doc. 89-11478 Filed 5-11-89; 8:45 am]

BILLING CODE 6450-01-M

Office of Fossil Energy

[ERA Docket No. 88-19-NG]

Hydro Engineering Inc.; Granting Long-Term Authorization to Import Natural Gas from Canada

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of an Order Granting Long-Term Authorization to Import Natural Gas.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice that it has issued an order in ERA Docket No. 88-19-NG granting Hydro Engineering, Inc. (Hydro Engineering), authorization to import up to 8,250 Mcf per day of Canadian natural gas over a 15-year period beginning on the date of first delivery. The gas would be imported on the behalf of Ada Cogeneration (Ada), a Michigan limited partnership, and used as the primary source of fuel at Ada's combined-cycle cogeneration facility located at Ada, Michigan.

A copy of this order is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, April 28, 1989.

J. Allen Wampler,

Assistant Secretary, Fossil Energy.

[FR Doc. 89-11477 Filed 5-11-89; 8:45 am]

BILLING CODE 6450-01-M

Western Area Power Administration

Proposed Allocation of Power from the Navajo Generating Station; Arizona

AGENCY: Western Area Power Administration, DOE.

ACTION: Proposed Allocation of Power from the Navajo Generating Station, Central Arizona Project, and Request for Comments.

SUMMARY: Section 107 of the Hoover Power Plant Act of 1984 (98 Stat. 1333) (Act) provides that capacity and energy associated with the United States interest in the Navajo Generating Station (Navajo), which is in excess of the pumping requirements of the Central Arizona Project (CAP) and certain needs for desalting and protective pumping facilities under the Colorado River Basin Salinity Control Act of 1974 (43 U.S.C. 1591, *et seq.*) (Navajo Surplus), shall be marketed and exchanged by the Secretary of Energy. The Act provides that in the sale and exchange of Navajo Surplus, the Secretary of the Interior shall adopt the plan deemed most acceptable, after consultation with the Secretary of Energy, the Governor of Arizona, and Central Arizona Water Conservation District (CAWCD) (or its successor) for the purposes of optimizing the availability of Navajo Surplus and providing financial assistance in the timely construction and repayment of construction costs of the authorized features of the CAP. The Act also provides that rates for Navajo Surplus shall not exceed levels that allow for an appropriate saving for the contractor.

On December 1, 1987, the Commissioner of the Bureau of Reclamation (Reclamation) adopted the Navajo Power Marketing Plan (Plan) on behalf of the Secretary of the Interior. The Plan was published in the **Federal Register** on December 21, 1987 (52 FR 48328). The Plan, a cooperative effort among Federal, State, and local entities, provides the criteria to be used in the sale and exchange of Navajo Surplus after the date of initial operation of the New Waddell Dam. The New Waddell Dam is the regulatory storage feature of the CAP on the Agua Fria River which will allow for operating flexibility to increase winter season pumping and reduce summer season pumping, thereby providing an enhanced power resource during the peakload season of the Southwest.

The date of initial operation of the New Waddell Dam, as defined in the Plan (section III (I)), is scheduled to occur on or before October 15, 1992, as determined by Reclamation.

By **Federal Register** notice (53 FR 17102) published May 13, 1988, Western requested applications for Navajo Surplus that will be available for sale and exchange after the date of initial operation of New Waddell Dam through September 30, 2011. The applications for long-term Navajo Surplus were to include the applicant profile data described in the notice and also include the amount(s) of power and type(s) of service (sale or exchange) requested.

The Western Area Power Administration (Western) has reviewed all of the applications received pursuant to its May 13, 1988, **Federal Register** notice and has developed the proposed allocations contained herein. Western believes that the proposed allocations best meet the intent of the Plan. Western will not conduct formal public meetings relative to this proposed allocation but will consider all written comments in making the final determination of Navajo Surplus allocations, which will be published in a future **Federal Register** notice.

DATES: The comment period will begin with publication of this notice in the **Federal Register** and will end 30 days thereafter.

ADDRESSES: Written comments may be sent to: Mr. Thomas A. Hine, Area Manager, Boulder City Area Office, Western Area Power Administration, P.O. Box 200, Boulder City, NV 89005.

FOR FURTHER INFORMATION CONTACT: Mr. Earl W. Hodge, Assistant Area Manager for Power Marketing, Boulder City Area Office, Western Area Power Administration, P.O. Box 200, Boulder City, NV 89005, (702) 477-3255.

Background

Section 107 of the Hoover Power Plant Act of 1984 required the Secretary of the Interior to adopt the plan deemed most acceptable for the purposes of optimizing the availability of Navajo Surplus and providing financial assistance in the timely construction and repayment of construction costs of the authorized features of the CAP. The Act provides that electrical capacity and energy associated with the United States interest in Navajo, which is in excess of the pumping requirements of the CAP and certain needs for desalting and protective pumping facilities, shall be marketed and exchanged by the Secretary of Energy in a manner consistent with the Plan adopted by the Secretary of the Interior.

Navajo Surplus, which is primarily a capacity resource, is being marketed in accordance with the Plan wherein capacity and energy will be available for sale and exchange on a long-term basis. Capacity and energy will be available for delivery throughout the year, onpeak and offpeak during the long-term contract period. Capacity available for sale will be 400 megawatts (MW), less the capacity used for exchange purposes. A maximum of 150 MW of the 400 MW available may be used for exchanges on a long-term basis. There will be up to 760 kilowatthours (kWh) of energy per year for each kilowatt (kW) of contract capacity available for sale or exchange, which equates to a load factor of approximately 9 percent.

The capacity rate will be fixed for the term of the contract at $72 per kW per year ($6 per kW per month). This equates to 94.7 mills per kWh based on the associated energy of 760 kWh per kW. The energy rate will be based on the annual operating costs associated with the United States Navajo entitlement plus a charge for Westen's costs associated with Navajo. Exchanges will be made at a one-kWh-for-one-kWh exchange rate plus the above-noted capacity rate and the charge for Western's costs associated with Navajo.

Any capacity or energy not sold or exchanged in accordance with the foregoing may, as determined by Western in cooperation with CAWCD and Reclamation, be sold under appropriate long-term or short-term arrangements or integrated with the Federal system and sold by Western under arrangements developed in cooperation with CAWCD and Reclamation. The Plan further provides that up to 30 MW of Navajo Surplus not sold or exchanged in accordance with the above will be made available first to Reclamation for the purposes of the Colorado River Basin Salinity Control Act. The Plan provides that delivery of capacity and energy for sale or exchange is subject to the provisions of section V of the Plan.

The long-term contracts will become effective upon their execution. Delivery of capacity and energy will begin after the date of initial operation of the New Waddell Dam. The long-term contracts will terminate on September 30, 2011.

Prior to termination of the initial long-term contracts, the long-term contractors of the Navajo Surplus shall be given the first opportunity for new long-term sales contracts and new long-term exchange contracts for approximately the same amounts of power contained in the then existing contracts with available capacity and energy distributed pro rata among contractors. Such new contracts shall be entered into prior to October 1, 2007.

Proposed Allocation

Navajo Surplus is being allocated for sale in accordance with the priority requirements of section VI of the Plan as set out below:

1. Federal preference entities within Arizona,
2. Federal preference entities within the Boulder City marketing area,
3. Federal preference entities in adjacent Federal marketing areas, and
4. Nonpreference entities in the Boulder City marketing area.

In the event that a potential contractor fails to execute a contract within the period specified by Western and in accordance with the terms and conditions offered by Western, or if a contract is terminated in accordance with the terms of the contract, the allocation to that entity will be withdrawn.

Any capacity and associated energy withdrawn or returned to Western may be reallocated without further public process and reoffered by Western in accordance with the order of priority specified above. In reallocating the power, Western will use the same methodology used in the initial allocations. The power being reallocated may be offered first to the remaining allottees or contractors up to their initial requested amounts. The CAWCD has determined that all long-term contracts must be executed no later than August 14, 1989, in order to accommodate CAWCD's contribution toward the cost of construction of the New Waddell Dam. An extension of time will only be granted if such extension will not affect the initiation of the CAWCD bonding, as determined by CAWCD. Western is preparing prototype contracts for the long-term sales and exchange of Navajo Surplus. Such prototype contracts will be made available to the proposed allottees and other interested parties upon request, when Western has determined that such prototype is developed sufficiently to release for review.

The Act also provides that Arizona entities, regardless of preference status, shall have first opportunity for electrical capacity and energy exchange rights as necessary to implement the Plan. Western, in consultation with CAWCD and Reclamation, may determine that any capacity and energy not contracted for by Arizona entities for exchange may be offered for long-term sale in the order of priority stated above or may be offered to non-Arizona entities for exchange.

Contract entitlements will be measured or calculated at the 500-kV bus of the Navajo Generating Station. Capacity and energy, less losses, will be scheduled and delivered at a voltage of 500 kilovolts to contractors at either Westwing Switchyard, McCullough Switchyard, or at such other points and voltages on the Navajo transmission systems as agreed upon by Western and the contractor. Any necessary transmission service beyond the agreed-upon points of delivery will be the responsibility of the contractor.

Western received 59 applications for sale and/or exchange of Navajo Surplus from entities located in the States of Arizona, California, Nevada, and Utah. Western received applications for purchase from 12 Arizona entities, 2 Nevada entities, 9 California entities, and 35 Utah entities. Three applications for exchange power were received from Arizona, one from Nevada, two from California, and none from Utah. Western has analyzed all applications received, and each of the applicants were categorized in accordance with the priorities set forth in section VI of the Plan. Appendices A, B, and C provide a listing of all applicants, their priority category, and their requested amounts of capacity.

Pursuant to the Act and the priority criteria of the Plan, the benefits of Navajo Surplus go first to the entities in the State of Arizona. Since there are more than sufficient applications from first-priority entities within the State of Arizona, Western has pro rated all available Navajo Surplus for sale and exchange to Arizona applicants in the amounts shown in tables 1 and 2. Because of this, the applicants described below were not granted an alllocation.

Although Chandler Heights Citrus Irrigation District (CHCID) is located in Arizona, CHCID was not granted an allocation. CHCID's application and applicant profile data did not specify any requested amount of capacity allocation, so Western reviewed CHCID's load data for 1985, 1986, and 1987 in an attempt to determine an appropriate amount to allocate. Western noted that the maximum historic power usage for CHCID for 1985–87 never exceeded 1.088 MW. Further, Western noted that CHCID has an allocation of Federal resources from the Salt Lake City Area Integrated Projects (SLA/IP), plus a suballocation of the Boulder Canyon Project (BCP) Federal resource. The sum of the BCP and the SLCA/IP Federal allocations is in excess of 1 MW. Western has determined that Navajo Surplus will not be allocated in units less than 1 MW. To grant CHCID a minimum allocation of 1 MW of Navajo Surplus power would give CHCID a total Federal allocation of power greater than their 3-year historic peakload requirement. Therefore, in order to assure them no entity receives an allocation greater than its load, no allocation is made to CHCID of Navajo Surplus.

The following applicants qualify as second-priority applicants for sale of Navajo Surplus because they are Federal-preference entities within the Boulder City marketing area but not within the State of Arizona: Edwards Air Force Base, California; March Air Force Base, California; City of Anaheim, California; city of Burbank, California; city of Glendale, California; city of Pasadena, California; and city of Riverside, California.

The 36 Utah entities which filed jointly as the Intermountain Consumer Power Association (ICPA) qualify for sale of Navajo Surplus as third-priority applicants because these entities' central headquarters and service areas are located outside of the State of Arizona in an adjacent Federal marketing area (with the two exceptions of Dixie-Escalante Rural Electric Association, Inc., Utah (Dixie-Escalante) and Garkane Power Association, Inc., Utah (Garkane)).

Dixie-Escalante's and Garkane's central headquarters are located outside the State of Arizona; however, Dixie-Escalante and Garkane serve loads within the State boundaries of Arizona. One of the expressed purposes of the Plan is to maximize the Navajo Surplus sales and exchange benefits for Arizona. Western is not assured that an allocation of Navajo Surplus to Dixie-Escalante and Garkane will be used exclusively for supplying their loads located within Arizona. Therefore, the ultimate benefits of a Navajo Surplus allocation cannot be guaranteed to be directly beneficial to Arizona.

Therefore, Western has determined that Dixie-Escalante and Garkane qualify as preference entities located in an adjacent marketing area even though both entities provide electric service to loads within the State of Arizona. However, because Dixie-Escalante and Garkane serve loads within Arizona, Western has determined that Dixie-Escalante and Garkane should receive consideration for an allocation before the other applicants in the third-priority applicant group if the third-priority group is considered for a reallocation.

In addition to their application as a member of the ICPA, Page Electric Utility, Page, Arizona (Page), applied on their own behalf. Page is considered to be a first-priority applicant for the sale of Navajo Surplus and will receive an allocation.

The following entities are investor-owned utilities, do not own and operate their own electric utility system, or have not demonstrated electric utility responsibility. For these reasons, these entities qualify as priority-four applicants for sale of Navajo Surplus: Tucson Electric Power Company, Arizona; Nevada Power Company, Nevada; Southern California Edison Company, California; Las Vegas Valley Water District, Nevada; Kern County Water Agency, California; and San Carlos Irrigation and Drainage District, Arizona.

The following applicants did not qualify as first-priority applicants for the exchange of Navajo Surplus because they are not located within the State of Arizona: Nevada Power Company, Nevada; Southern California Edison Company, California; and the city of Pasadena, California.

Western proposes to allocate a total of 250 MW of Navajo Surplus for sale to the following entities that qualify as first-priority applicants for sale of Navajo Surplus:

TABLE 1.—PROPOSED ALLOCATION FOR SALE OF NAVAJO SURPLUS

Entity	Proposed allocation in MW
Arizona Power Pooling Association, Arizona	38.0
Davis-Monthan Air Force Base, Arizona	2.0
Luke Air Force Base, Arizona	2.0
Department of the Army, Yuma Proving Ground, Arizona	1.0
Papago Tribal Utility Authority, Arizona	1.0
Bureau of Indian Affairs, San Carlos Irrigation Project, Arizona	5.0
Salt River Project, Arizona	200.0
Page Electric Utility, Arizona	1.0
Total	250.0

Western, in developing the proposed allocations, determined that it was impractical to allocate the available 250 MW of Navajo Surplus for delivery in units less than 1 MW; therefore, no allocation is proposed for less than 1 MW. The basis for this allocation reflects the direct relationship of the individual applicant's load to the total load served by all applicants, with consideration given for the relationship of the individual applicant's load being served by Federal resources. The load data used to develop the allocations were the individual applicant's average annual load for the years 1985–1987, as provided in their applicant profile data.

Based on the above rationale, Western utilized the following formula to maximize the available Navajo Surplus to the qualified applicants:

(Individual Applicant's 3-Year Average Annual Load – Individual Applicant's Annual Allocation of Federal Resources)
÷ (Total All Applicant's 3-year Average Annual Load – Total All Applicant's Annual Allocation of Federal Resources)
× 250.0 MW (Rounded to the Nearest 1 MW)

Western did not allocate more to an individual applicant than the amount that was requested. The derivation of the allocation is shown in appendix D.

Western proposes to allocate a total of 150 MW of Navajo Surplus for exchange to the following entities qualified as first-priority applicants for exchange of Navajo Surplus:

TABLE 2.—PROPOSED ALLOCATION FOR EXCHANGE OF NAVAJO SURPLUS

Entity	Proposed allocation in MW
Arizona Public Service Company, Arizona	102.0
Arizona Power Pooling Association, Arizona	11.0
Tucson Electric Power Company, Arizona	37.0
Total	150.0

The basis for the allocation of Navajo Surplus for exchange was to prorate the total 150 MW of Navajo Surplus available for exchange on a percentage basis of average annual load served by the individual qualified Arizona applicants, compared to the sum of the average annual load served by those same individual qualified Arizona applicants. The load data used to develop the allocations were the individual applicant's loads for the years 1985–1987, as provided in their applicant profile data. Based on the above rationale, the following formula was used by Western to allocate the exchange of Navajo Surplus:

(Individual Applicant 3-Year Average Annual Load
÷ Total of all Individual Applicant's 3-Year Average Annual Load
× 150 MW (Rounded to the Nearest MW)

Western did not allocate more to an individual applicant than its requested amount. The derivation of the allocation is shown in appendix E.

Executive Order 12291

Under the provisions of section 3 of Executive Order 12291, dated February 19, 1981, a regulatory impact analysis must be made prior to the publication of a major rule. This proposal is of a technical nature and considered to be a nonmajor rule within the meaning of the Executive order. Western has an exemption from sections 3, 4, and 7 of Executive Order 12291; accordingly, no clearance of this procedure by the Office of Management and Budget (OMB) is required.

National Environmental Policy Act

In compliance with the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality Regulations, and the Department of Energy guidelines for compliance with NEPA, republished and amended in the **Federal Register** on December 15, 1987 (52 FR 47662), Western prepared an environmental assessment of the potential impacts of the marketing of long-term Navajo Surplus. The Department of Energy has determined that Western's proposed actions as described in the environmental assessment will not lead to any significant environmental impacts.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*), each agency, when required to publish a general notice of proposed rule, shall prepare for public comment an initial regulatory flexibility analysis to describe the impact of the proposed rule on small entities. In this instance, this proposal relates to particular electric services and rates provided by Western. Under 5 U.S.C. 601(2), such rules and practices relating to services are not considered "rules" within the meaning of this Act. Accordingly, no regulatory flexibility analysis is required.

Issued at Golden, Colorado, May 1, 1989.

William H. Clagett,

Administrator, Western Area Power Administration.

APPENDIX A.—LONG-TERM NAVAJO APPLICANTS SUMMARY

All Applicants

Entity name & state	Purchase request (kW)	Priority status
Department of the Air Force, Davis-Monthan Air Force Base, Arizona	7,000	1
Department of the Air Force, Edwards Air Force Base, California	(4)	2
Department of the Air Force, Luke Air Force Base, Arizona	6,000	1
Department of the Air Force, March Air Force Base, California	(4)	2
Anaheim, City of, California	40,000	2
Arizona Power Pooling Association, Arizona	95,000	1

APPENDIX A.—LONG-TERM NAVAJO APPLICANTS SUMMARY—Continued

All Applicants

Entity name & state	Purchase request (kW)	Priority status
Department of the Army, Yuma Proving Ground, Arizona	[1] 2,000	1
Burbank, City of, California	10,000	2
Bureau of Indian Affairs, San Carlos Irrigation District, Arizona	6,000	1
Chandler Heights Citrus Irrigation District, Arizona	([4])	1
Glendale, City of, California	10,000	2
Hillander "C" Irrigation District, Arizona	[2] 1,500	N/A
Intermountain Consumer Power, Association, Utah	([3])	3
Kern County Water Agency, California	[1] 16,000	4
Las Vegas Valley Water District, Nevada	27,000	4
Nevada Power Company, Nevada	[1] 150,000	4
Page Electric Utility, Arizona	25,000	1
Papago Tribal Utility Authority, Arizona	35,000	1
Pasadena, City of, California	15,000	1
Riverside, City of, California	75,000	2
San Carlos Irrigation and Drainage District, Arizona	2,000	4
Salt River Project, Arizona	200,000	1
Southern California Edison Company, California	400,000	4
Tucson Electric Power Company, Arizona	150,000	4

[1] Identifies maximum amount requested.
[2] Hillander "C" Irrigation District withdrew its application on February 8, 1989.
[3] ICPA made application on behalf of 36 entities outside the Boulder City marketing area for differing amounts of capacity. Total capacity from all applications equals 219,560 kW. See appendix B for summary of ICPA applications.
[4] No capacity amount requested.

APPENDIX B.—INTERMOUNTAIN CONSUMER POWER ASSOCIATION APPLICATION FOR SALE OF LONG-TERM NAVAJO SURPLUS

Entity name & state	Purchase request (kW)	Priority status
Beaver, City of, Utah	2,000	3
Blanding, City of, Utah	4,000	3
Bountiful, City of, Utah	2,300	3
Bridger Valley Rural Electric Association, Utah	3,000	3
Brigham City, Utah	11,000	3
Dixie-Escalante Rural Electric Association, Utah	15,000	3
Enterprise, City of, Utah	1,000	3
Ephraim, City of, Utah	2,500	3
Fairview, City of, Utah	400	3
Fillmore, City of, Utah	1,200	3
Flowell Electrical Association, Inc., Utah	500	3
Garkane Power Association, Inc., Utah	10,000	3
Hyrum City, Utah	7,000	3
Heber Light & Power, Utah	3,000	3
Holden, Town of, Utah	100	3
Hurricane, City of, Utah	4,000	3
Kanosh, Town of, Utah	260	3
Kaysville, City of, Utah	4,300	3
Lehi, City of, Utah	2,800	3
Logan City, Utah	26,000	3
Meadow, Town of, Utah	200	3
Monroe, City of, Utah	800	3
Moon Lake Rural Electric Association, Utah	10,000	3
Morgan City, Utah	600	3
Mt. Pleasant City, Utah	500	3
Mt. Wheeler, Utah	3,000	3
Murray, Utah	2,500	3
Oak City, Utah	300	3
Page Electric Utility, Arizona	25,000	3

APPENDIX B.—INTERMOUNTAIN CONSUMER POWER ASSOCIATION APPLICATION FOR SALE OF LONG-TERM NAVAJO SURPLUS—Continued

Entity name & state	Purchase request (kW)	Priority status
Parowan, Utah	1,300	3
Payson, Utah	2,700	3
St. George, Utah	64,000	3
Spring City, Utah	600	3
Springville, Utah	2,000	3
Strawberry Electric Service District, Utah	4,700	3
Washington, Utah	1,000	3

APPENDIX C.—APPLICATIONS FOR EXCHANGE OF NAVAJO SURPLUS

Entity name & state	Exchange request (kW)	Priority status
Arizona Public Service Company, Arizona	150,000	1
Arizona Power Pooling Association, Arizona	[1] 95,000	1
Tucson Electric Power Company, Arizona	150,000	1
Nevada Power Company, Nevada	[1] 150,000	2
Pasadena, City of, California	15,000	2
Southern California Edison Company, California	[1] 400,000	2

[1] Identifies maximum amount requested.

APPENDIX D.—CALCULATIONS IN SUPPORT OF TABLE 1

Entity	Average annual system load (MW)	Current federal annual allocation (MW)	Total annual non-fed. load (MW)	Entity non-fed. is of total non-fed. (percent)	Non-adjusted allocation of 250 (MW)	Requested allocation (MW)	Adjusted allocation limited by request (MW)	Dist. of excess (MW)	Final allocation of 250 (MW)
Davis-Monthan Air Force Base	15,229	0	15,229	0.52	1.3	7.0	1.0	1.0	2.0
Luke Air Force Base	17,367	2,227	15,140	0.51	1.3	6.0	1.0	1.0	2.0
Arizona Power Pooling Assn.	353,833	61,525	292,308	9.89	24.7	95.0	24.0	14.0	38.0
Department of the Army, Yuma Proving Ground	7,324	5,582	1,742	0.06	0.1	2.0	1.0	0.0	1.0
Papago Tribal Util. Auth.	11,418	2,353	9,065	0.31	0.8	35.0	1.0	0.0	1.0
Bureau of Indian Affairs, San Carlos Irrigation District	49,133	18,551	30,582	1.03	2.6	6.0	3.0	2.0	5.0
Salt River Project	2,761,000	173,714	2,587,286	87.52	218.8	200.0	200.0	N/A	200.0
Page Electric Utility	12,821	8,040	4,781	.16	.4	25.0	1.0	0.0	1.0
Total	3,228,125	271,992	2,956,133	100.00	250.0	376.0	232.0	18.0	250.0

APPENDIX E.—CALCULATIONS IN SUPPORT OF TABLE 2

Entity name	Average annual total load (MW)	Total load (Percent)	150 MW allocation
Tucson Electric Power Company	1,146.7	24.48	36.7
Arizona Public Service	3,183.9	67.97	102.0
Arizona Power Pooling Assn.	353.8	7.55	11.3
Total	4,684.4	100.00	150.0

[FR Doc. 89-11476 Filed 5-11-89; 8:45 am]
BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-3569-1]

Approval of Prevention of Significant Air Quality Deterioration (PSD) Permit to Pacific Thermonetics, Inc. (EPA Project Number SFB 88-01)

AGENCY: Environmental Protection Agency (EPA), Region 9.

ACTION: Notice.

SUMMARY: Notice is hereby given that on April 6, 1989, the Environmental Protection Agency issued a PSD permit under EPA's federal regulations 40 CFR Section 52.21 to the applicant named above. The PSD permit grants approval to construct a 242 MW natural gas-fired cogeneration facility to be located in Crockett, California. The permit is subject to certain conditions, including an allowable emission rate as follows: PM_{10} at 4.15 lbs/hr (2-hour average).

FOR FURTHER INFORMATION: Copies of the permit are available for public inspection upon request; address requests to: Linda Barajas (A-3-1), U.S. Environmental Protection Agency, Region 9, 215 Fremont Street, San Francisco, CA 94105, (415) 974-8221, FTS 454-8221.

SUPPLEMENTARY INFORMATION: Best Available Control Technology (BACT) requirements include use of natural gas exclusively as fuel.

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 July 11, 1989.

David P. Howekamp,
Director, Air and Toxics Division, Region 9.
Date: April 27, 1989.

[FR Doc. 89-11480 Filed 5-11-89; 8:45 am]
BILLING CODE 6560-50-M

[ER-FRL-3569-5]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382-5073 or (202) 382-5075.

Availability of Environmental Impact Statements Filed May 1, 1989 Through May 5, 1989 Pursuant to 40 CFR 1506.9.

EIS No. 890115, Final, AFS, CA, Grider Fire Recovery Project, 1987 August thru October Grider/Lake Fire Resource Management Plan, Klamath National Forest, Siskiyou County, CA, Due: June 12, 1989, Contact: Mark S. Chaney (916) 465-2241.

EIS No. 890116, Draft, FHW, MO, Rt-115 Extension, I-70 to MO-94 and Rt-115/I-70 Interchange Construction, Funding and 404 Permits, St. Charles City and St. Peters City, St. Charles County, MO, Due: June 30, 1989, Contact: Robert G. Anderson (314) 636-7104.

EIS No. 890117, Draft, UAF, MT, Malstrom AFB, Deployment of the Second KC-135R Air Refueling Squadron, 301st Air Refueling Wing, City of Great Falls, Cascade County, MT, Due: June 27, 1989, Contact: Lt. Col. Thomas Bartol (714) 382-4891.

EIS No. 890118, FSuppl, COE, WA, Grays Harbor Navigation Improvement Project, Updated Description of Impacts, Implementation, Chehalis and Hoquiam Rivers, Grays Harbor County, WA, Due: June 12, 1989, Contact: Marcia Geidel (206) 764-6578.

Amended Notices

EIS No. 890046, Draft, AFS, AK, Big Islands Management Area, Resource Management Plan, Implementation, Hawkins, Hinchinbrook, Montague, Green, Little Green and Wooded Islands and The Needle, Prince Williams Sound, AK, Due: May 24, 1989, Contact: Cecil R. Kuhn (907) 271-2558. Published FR 03-10-89—Review period extended.

Dated: May 9, 1989.
William D. Dickerson,
Deputy Director, Office of Federal Activities.
[FR Doc. 89-11474 Filed 5-11-89; 8:45 am]
BILLING CODE 6560-50-M

[ER-FRL-3569-6]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared April 24, 1989 through April 28, 1989 pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 14, 1989 (54 FR 15006).

Draft EISs

ERP No. LD-AFS-G61032-AR, Rating EC2, Ozark National Forest Wild and Scenic River Study for Thirteen Rivers, Designation or Nondesignation into the National Wild and Scenic River System, Baxter, Newton, Franklin, Pope, Johnson, Searcy and Stone, AR.

Summary: EPA expressed environmental concerns for the proposed alternative and advocates recommending as many of the 13 streams studies for Federal designation as wild and scenic as possible. EPA requested additional information to strengthen the final EIS and to clarify the Forest Service rationale for selection of their preferred alternative.

ERP No. D-AFS-L82008-ID, Rating EC2, Idaho Panhandle National Forests, Weed Pest Management Plan, Implementation, Benewah, Bonner, Boundary, Kootenai and Shoshone Counties, ID.

Summary: EPA has requested additional information on ground and surface water effects and monitoring of the draft Weed Management Program implementation.

ERP No. D-FAA-J51008-CO, Rating EC2, New Denver Airport Development, Construction and Operation Plan for Replacement of the Stapleton International Airport, Approval and Funding, Denver County, Co.

Summary: EPA expressed concern regarding air, water quality and noise impacts, EPA requested that the final EIS include carbon monoxide hot-spot modeling/monitoring, detailed wasterwater and storm water plans and specific FAA noise mitigations commitment.

Final EISs

ERP No. F-BLM-L65082-OR, Western Oregon Program, Management of Competing Vegetation, Implementation, OR.

Summary: EPA continues to have concerns relating to the risks of using herbicides, especially those that are persistent and are known to migrate through soil into ground water. A commitment to using available techniques for evaluating and mitigating impacts such as ground water and health effects in individual projects should satisfy our environmental concerns.

ERP No. F-FHW-L40153-OR, North Roseburg Interchange/I-5 Construction, I-5 to Oakland-Shady Highway, Funding, Douglas County, OR.

Summary: Review of the final EIS has been completed and the project found to be satisfactory. No formal letter was sent the agency.

ERP. No. F-FHW-L40158-OR, OR-42/ Coos Bay/Roseburg Highway Widening and Realignment, Cedar Point Road to Main Street, Funding and 404 Permit, City of Coquille, Coos County, OR.

Summary: EPA has concerns about the impacts of the preferred alternative on wetlands. EPA would, however, have no objections to this alternative as long as the wetland mitigation plan, summarized in this document is strictly followed.

Regulations

ERP No. RR-FEM-A06169-00, 44 CFR 352; Commercial Nuclear Power Plants; Emergency Preparedness Planning; Final Rule (Docket No. 352 INT.) (54 FR 8512).

Summary: EPA requested clarification of how the expenses of federal agencies under this rule would be reimbursed.

Dated: May 9, 1989.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 89-11475 Filed 5-11-89; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-00099; FRL-3570-1]

Biotechnology Science Advisory Committee; Subcommittee on Biotechnology Health; Open Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Open Meeting.

SUMMARY: There will be a 1-day meeting of the Biotechnology Science Advisory Committee; Subcommittee on Biotechnology Health. The meeting will be open to the public. The Subcommittee will discuss health research needs for environmental biotechnology risk assessment, review research efforts conducted within EPA's current biotechnology research program, and assist in designing a research strategy for a biotechnology health research program in EPA.

DATE: The meeting will be held on Friday, June 2, 1989, starting at 9 a.m. and ending at approximately 5 p.m.

ADDRESS: The meeting will be held at: The Embassy Suites Hotel, 1300 Jefferson Davis Highway, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. EB-44, 401 M St., SW., Washington, DC 20460, Telephone: (202) 544-1404, TDD: (202) 554-0551.

SUPPLEMENTARY INFORMATION: Attendance by the public will be limited to available space. The TSCA Assistance Office will provide summaries of the meeting at a later date.

Dated: May 8, 1989.

Victor J. Kimm,

Acting Assistant Administrator, for Pesticides and Toxic Substances.

[FR Doc. 89-11482 Filed 5-11-89; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3570-3]

Science Advisory Board; Environmental Effects, Transport and Fate Committee, Amendment to Motion of Open Meeting

SUMMARY: Pursuant to the Federal Advisory Committee Act, Pub. L. 92-463, notice is hereby given of an addition to the agenda of the Environmental Effects, Transport and Fate Committee (EETFC) meeting to be held May 15-16, 1989. The meeting will begin at (9:00 a.m. and will be held in the Stouffer Concourse Hotel, 9801 Natural Bridge Road, St. Louis, MO 63134. The meeting will adjourn approximately 12:00 p.m. on May 16, 1989. The original **Federal Register** Notice appeared on May 3, 1989.

The Agenda is expanded to include consideration of a protocol under consideration by the Agency which would address remediation of the Exxon Valdez oil spill which occurred March 24, 1989 in Alaska's Prince William Sound. This protocol will be reviewed by a Subcommittee of the Science Advisory Board which will convene as part of the EETFC meeting. For further information, please contact Ms. Janis Kurtz, Executive Secretary, EETFC, Science Advisory Board on (202) 382-2552.

Dated: May 5, 1989.

A. Robert Flaak,

Acting Deputy Director, Science Advisory Board.

[FR Doc. 89-11578 Filed 5-11-89; 8:45 am]

BILLING CODE 6560-50-M

[OPP-100060; FRL-3570-2]

Chemical Waste Management; Transfer of Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This is a notice to certain persons who have submitted information to EPA in connection with pesticide information requirements imposed under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA). Chemical Waste Management (CWM), of Oak Brook, Illinois, has been awarded an EPA contract for the disposal of dinoseb, a suspended and canceled pesticide for which EPA has disposal responsibility under section 19 of FIFRA (prior to the FIFRA amendments of 1988). This work will be done for the Office of Pesticide Programs, and will require access to certain information submitted to EPA under FIFRA and FFDCA. This information may have been claimed as confidential business information (CBI) by submitters. This information will be transferred to CWM as authorized by 40 CFR 2.307(h)(3) and 40 CFR 2.308(i)(2). This transfer will enable CWM to fulfill the obligations of the contract. This notice informs persons who have submitted information to EPA under FIFRA and FFDCA of the transfer.

DATE: CWM will be given access to this information no sooner than May 17, 1989.

FOR FURTHER INFORMATION CONTACT: By mail: Catherine S. Grimes, Program Management and Support Division

(H7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 212, CM #2, 1921 Jefferson Davis Highway, Arlington, VA (703) 557-4460.

SUPPLEMENTARY INFORMATION: Under Contract No. 68-D9-0020, CWM will be disposing of the stocks of suspended and canceled dinoseb products, for which EPA is responsible, through high-temperature incineration. The contract also requires disposal of all rinsate, containers and contaminated materials resulting from the disposal and any decontamination activities. In order to meet the objectives of this contract, CWM will need complete information on product formulations.

The Office of Pesticide Programs has determined that the contract herein described involves work that is being conducted in connection with FIFRA, in that under section 19, the Agency has disposal responsibility for dinoseb.

Some of this information may be entitled to confidential treatment. This information has been submitted to EPA under sections 3, 6, and 7 of FIFRA and obtained under sections 408 and 409 of the FFDCA.

In accordance with the requirements of 40 CFR 2.307(h)(3) and 2.308(i)(2), CWM shall not use the information for any purpose other than purpose(s) specified in the contract; shall not disclose the information in any form to a third party without prior written approval from the Agency or affected business; and shall require that each official and employee of the contractor sign an agreement to protect the information from unauthorized release. In addition, CWM is required to submit for EPA approval a security plan in accordance with the FIFRA Information Security Manual under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to CWM until the above requirements have been fully satisfied. Records of information provided to CWM will be maintained by the Project Officer for this contractor in EPA's Office of Pesticide Programs. All information supplied to CWM by EPA for use in connection with this contract will be returned to EPA at the conclusion of the contract.

Dated: May 4, 1989.

Douglas D. Campt,

Director, Office of Pesticide Programs.

[FR Doc. 89-11481 Filed 5-11-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

Applications for Consolidated Hearing; Virgil L. Pearman, et al.

[**Editorial Note:** This is a republication of a document which was printed in the issue of April 24, 1989 at page 16404. That issue's table of contents mistakenly listed the entry for the document under the Federal Energy Regulatory Commission.]

1. The Commission has before it the following mutually exclusive applications for three new FM stations:

I.

Applicant, city, and state	File No.	MM Docket No.
A. Virgil L. Pearman; Radcliff, KY.	BPH-871110MK	89-82
B. W&B Broadcasting, Inc.; Radcliff, KY.	BPH-871110MU	
C. Elizabethtown Broadcasting Co., Inc.; Radcliff, KY.	BPH-871110NG	

Issue Heading and Applicants

1. Air Hazard, B
2. Comparative, A, B, C
3. Ultimate, A, B, C

II.

Applicant, city, and state	File No.	MM Docket No.
A. Nancy C. Hart; Auberry, CA.	BPH-870330MF	89-81
B. Mirror Broadcasting Corp.; Auberry, CA.	BPH-870331OE	
C. James K. Zahn; Auberry, CA.	BPH-870331OS	
D. Sharryle G. Chung Eurich and Robert Eurich d/b/a Mountain Air Broadcasting; Auberry, CA.	BPH-870331OZ	
E. Eric R. Hilding; Auberry, CA.	BPH-870331PL	
F. Catharina Louisa Osborn; Auberry, CA.	BPH-870408KC	
G. Gary E. Willson; Auberry, CA.	BPH-870331ON; (Dismissed herein)..	.....

Issue Heading and Applicants

1. Financial, E
2. Comparative, A-F
3. Ultimate, A-F

III.

Applicant, city, and state	File No.	MM Docket No.
A. RFI Associates; Ithaca, NY.	BPED-861229MA.	89-83
B. Family Life Ministries Radio, Inc.; Spencer, NY.	BPED-870608MB.	

Issue Heading and Applicant

1. Financial, A
2. 307(b)—Noncommercial Educational, A, B
3. Contingent Comparative, A, B
4. Ultimate, A, B

2. Pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above applications have been designated for hearing in a consolidated proceeding upon the issues whose headings are set forth below. The text of each of these issues has been standardized and is set forth in its entirety under the corresponding headings at 51 FR 19347, May 29, 1986. The letter shown before each applicant's name, above, is used below to signify whether the issue in question applies to that particular applicant.

3. If there is any non-standardized issue in the proceeding, the full text of the issue and the applicants to which it applies are set forth in the Appendix to this Notice. A copy of the complete HDO in this proceeding is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text may also be purchased from the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street, NW., Washington, DC 20037. (Telephone (202) 857-3800).

W. Jan Gay,

Assistant Chief, Audio Services Division, Mass Media Bureau.

[FR Doc. 89-11538 Filed 5-11-89; 8:45 am]

BILLING CODE 1505-02

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal

Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-200243.

Title: Virginia International Terminals Agreement.

Parties: Virginia International Terminals, Inc., Trans Freight Lines (TFL), Nedlloyd Lines (Nedlloyd).

Synopsis: The Agreement provides that TFL and Nedlloyd will have nonexclusive use of marine terminal facilities at the Portsmouth Marine Terminal and will receive free wharfage for all annual tonnage over 250,000 tons if certain annual tonnage requirements are met. The Agreement also provides TFL and Nedlloyd with reduced dockage rates. The Agreement's term is for three years.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: May 8, 1989.

[FR Doc. 89-11429 Filed 5-11-89; 8:45 am]

BILLING CODE 6730-01-M

[Docket No. 89-11]

American Star Lines, Inc., et al.; Order of Investigation and Hearing on Possible Violations of Passenger Vessel Certification Requirements

This proceeding is instituted pursuant to section 3 of Pub. L. 89-777, 46 U.S.C. app. 817e; section 22 of the Shipping Act, 1916, 46 U.S.C. app. 821; and the Commission's regulations at 46 CFR Part 540.

National Transatlantic Lines of Greece S.A. ("National Transatlantic") is a Panamanian corporation organized on March 23, 1987, to charter passenger vessels and operate a cruise schedule through its agent, American Star Lines, Inc. ("ASL"), a Delaware corporation with principal offices in New York City. Dimitri Anninos is the President, Chief Executive Officer and sole stockholder of ASL. National Transatlantic does business under the trade name American Star Lines.

On April 21, 1987, National Transatlantic and ASL filed an application with the Commission for a Certificate (Performance) to cover cruises of the vessel *Betsy Ross* scheduled out of Fort Lauderdale, Florida, commencing in 1988. National Transatlantic was said to be bareboat chartering that vessel from December 1, 1987, through March 31, 1991. The *Betsy Ross* was described as having berth or stateroom accommodations for 380 passengers. The application was signed by Dimitri Anninos, as president of ASL, on behalf of and as agent for National Translantic Lines of Greece S.A.[1] No performance guarantee or other evidence of financial responsibility accompanied the application nor was any such evidence filed subsequent to that application. No certificate (Performance) was issued for any cruise of the *Betsy Ross.*

It appears that under the direction of Dimitri Anninos, National Transatlantic and ADSL advertised cruises of the *Betsy Ross* out of Fort Lauderdale, Florida, in several trade publications and newspapers, in a brochure distributed to the travel industry, and by solicitation to several university alumni associations during 1987 and 1988. In addition, National Transatlantic and ASL apparently booked in excess of one hundred passengers for cruises scheduled to depart Fort Lauderdale, Florida, in February and March, 1988. National Transatlantic and ASL allegedly collected more than $117,000.00 in fares and deposits for those cruises, which were subsequently canceled.

It appears, therefore, that National Transatlantic, ASL, and Dimitri Anninos, have arranged, offered and advertised, and collected fares and deposits for, cruises on the *Betsy Ross* out of a U.S. port without first having obtained a Certificate (Performance) from the Commission in violation of section 3(a) of Pub. L. 89-777 and the Commission's regulations at 46 CFR 540.3.

Now, therefore, it is ordered, That pursuant to section 3 of Pub. L. 89-777, section 22 of the Shipping Act, 1916, and 46 CFR Part 540, a proceeding is hereby instituted to determine whether National Transatlantic, ASL and Dimitri Anninos, or any or either of them, violated section 3(a) of Pub. L. 89-777 or the Commission's regulations at 46 CFR 540.3 during the period January 7, 1987 to June 29, 1988;

It is further ordered, That if National Transatlantic, ASL and Dimitri Anninos, or any or either of them, are found to have violated Pub. L. 89-777 or 46 CFR Part 540, then this proceeding shall also determine whether and in what amount civil penalties should be assessed and whether a cease and desist order should be entered;

It is further ordered, That this matter be assigned for public hearing before an Administrative Law Judge of the Commission's Office of Administrative Law Judges at a date and place to be determined by the Administrative Law Judge in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the Presiding Administrative Law Judge only upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depostions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record;

It is further ordered, That National Transatlantic Lines of Greece S.A., American Star Lines, Inc., and Dimitri Anninos are designated respondents in this proceeding;

It is further ordered, That the Commission's Bureau of Hearing Counsel is designated a party to this proceeding;

It is further ordered, That notice of this Order be published in the **Federal Register,** and copies be served upon all parties of record;

It is further ordered, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72;

It is further ordered, That all future notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on parties of record;

It is further ordered, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, DC 20573, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 CFR 502.118, and shall be served on parties of record;

It is further ordered, That pursuant to Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61, the initial decision of the Administrative Law Judge shall be issued by May 4, 1990, and the final decision of the

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[1] The original name of the cruise operator was "National Transatlantic Maritime Lines of Greece S.A." On March 31, 1987, the name was changed to "National Transatlantic Lines of Greece S.A." The application erroneously contained the original name.

Commission shall be issued by September 4, 1990.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 89-11431 Filed 5-11-89; 8:45 am]

BILLING CODE 6730-01-M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No: 212-010027-022.

Title: Brazil/U.S. Atlantic Coast Agreement.

Parties:

Companhia de Navegacao Lloyd Brasileiro Companhia de Navegacao Maritima Netumar

American Transport Lines, Inc.

A/S Ivarans Rederi

Empresa Lineas Maritimas Argentinas S/A I14A. Bottacchi S.A. de Navegacion C.F.I.I.

Van Nievelt, Goudriaan and Co., B.V.

Synopsis: The proposed modification would exclude Vegetable Oil in deep tanks from the cargoes subject to the pool, and would extend the special carrying adjustment for Wheels for Automobiles until November 1, 1989.

Agreement No: 217-011238.

Title: Canadian Transport Company Limited/Star Shipping A/S Container Space Charter Agreement.

Parties:

Canadian Transport Company Ltd., Star Shipping A/S.

Synopsis: The proposed Agreement would provide for successive one-way space charters by Star Shipping A/S on vessels of Canadian Transport Co. Ltd., in the westbound trade from ports in Northwest Europe to ports on the west coast of the United States.

By Order of the Federal Maritime Commission

Joseph C. Polking,

Secretary.

Dated: May 9, 1989.

[FR Doc. 89-11430 Filed 5-11-89; 8:45 am]

BILLING CODE 6730-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 89N-0165]

Animal Drug Export; Yohimbine Injectable

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Vet-A-Mix, Inc., has filed an application requesting approval for the export to Canada of the animal drug Yobine™ (yohimbine) Injectable for use in dogs.

ADDRESS: Relevant information on this application may be directed to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, and to the contact person identified below. Any future inquiries concerning the export of animal drugs under the Drug Export Amendments Act of 1986 should also be directed to the contact person.

FOR FURTHER INFORMATION CONTACT: Beverly E. Bartolomeo, Center for Veterinary Medicine (HFC-142), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-2855.

SUPPLEMENTARY INFORMATION: The Drug Export Amendments Act of 1986 (Pub. L. 99-660) (section 802 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 382)) provides that FDA may approve applications for the export of drugs that are not currently approved in the United States. The approval process is governed by section 802(b) of the act. Section 802(b)(3)(B) of the act sets forth the requirements that must be met in an application for approval. Section 802(b)(3)(C) of the act requires that the agency review the application within 30 days of its filing to determine whether the requirements of section 802(b)(3)(B) have been satisfied. Section 802(b)(3)(A) of the act requires that the agency publish a notice in the **Federal Register** within 10 days of the filing of an application for export to facilitate public participation in its review of the application. To meet this requirement, the agency is providing notice that Vet-A-Mix, Inc., 604 West Thomas, P.O. Box A, Shenandoah, IA 50601, has filed an application requesting approval for the export to Canada of the animal drug Yobine™ (yohimbine) Injectable. The drug is used in dogs to reverse the effects of xylazine and as an antidote for overdoses of xylazine. The application was received and filed in the Center for Veterinary Medicine on April 26, 1989, which shall be considered the filing date for purposes of the act.

Interested persons may submit relevant information on the application to the Dockets Management Branch (address above) in two copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. These submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

The agency encourages any person who submits relevant information on the application to do so by May 22, 1989, and to provide an additional copy of the submission directly to the contact person identified above, to facilitate consideration of the information during the 30-day review period.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (sec. 802, Pub. L. 99-660 (21 U.S.C. 382)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Center for Veterinary Medicine (21 CFR 5.44).

Dated: May 1, 1989.

Robert C. Livingston,

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

[FR Doc. 89-11380 Filed 5-11-89; 8:45 am]

BILLING CODE 4160-01-M

Health Resources and Services Administration

Program Announcement and Proposed Funding Priority for Nursing Education Opportunities for Individuals from Disadvantaged Backgrounds

The Health Resources and Services Administration announces that applications for Fiscal Year 1990 will be accepted for grants for Nursing Education Opportunities for Individuals from Disadvantaged Backgrounds authorized by section 827, Title VIII of the Public Health Service Act and invites comments on the proposed funding priority stated below.

Section 827 of the Public Health Service Act authorizes grants to

increase opportunities for individuals from disadvantaged backgrounds to pursue a nursing education. This provision was previously provided under Purpose 1, Nursing Special Projects, section 820 of the PHS Act.

The Administration's budget request for Fiscal Year 1990 does not include funding for this program. Applicants should be advised that this program announcement is a contingency action being taken to ensure that should funds become available for this purpose, they can be awarded in a timely fashion consistent with the needs of the programs as well as to provide for even distribution of funds throughout the fiscal year. This notice regarding applications does not reflect any change in this policy.

Grants may be awarded to eligible applicants to meet the costs of special projects to increase nursing education opportunities for individuals from disadvantaged backgrounds:

1. By identifying, recruiting and selecting such individuals;
2. By facilitating the entry of such individuals into schools of nursing;
3. By providing counseling or other services designed to assist such individuals to complete their nursing education;
4. By providing, for a period prior to the entry of such individuals into the regular course of education at a school of nursing, preliminary education designed to assist them to complete successfully such regular course of education;
5. By paying such stipends as the Secretary may determine for such individuals for any period of nursing education;
6. By publicizing especially to licensed vocational or practical nurses, existing sources of financial aid available to persons enrolled in schools of nursing or who are undertaking training necessary to qualify them to enroll in such schools; and
7. By providing training, information or advice to the faculty of such schools with the respect to encouraging such individuals to complete the programs of nursing education in which the individuals are enrolled.

Public and nonprofit private schools of nursing and other public or nonprofit private entities are eligible for grant support.

Review Criteria

The review of applications will take into consideration the following criteria.

(1) The national or special local need which the particular project proposes to serve;

(2) The potential effectiveness of the proposed project in carrying out such purposes;

(3) The administrative and managerial capability of the applicant to carry out the proposed project;

(4) The adequacy of the facilities and resources available to the applicant to carry out the proposed project;

(5) The qualifications of the project director and proposed staff;

(6) The reasonableness of the proposed budget in relation to the proposed project; and

(7) The potential of the project to continue on a self-sustaining basis after the period of grant support.

In addition, the following mechanisms may be applied in determining the funding of approved applications.

1. Funding preferences—funding of a specific category or group of approved applications ahead of other categories or groups of applications, such as competing continuations ahead of new projects.
2. Funding priorities—favorable adjustment of review scores when applications meet specified objective criteria.
3. Special considerations—enhancement of priority scores by merit reviewers based on the extent to which applicants address special areas of concern.

Proposed Funding Priority for Fiscal Year 1990

In determining the order of funding of approved applications, it is proposed to give a funding priority to:

Applications from nursing schools that have a minority and low income student enrollment of 35 percent or more, or can document a 20 percent annual increase in the number of minority and low income students matriculating into the nursing major for the past three years.

Interested persons are invited to comment on the proposed funding priority. Normally, the comment period would be 60 days. However, due to the need to implement any changes for the Fiscal Year 1990 award cycle, this comment period has been reduced to 30 days. All comments received on or before June 12, 1989 will be considered before the final funding priority is established. No funds will be allocated or final selections made until a final notice is published stating whether the funding priority will be applied.

Written comments should be addressed to: Director, Division of Nursing, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 5C-26, 5600 Fishers Lane, Rockville, Maryland 20857.

All comments received will be available for public inspection and copying at the Division of Nursing, Bureau of Health Professions, at the above address, weekdays (Federal holidays excepted) between the hours of 8:30 a.m. and 5:00 p.m.

Requests for grant application materials and questions regarding grants policy should be directed to: Grants Management Officer (D-19), Bureau of Health Professions, Health Resources and Services Administration, 5600 Fishers Lane, Room 8C-22, Rockville, Mayland 20857, Telephone: (301) 443-6915.

Application materials should also be mailed to the Grants Management Officer at the above address.

Should additional programmatic information be required, please contact: Division of Nursing, Bureau of Health Professions, Health Resources and Services Administration, 5600 Fishers Lane, Room 5C-14, Rockville, Mayland 20857, Telephone: (301) 443-5763.

The standard application form PHS 6025-1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB Clearance number is 0915-0060 Multiple review cycles are held annually. The application deadline dates for Fiscal Year 1990 funding are July 1 and October 1, 1989.

Applications shall be considered as meeting the deadline if they are either:

1. *Received* on or before the deadline date, or
2. *Postmarked* on or before the deadline and received in time for submission to the independent review group. A legibly dated receipt from a commercial carrier or the U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks shall not be acceptable as proof of timely mailing.

Any application not meeting particular deadline will be reviewed with applications meeting the subsequent deadline.

This program is listed at 13.178 in the Catalog of Federal Domestic Assistance. It is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs, (as implemented through 45 CFR Part 100).

Dated: May 8, 1989.

John H. Kelso,

Acting Administrator.

[FR Doc. 89-11440 Filed 5-11-89; 8:45 am]

BILLING CODE 4160-15-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

[Docket No. D-89-897; FR-2637]

Delegation of Authority to Assistant Secretary for Public and Indian Housing With Respect to Ceiling Rents for Public and Indian Housing

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of delegation of authority.

SUMMARY: The Secretary of Housing and Urban Development is delegating to the Assistant Secretary for Public and Indian Housing the authority to redelegate to other employees of the Department the authority to waive the provisions of 24 CFR 913.107 for the purpose of approving the establishment of ceiling rents in public and Indian rental housing projects, in accordance with section 3(a)(2) of the U.S. Housing Act of 1937 (42 U.S.C. 1437a).

EFFECTIVE DATE: May 8, 1989.

FOR FURTHER INFORMATION CONTACT: Thomas Sherman, Acting Assistant Secretary for Public and Indian Housing, Room 4100, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 755-0950. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On September 7, 1983, the Secretary of Housing and Urban Development (the Secretary) transferred to the Assistant Secretary for Public and Indian Housing (the Assistant Secretary) the authority previously delegated to the Assistant Secretary for Housing-Federal Housing Commissioner with respect to all public and Indian housing programs administered under the United States Housing Act of 1937 (1937 Act). (See 48 FR 41097 (Sept. 13, 1983).) The authority transferred excluded the authority to redelegate authority to issue rules and regulations or to waive rules and regulations under the programs.

Section 102(a) of the Housing and Community Development Act of 1987 amended section 3(a) of the 1937 Act to allow public housing agencies (PHAs) and Indian Housing Authorities (IHAs) to establish, with approval by the Secretary, a cap on rents, or ceiling rents, in public and Indian rental housing projects owned and operated by the PHAs and IHAs. On March 15, 1989, HUD published two Notices stating its policy on allowing PHAs and IHAs to apply to HUD for a waiver of the income-based rent provisons of § 913.107 and for permission to adopt ceiling rents for projects owned and operated by the PHAs and IHAs (54 FR 10730 and 10733). The Notices provide for approval of ceiling rent applications by HUD Field Offices, which requires the authority to waive the provisions of § 913.107.

Accordingly, the Secretary delegates as follows:

Delegation of Authority

This delegation amends Section C(2) of the Delegation of Authority of September 7, 1983 (48 FR 41097 (Sept. 13, 1983)) to the Assistant Secretary for Public and Indian Housing to read as follows:

* * * * *

(2) Waive rules and regulations; Provided, however, that the Assistant Secretary for Public and Indian Housing is authorized to redelegate to employees of the Department the power to waive the income-based rent provisions of 24 CFR 913.107 for the purpose of granting permission to PHAs and IHAs to adopt ceiling rents for public and Indian rental housing projects owned and operated by the PHAs and IHAs in accordance with the provisions of section 3(a)(2) of the United States Housing Act of 1937 and the Notices published on March 15, 1989 at 54 FR 10730 and 10733.

(Secs. 5(a), 7(d), Department of Housing and Urban Development Act (42 USC 3534(a), 3535(d).)

Dated: May 8, 1989.

Jack Kemp,

Secretary of Housing and Urban Development.

[FR Doc. 89-11437 Filed 5-11-89; 8:45 am]

BILLING CODE 4210-32-M

Office of the Assistant Secretary for Public and Indian Housing

[Docket No. D-89-898; FR-2638]

Redelegation of Authority From the Assistant Secretary for Public and Indian Housing to Regional Administrators and Others With Respect to Ceiling Rents in Public and Indian Rental Housing Projects

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of redelegation of authority.

SUMMARY: This Notice is to announce the redelegation of authority from the Assistant Secretary for Public and Indian Housing to Department of Housing and Urban Development Regional Administrators and Deputy Regional Administrators to waive the provisions of 24 CFR 913.107 for the purpose of approving the establishment of ceiling rents in public and Indian rental housing projects, in accordance with section 3(a)(2) of the U.S. Housing Act of 1937 (42 U.S.C. 1437a).

EFFECTIVE DATE: May 8, 1989.

FOR FURTHER INFORMATION CONTACT: Thomas Sherman, Acting General Deputy Assistant Secretary for Public and Indian Housing, Room 4100, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 755-0950. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On September 7, 1983, the Secretary of Housing and Urban Development (the Secretary) transferred to the Assistant Secretary for Public and Indian Housing (the Assistant Secretary) the authority previously delegated to the Assistant Secretary for Housing-Federal Housing Commissioner with respect to all public and Indian housing programs administered under the United States Housing Act of 1937 (1937 Act). (See 48 FR 41097 (Sept. 13, 1983).) The authority transferred excluded the authority to redelegate authority to issue rules and regulations or to waive rules and regulations under the programs.

On May 8, 1989, the Secretary delegated the authority to the Assistant Secretary to redelegate the authority to waive the Department's regulation at 24 CFR 913.107 for the purpose of approving the establishment of ceiling rents in public and Indian housing projects upon application by public housing agencies (PHAs) and Indian Housing Authorities (IHAs) to adopt ceiling rents in projects owned and operated by the PHAs and IHAs. (See publication elsewhere in today's **Federal Register.**

Accordingly, the redelegation of authority to Regional Administrators and Deputy Regional Administrators, published at 35 FR 16105 (Oct. 14, 1970), as amended at 35 FR 17964, 36 FR 21298, 37 FR 9048, 37 FR 12420, and 45 FR 54143, is further amended to add the following provisions to Section A, paragraph 8:

Delegation of Authority

* * * * *

d. Waive rules and regulations; *Provided,* that Department Regional Administrators and Deputy Regional Administrators are authorized to waive the income-based rent provision of 24 CFR 913.107 for the purpose of approving the establishment of ceiling rents

in public and Indian housing projects upon application by PHAs and IHAs to adopt ceiling rents in projects owned and operated by the PHAs and IHAs, in accordance with section 3(a)(2) of the U.S. Housing Act of 1937; *Provided*, further that Regional Administrators and Deputy Regional Administrators are authorized to redelegate the authority granted by this paragraph to Field Office Managers and Deputy Field Office Managers of Category A and Category B offices, Regional Directors for Public Housing in collocated offices, and Directors of Offices of Indian Programs.

Dated: May 8, 1989

Thomas Sherman,

Acting General Deputy, Assistant Secretary for Public and Indian Housing.

[FR Doc. 89-11438 Filed 5-11-89; 8:45 am]

BILLING CODE 4210-33-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT-940-09-4212-11; U-42757]

Termination of Recreation and Public Purpose Classification; Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice terminates Recreation and Public Purpose Classification affecting 400.56 acres in Sanpete County Utah.

FOR FURTHER INFORMATION CONTACT: Mike Barnes, BLM Utah State Office, 324 South State Street, Suite 301, Salt Lake City, Utah 84111-2303, (801) 539-4119.

By virtue of the authority vested in the Secretary of the Interior by the Recreation and Public Purpose Act of June 14, 1926, as amended; 43 U.S.C. 869; 869-4, it is ordered as follows:

1. Pursuant to 43 CFR 2091.7-1(b)(1) and the authority delegated to me by BLM Manual section 1203 (48 FR 85), the classification decision U-42757 dated November 2, 1980, which classified 500.56 acres of public land as suitable for recreation and public purposes is hereby revoked insofar as it affects the following described lands:

Salt Lake Meridian

T. 12 S., R. 3 E.,
Sec. 1, Lots, 2, 3, 4, S½N½, NW¼SW¼ and N½SE¼.

The area described contains 400.56 acres located in Sanpete County.

2. At 9:00 a.m. on June 1, 1989, the lands described in paragraph one shall be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals and the requirements of applicable laws. All valid applications received at or prior to 9:00 a.m. on June 1, 1989, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 9:00 a.m. on June 1, 1989, the lands described in paragraph one will be opened to location and entry under the United States mining laws subject to valid existing rights. Appropriation of any of the lands described in paragraph one of this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38, shall vest no right against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Ted D. Stephenson,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 89-11441 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-DQ-M

[UT-920-08-4121-14; UTU-64263]

Public Hearing and Call for Public Comment of Fair Market Value and Maximum Economic Recovery; Coal Lease Application

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management announces a public hearing on a proposed coal lease sale and requests public comment on the fair market value of certain coal resources it proposes to offer for competitive lease sale. The lands included in Coal Lease Application UTU-64263 located in Carbon County, Utah, approximately 15 miles southwest of Price, Utah, and are described as follows:

T. 14 S., R. 7 E.,
Sec. 34, lots 3 and 4, N½SE¼;
T. 15 S., R. 7 E.,
Sec. 2, lots 2-7, and 10-12, SW¼, W½SE¼;
Sec. 3 lots 1, 2, and 7-10, E½W½SE¼, E½SE¼;
Sec. 10, E½NW¼NE¼, E½E½;
Sec. 11, W½, W½E½;
Sec. 14, NW¼NE¼, NW¼;
Sec. 15, E½E½NE¼;
Containing 1, 987.46 acres.

Three coal seams are continous in the tract but only one is believed to be economically minable. The Wattis coal seam ranges from 6 to 9 feet in thickness. This tract contains an estimated 8 million tons of recoverable high volatile B bituminous coal. The range of coal quality in the seams on an as received basis is as follows: 12, 180-12,440 BTU/lb. 5.7-7.5 percent moisture, 0.44-0.62 percent sulfur, and 5.9-7.9 percent ash.

The public is invited to the hearing to make public comment and also to submit written comments on the fair market value and the maximum economic recovery of the tract.

DATE: The public hearing will be held June 15, 1989, and comments on fair market value and maximum economic recovery must be received by July 15, 1989.

ADDRESSES: The public hearing will be held at the College of Eastern Utah, Main Building, Room 114, 451 East 4th South, Price, Utah, at 7:00 p.m. For more complete data on this tract, contact the Bureau of Land Management, Utah State Office, 324 South State Street, Salt Lake City, Utah 84111-2303.

FOR FURTHER INFORMATION CONTACT: Max Nielson (801) 539-4038.

SUPPLEMENTARY INFORMATION: In accordance with Federal coal management regulations 43 CFR 4322 and 4325, a pulic hearing shall be held on the proposed sale to allow public comment on and discussion of the potential effects of mining the prepared lease, not less than 30 days prior to the publication of a notice of sale, the Secretary shall solicit public comments on fair market value appraisal and maximum economic recovery and on factors that may affect these two determinations. Proprietary data marked as confidential may be submitted to the Bureau of Land Management in response to this solicitation of public comments. Data so marked shall be treated in accordance with the laws and regulations governing the confidentiality of such information. A copy of the comments submitted by the public on fair market value and maximum economic recovery, except those portions identified as proprietary by the author and meeting exemptions stated in the Freedom of Information Act, will be available for public inspection at the above address during regular business hours (9:00 a.m. to 4:00 p.m.) Monday through Friday.

Comments on fair market value and maximum economic recovery should be sent to the Bureau of Land Management and should address, but not necessarily be limited to, the following information:

1. The quality and quantity of the coal resource;

2. The mining method or methods which would achieve maximum economic recovery of the coal, including specification of seams to be mined and the most desirable timing and rate of production.

3. The quantity of coal;

4. If this tract is likely to be mined as part of an existing mine and therefore be evaluated, on a realistic incremental basis, in relation to the existing mine to which it has the greatest value;

5. If this tract should be evaluated as part of a potential larger mining unit and evaluated as a portion of a new potential mine (i.e., a tract which does not in itself form a logical mining unit);

6. The configuration of any larger mining unit of which the tract may be a part.

7. Restrictions to mining which may affect coal recovery;

8. The price that the mined coal would bring when sold;

9. Costs, include mining and reclamation, of producing the coal and the times of production.

10. The percentage rate at which anticipated income streams should be discounted, either in the absence of inflation or with inflation, in which case the anticipated rate of inflation should be given;

11. Depreciation and other tax accounting factors;

12. The value of any surface estate where held privately;

13. Documented information on the terms and conditions of recent and similar coal land transactions in the lease sale area; and

14. Any comparable sales data of similar coal lands. Coal values developed by BLM may or may not change as a result of comments received from the public and changes in market conditions between now and when final economic evaluations are completed.

James Parker,

State Director, Utah.

Date: May 5, 1989.

[FR Doc. 89-11442 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-DQ-M

[NV-040-09-4320-12]

Ely District Advisory Council Meeting and Board Hearing

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of hearing.

SUMMARY: Notice is hereby given that a joint meeting of the Ely District Advisory Council and the Ely District Grazing Advisory Board will be held on Thursday, June 8, 1989.

The board and council will tour various riparian areas in North Spring Valley and the Antelope Range in the northeastern portion of White Pine County.

The council and board members will convene for a brief business meeting at 8:00 a.m. in the Conference Room of the Ely District Office located on the Pioche Highway one mile south of Ely, Nevada. A public comment period is scheduled for 8:30 a.m. After the public comment period, tour participants will depart. Transportation will be provided for council and board members.

Members of the public are invited to accompany the advisory group but must provide their own transportation and lunch.

Minutes of the meeting will be available for public inspection and reproduction during regular office hours within 30 days following the meeting.

DATE: May 2, 1989.

ADDRESS: Comments and suggestions should be sent to: Bureau of Land Management, Star Route 5, Box 1, Ely, Nevada 89301.

FOR FURTHER INFORMATION CONTACT: Kathy Lindsey, (702) 289-4865.

Date: May 2, 1989.

Kenneth G. Walker,

District Manager.

[FR Doc. 89-11447 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-HC-M

[CO-930-09-4214-11; C-28330]

Proposed Modification and Continuation of Withdrawal; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Department of the Army Corps of Engineers proposes that Public Land Orders 268 and 443 which withdrew public lands for the protection of the John Martin Dam and Reservoir for an indefinite period of time be modified and the withdrawal be continued for 50 years. The land will continue to be closed to surface entry, to the mining laws, and to the mineral leasing laws.

DATE: Comments should be received within 90 days of publication date.

ADDRESS: Comments should be addressed to State Director, Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215-7076.

FOR FURTHER INFORMATION CONTACT: Doris E. Chelius, BLM Colorado State Office, 303-236-1768.

SUPPLEMENTARY INFORMATION: The Department of the Army Corps of Engineers proposes that the existing withdrawal made by Public Land Orders 268 and 443, as modified, for an indefinite period of time be modified to expire in 50 years pursuant to section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, insofar as it affects the following described lands:

T.23 S., R. 49 W.
- Sec. 5, Lots 9 and 10;
- Sec. 7, Lot 5;
- Sec. 8, Lot 3;
- Sec. 17, All that tract of land within the N½SE¼NW¼ that lies northerly of a line that parallels, and measures at one hundred feet north of the center line of the main track of the AT&SF RR line.

T. 23 S., R. 50 W.
- Sec. 19, SW¼SE¼.

T. 23 S., R. 51 W.
- Sec. 2, Lot 4;
- Sec. 3, Lots 3 and 5.

The areas described aggregate approximately 180.88 acres of public land in Bent County.

The purpose of this withdrawal is for the administration and protection of the John Martin Dam and Reservoir. No change is proposed in the purpose of this withdrawal. The land will continue to be withdrawn from surface entry, mining, and mineral leasing.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments in connection with this proposed action may present their views in writing to this office.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources. A report will be prepared for consideration by the Secretary of the Interior, the President, and Congress, who will determine whether or not the withdrawal will be modified and continued and, if so, for how long. Notice of the final determination will be published in the **Federal Register**. The existing withdrawal will continue until such determination is made.

John R. Hodgins,

Acting Chief, Realty Programs.

[FR Doc. 89-11421 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-JB-M

National Park Service

Comprehensive River Conservation Study of the Hanford Reach of the Columbia River; Washington

AGENCY: National Park Service, Interior.

ACTION: Notice of intent to prepare an Environmental Impact Statement (EIS)

for the Comprehensive River Conservation Study of the Hanford Reach of the Columbia River.

SUMMARY: In accordance with the Act of November 4, 1988 (Pub. L. 100-605, 102 Stat. 3043) the National Park Service will prepare an EIS for its comprehensive river conservation study of the Hanford Reach of the Columbia River. The study will include a resource inventory and analysis of the river area from one mile below Priest Rapids Dam downstream approximately fifty-one miles to the McNary pool north of Richland, Washington. The study shall identify and evaluate natural, cultural and historic values of the area and examine alternative means for their preservation including adding all or a portion of the area to the National Wild and Scenic Rivers System.

Scoping Meetings: Public meetings will be held on May 16, 1989 at the Jackson Federal Bldg., 4th Floor Conference Room, 914 2nd Ave., Seattle, Washington from 7:00 p.m. to 9:00 p.m.; and on May 18, 1989 at the Gresham High School, 1200 North Main St., Gresham, Oregon from 7 to 9 p.m. All interested persons may attend and participate. The final scoping document will be available for review from the Pacific Northwest Regional office, National Park Service, 83 South King St., Seattle, Washington. Comments will be received until July 31, 1989.

FOR FURTHER INFORMATION CONTACT: Dennis Canty at 83 South King St., Seattle, Washington 98104, Telephone 206-442-5366.

William J. Briggle,

Acting Regional Director.

[FR Doc. 89-11381 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-70-M

Chesapeake and Ohio Canal National Historical Park Commission; Meeting

Notice is hereby given in accordance with Federal Advisory Committee Act that a meeting will be held Saturday, June 10, 1989 at the American Legion Post 202, American Legion Avenue, Williamsport, Maryland.

The Commission was established by Pub. L. 91-664 to meet and consult with the Secretary of the Interior on general policies and specific matters related to the administration and development of the Chesapeake and Ohio Canal National Historical Park.

The members of the Commission are as follows: Mrs. Sheila Rabb Weidenfeld, Chairman, Washington, DC.; Mrs. Dorthy Tappe Grotos, Arlington, VA; Mr. Samuel S.D. Marsh, Bethesda, MD; Mr. James F. Scarpelli, Sr.,. Cumberland, MD; Ms. Elise B. Heinz, Arlington, VA; Professor Charles P. Poland, Jr., Chantilly, VA; Captain Thomas F. Hahn, Shepherdstown, VA; Mr. Rockwood H. Foster, Washington, DC. Mr. Barry A. Passett, Washington, DC. Mrs. Jo Reynolds, Potomac, MD; Ms. Nancy C. Long, Glen Echo, MD; Mrs. Minny Pohlmann, Dickerson, MD; Dr. James H. Gilford, Frederick, MD; Mr. Edward K. Miller, Hagerstown, MD; Mrs. Sue Ann Sullivan, Williamsport, MD; Mrs. Josephine L. Beynon, Cumberland, MD; and Mr. Robert L. Ebert, Cumberland, MD.

Matters to be discussed at this meeting include: 1. Old and new business; 2. Superintendent's report; 3. Committee reports, Plans and Projects Committee, Recreation Policies and Issues Committee, Resource Protection Committee; 4. Public comments.

The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning the matters to be discussed. Persons wishing further information concerning this meeting, or who wish to submit written statements, may contact Richard L. Stanion Superintendent, C&O Canal National Historical Park, P.O. Box 4, Sharpsburg, Maryland 21782.

Minutes of the meeting will be available for public inspection six (6) weeks after the meeting at Park Headquarters, Sharpsburg, Maryland.

Date: May 5, 1989.

Robert Stanton,

Regional Director, National Capital Region.

[FR Doc. 89-11382 Filed 5-11-89; 8:45 am]

BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

Agricultural Cooperative Notice to the Commission of Intent to Perform Interstate Transportation for Certain Nonmembers

Date: May 8, 1989.

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 filed 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) Northwest Agricultural Cooperative Association, Inc. (N.A.C.A., Inc.), P.O. Box SE 9th Avenue, Ontario, OR 97914.

(2)

(3) 920 SE 9th Avenue, Ontario, OR 97914.

(4) Ted Hoots, P.O. Box 1, Ontario, OR 97914.

Noreta R. McGee,

Secretary.

[FR Doc. 89-11356 Filed 5-11-89; 8:45 am]

BILLING CODE 7035-01-M

Intent To Engage in Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

A. 1. Parent corporation and address of principal office: Cycle Country Accessories Corp., R.R. #3 Box 125 Hwy. 71 North, Milford, Iowa 51351, will provide compensated intercorporate hauling for Okoboji Industries Corp., R.R. #3 Box 125 Hwy. 71 North, Milford, Iowa 51351, A Iowa Corporation.

B. 1. Parent corporation and address of principal office: Dilgard Frozen Foods, Inc., 830 Hayden Street, P.O. Box 13369, Fort Wayne, Indiana 46868-3369.

2. Wholly-owned subsidiary which will participate in the operations, and State of incorporation: Dilgard Transportation Company, Inc., 830 Hayden Street, P.O. Box 13369, Fort Wayne, Indiana 46868-3369. State of Incorporation: Indiana.

C. 1. Parent corporation and address of principal office: Elswood Investment Corporation, P.O. Box 49100, Four Bentall Centre, Vancouver, B.C., Canada V7X 1H3.

2. Wholly-owned subsidiaries which will participate in the operations, and State(s) of incorporation:

(i) General Hardwood Company, d/b/a Hardwoods, Inc., incorporated in the State of Alaska;

(ii) Hardwoods, Inc., Alaska; incorporated in the State of Alaska;

(iii) Hardwoods, Inc., California, incorporated in the State of California;

(iv) Hardwoods, Inc., Colorado, incorporated in the State of Colorado;

(v) Hardwoods, Inc., Utah, incorporated in the State of Utah;

(vi) Sauder Exterior Building Products, Inc., incorporated in the State of Washington;

(vii) Siteline Exterior Corporation, incorporated in the State of Washington;

(viii) American Maywood Corporation, incorporated in the State of Washington;

(ix) Seattle Gypsum, Inc., incorporated in the State of Washington;

(x) Sauder Door Corporation, incorporated in the State of Washington;

(xi) Wellington Investment Corporation, incorporated in the State of Washington;

(xii) Takahashi Industries Limited, incorporated in the Province of British Columbia, Canada;

(xiii) Sauder Industries Limited, incorporated in the Province of British Columbia;

(xiv) Sauder Transport, Inc., incorporated in the State of Washington, a transporting entity.

D. 1. Parent corporation and address of principal office: Motor Coils Manufacturing Co., 100 Talbot Avenue, Pittsburgh, Pennsylvania 15104.

2. Wholly-owned subsidiaries which will participate in the operations and State(s) of incorporation: (i) MCM Transportation Co.—Pennsylvania.

E. 1. Parent corporation and address of principal office: Outboard Marine Corporation, a Delaware corporation with its principal place of business at 100 Sea Horse Drive, Waukegan, Illinois 60085.

2. Wholly-owned subsidiaries which will participate in the operations, and State(s) of incorporation: Syracuse Transportation, Inc.—Indiana, Donzi Marine Corporation—Delaware, OMCCC Inc. (Chris Craft)—Delaware, Sunbird Boat Company—South Carolina, Sea Nymph, Inc.—Nevada, Stratos Boats, Inc.—Delaware, Lowe Industries—Missouri, Bramco, Inc.—Oregon, Four Winns, Inc.—Michigan, Four Winns of Texas, Inc.—Texas, Hydra-Sports Corp.—Louisiana.

Noreta R. McGee,

Secretary.

[FR Doc. 89-11355 Filed 5-11-89; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 31445]

Indiana Hi-Rail Corp.; Purchase From CSX Transportation, Inc.; Line Between Richmond, IN, and Fernald, OH; Decision

AGENCY: Interstate Commerce Commission.

ACTION: Notice of decision accepting application for consideration.

SUMMARY: The Commission is accepting for consideration the application, filed March 31, 1989, as amended April 18, 1989, by Indiana Hi-Rail Corporation (INRC) and R. Powell Felix to purchase from CSX Transportation, Inc. (CSXT), a 47.14-mile line of railroad between milepost 19.00 at Richmond, Wayne County, IN, and milepost 66.14 at Fernald, Hamilton County, OH. CSXT will retain trackage rights over IHRC between Cottage Grove, IN, and Richmond. Pursuant to 49 CFR Part 1180, the Commission finds this to be a minor transaction.

DATES: Written comments must be filed with the Interstate Commerce Commission no later than June 12, 1989. Comments from the Secretary of Transportation and Attorney General of the United States must be filed by June 26, 1989. Applicants' reply is due July 17, 1989.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 275-7245 [TDD for hearing impaired: (202) 275-1721].

ADDRESSES: An original and 10 copies of all documents must be sent to: Office of the Secretary, Case Control Branch, Attn: Finance Docket No. 31445, Interstate Commerce Commission, Washington, DC 20423.

In addition, one copy of all documents in this proceeding must be sent to each of applicants' representatives:

Lawrence H. Richmond, CSX Transportation, Inc., 100 North Charles Street, Baltimore, MD 21201.

Richard A. Allen, Zuckert, Scoutt & Rasenberger, 888 17th Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: By application filed March 31, 1989, and amended April 18, 1989 CSXT, IHRC, and R. Powell Felix (applicants), seek approval under 49 U.S.C. 11343, *et seq.*, for IHRC's purchase of a 47.14-mile CSXT line between Richmond, IN, and Fernald, OH. CSXT will retain trackage rights over the line between Cottage Grove, IN, and Richmond. Applicants contend that this is a minor transaction under 49 CFR 1180.2(c), and they submitted a conforming application in accordance with the railroad consolidation regulations at 49 CFR Part 1180.

IHRC is a Class III common carrier controlled by R. Powell Felix. Mr. Felix controls no other carrier. CSXT is a Class I carrier and a unit of CSX Corporation. IHRC now operates six lines of railroad, none of which connects with each other or the line to be acquired. The Richmond-Fernald line connects with a line of Consolidated Rail Corporation at Richmond.

In 1987, CSXT handled approximately 2,200 carloads of originating or terminating traffic on the Richmond-Fernald line. During the first 10 months of 1988, CSXT handled about 2,000 carloads. The line currently carries overhead corn, scrap iron, soybean, wheat, chemicals, coal, steel and paper traffic to and from the CSXT line between Richmond and Sante Fe, IN.

Applicants maintain that the transaction will result in operating economies and improved service, and that this will enhance their financial viability. Specifically, the proposal will enable IHRC to effect economies by allowing it to share administrative, insurance, and operating costs with the new line. In addition, IHRC anticipates that, by its provision of effective competition and efficient service, there is a significant and real potential to divert traffic from truck to rail. CSXT, on the other hand, will no longer be required to maintain what is a marginally profitable operation. Applicants assert that the transaction will improve service because IHRC will be better able to accommodate shipper needs.

Because IHRC will merely replace CSXT, applicants contend that the transaction will not result in a monopoly or reduce competition. Rather, they submit that the transaction will enhance competition by allowing IHRC to compete more effectively with other modes of transportation through provision of responsive rail service on the line.

IHRC intends to operate the Richmond-Fernald line with its own employees. No employee positions with IHRC would be eliminated. On the other hand, CSXT plans to abolish one employee position and reduce the annual earnings of four other employee positions. CSXT states that it will negotiate employee protection agreements with any affected employee pursuant to the conditions in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). These conditions are appropriate for employees affected by the acquisition. If IHRC's operation eventually requires additional employees, IHRC maintains it will offer employment on a preferential

basis to CSXT employees who worked on the line. Any employee affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978) as modified in *Mendocino Coast Ry, Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Under § 1180.4(b)(2) of our consolidation regulations, we must determine initially whether a transaction is a major, significant, or minor one. The proposed transaction involves a Class I and a Class III railroad. It has no regional or national significance and will neither result in a major market extension nor reduce the present level of competition. Accordingly, we find the proposal a minor transaction under § 1180.2(c). Because the application complies with our regulations governing minor transactions, we are accepting it for consideration.

The application and exhibits are available for inspection in the Public Docket Room at the Offices of the Interstate Commerce Commission in Washington, DC. In addition, they may be obtained upon request from applicants' representatives named above.

Any interested persons, including governmental entities, may participate in this proceeding by submitting written comments. Comments must be filed no later than June 12, 1989. The United States Secretary of Transportation and the Attorney General of the United States must file their comments no later than June 26, 1989. Applicants' reply is due July 17, 1989. An original and 10 copies of all pleadings must be filed with the Secretary, Interstate Commerce Commission, Washington DC 20423.

Written comments must be served concurrently by first class mail on the Secretary of Transportation, the Attorney General and applicants' representatives. Written comments must also be served on all parties of record within 10 days of the service of the service list by the Commission. We plan to issue the service list by June 26, 1989. Any person who files timely written comments shall be considered a party of record if the persons' comments so request. In this event, no petition for leave to intervene need be filed. Consistent with 49 CFR 1180.4(d)(1) (iii) written comments must contain:

(a) The docket number and title of the proceeding;

(b) The name, address, and telephone number of the commenting party and its representative upon whom service shall be made;

(c) The commenting party's position, *i.e.*, whether it supports or opposes the proposed transaction;

(d) A statement of whether the commenting party intends to participate formally in the proceeding or merely comment on the proposal;

(e) If desired, a request for an oral hearing with reasons supporting the request; the request must indicate the disputed material facts that can only be resolved at a hearing; and

(f) A list of all information sought to be discovered from applicant carriers.

Because we have determined that the proposal constitutes a minor transaction, no responsive applications will be permitted. The time limits for processing a minor transaction are set forth at 49 U.S.C. 11345(d).

Discovery may begin immediately. We admonish the parties to resolve all discovery matters expeditiously and amicably.

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

It is ordered:

1. This proposal is found to be a minor transaction under 49 CFR 1180.2(c).
2. The application in Finance Docket No. 31445 is accepted for consideration.
3. The parties shall comply with all provisions as stated above.
4. This decision is effective on the date of service.

Decided: May 4, 1989.

By the Commission, Chairman Cradison, Vice Chairman Simmons, Commissioner Andre, Lamboley, and Phillips.

Noreta R. McGee,

Secretary.

[FR Doc. 89-11416 Filed 5-11-89; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Application by Department of Agriculture

Pursuant to section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(h)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with § 1311.42 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on March 9, 1989, U.S. Department of Agriculture-ARS, Plant Science Institute, Tropical Plants Research Lab., Bldg. 001, Room 236, BARC-West, Beltsville, Maryland 20705, made application to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

Drug	Schedule
Cocaine (9041)	II
Benzoylecgonine (9180)	II
Coca Leaves (9040)	II

Any manufacturer holding, or applying for, registration as a bulk manufacturer of these basic classes of controlled substances may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.54 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections or requests for a hearing may be addressed to the Deputy Assistant Administrator, Drug Enforcement Administration, United States Department of Justice, 1405 I Street, NW., Washington, DC 20537, Attention: DEA Federal Register Representative (Room 1112), and must be filed no later than June 12, 1989.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1311.42(b), (c), (d), (e) and (f). As noted in a previous notice at 40 FR 43745-46 (September 23, 1975), all applicants for registration to import a basic class of any controlled substance in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator of the Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1311.42(a), (b), (c), (d), (e) and (f) are satisfied.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

Dated: May 2, 1989.

[FR Doc. 89-11388 Filed 5-11-89; 8:45 am]

BILLING CODE 4410-09-M

Manufacturer of Controlled Substances; Application by Penick Corp.

Pursuant to § 1301.43(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 8, 1988,

Penick Corporation, 158 Mount Olivet Avenue, Newark, New Jersey 07114, made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Codeine-N-Oxide (9053)	I
Morphine-N-Oxide (9307)	I

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the above application and may also file a written request for a hearing thereon in accordance with 21 CFR 1301.54 and in the form prescribed by 21 CFR 1316.47.

Any such comments, objections or requests for a hearing may be addressed to the Deputy Assistant Administrator, Drug Enforcement Administration, United States Department of Justice, 1405 I Street, NW., Washington, DC 20537, Attention: DEA Federal Register Representative (Room 1112), and must be filed no later than June 12, 1989.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

Dated: May 2, 1989.

[FR Doc. 89-11385 Filed 5-11-89; 8:45 am]

BILLING CODE 4410-09-M

Importation of Controlled Substances; Application by Sigma Chemical Co.

Pursuant to section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(h)), the Attorney General shall, prior to issuing a registration under this section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with § 1311.42 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on February 9, 1989, Sigma Chemical Company, 3500 Dekalb Street, St. Louis, Missouri 63118, made application to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

Drug:	Schedule
Methaqualone (2565)	I
Ibogaine (7260)	I
Lysergic acid diethylamide (7315)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
2,5-dimethoxyamphetamine (7396)	I
3,4-methylenedioxyamphetamine (7400)	I
3,4-methylenedioxymethamphetamine (MDMA) (7405)	I
4-methoxyamphetamine (7411)	I
Bufotenine (7433)	I
Diethyltryptamine (7434)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
Etorphine, except Hydrochloride (9056)	I
Heroin (9200)	I
Beta-Hydroxyfentanyl (9830)	I
Amphetamine, its salts, optical isomers, and salts of its optical isomers (1100)	II
Methamphetamine, its salts, isomers, and salts of its isomers (1105)	II
Secobarbital (2315)	II
Phencyclidine (7471)	II
Anileridine (9020)	II
Cocaine (9041)	II
Codeine (9050)	II
Diprenorphine (9058)	II
Benzoylecgonine (9180)	II
Methadone (9250)	II
Bulk Dextropropoxyphene (9273)	II
Morphine (9300)	II
Morphine-3-glucuronide (9329)	II
Oxymorphone (9652)	II

Any manufacturer holding, or applying for, registration as a bulk manufacturer of this basic class of controlled substance may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.54 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections or requests for a hearing may be addressed to the Deputy Assistant Administrator, Drug Enforcement Administration, United States Department of Justice, 1405 I Street, NW., Washington, DC 20537, Attention: DEA Federal Register Representative (Room 1112), and must be filed no later than (30 days from publication).

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1311.42 (b), (c), (d), (e) and (f). As noted in a previous notice at 40 FR 43745-46 (September 23, 1975), all applicants for registration to import a basic class of any controlled substance in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator of the Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1311.42 (a), (b), (c), (d), (e) and (f) are satisfied.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

Dated: May 2, 1989.

[FR Doc. 89-11386 Filed 5-11-89; 8:45 am]

BILLING CODE 4410-09-M

Manufacturer of Controlled Substances; Application by Toxi-Lab, Inc.

Pursuant to § 1301.43(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on November 17, 1988, Toxi-Lab, Inc., 2 Goodyear, Irvine, California 92718, made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug:	Schedule
Phencyclidine (7471)	II
1-piperidinocyclohexanecarbonitrile (PCC) (8603)	II
Benzoylecgonine (9187)	II

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the above application and may also file a written request for a hearing thereon in accordance with 21 CFR 1301.54 and in the form prescribed by 21 CFR 1316.47.

Any such comments, objections or requests for a hearing may be addressed to the Deputy Assistant Administrator, Drug Enforcement Administration, United States Department of Justice, 1405 I Street, NW., Washington, DC 20537, Attention: DEA Federal Register Representative (Room 1112), and must be filed no later than June 12, 1989.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

Dated: May 2, 1989.

[FR Doc. 89-11387 Filed 5-11-89; 8:45 am]

BILLING CODE 4410-09-M

Federal Bureau of Investigation

National Crime Information Center; Advisory Policy Board Meeting

The Advisory Policy Board of the National Crime Information Center

(NCIC) will meet on June 6–7, 1989, at Raffles Hotel, Denver Southeast, 3200 South Parker Road, Aurora, Colorado 80014.

The major topics to be discussed will include the status of the NCIC 2000 Study, technical and operational specifications for certain concepts proposed in the NCIC 2000 Study, state and local funding for NCIC, and deoxyribonucleic acid technology.

The meeting will be open to the public with approximately 25 seats available on a first-come, first-served basis. Any member of the public may file a written statement with the Advisory Policy Board before or after the meeting. Anyone wishing to address a session of the meeting should notify the Committee Management Liaison Officer, Mr. William A. Bayse, FBI, at least 24 hours prior to the start of the session. The notification may be by mail, telegram, cable or hand-deliverd note. It should contain the name, corporate designation, consumer affiliation, or Government designation, along with the capsulized version of the statement and an outline of the material to be offered. A person will be allowed not more than 15 minutes to present a topic, except with the special approval of the Chairman of the Board.

Inquiries may be addressed to Mr. William A. Bayse, Committee Management Liaison Officer, Technical Services Division, Federal Bureau of Investigation, Washington, DC 20535, telephone number 202–324–5350.

Date: May 9, 1989.

William S. Sessions,

Director.

[FR Doc. 89–11473 Filed 5–11–89; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance; ABB Power Distribution

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separation began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than May 22, 1989.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than May 22, 1989.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street, NW., Washington, DC 20213.

Signed at Washington, DC, this 1st day of May 1989.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition number	Articles produced
ABB Power Distribution (IBEW)	Tulsa, OK	5/1/89	4/14/89	22,838	Power switches.
A&S Mfg/CFC International (workers)	Moonachie, NJ	5/1/89	3/15/89	22,839	Hot stamping foil.
Aeronca Incorp. (IAM&AW)	Middletown, OH	5/1/89	4/12/89	22,840	Components.
Almer's Construction (workers)	Tioga, ND	5/1/89	4/11/89	22,841	Pipeline construction.
Alvid Associates (workers)	New York City, NY	5/1/89	4/12/89	22,842	Ladies' sleepwear.
America Trim Products (workers)	Rochester, NY	5/1/89	4/14/89	22,843	Molded buttons.
Artesia Fishing Tool Co. (workers)	Artesia, NM	5/1/89	4/9/89	22,844	Oil and Gas.
Bayless Drilling Co. (workers)	Farmington, NM	5/1/89	4/6/89	22,845	Oil and Gas.
Bishop Construction (workers)	Hutchinson, KS	5/1/89	4/13/89	22,846	Oil and Gas.
Cardell-Tlapek, Co. (workers)	Magnolia, AR	5/1/89	4/14/89	22,847	Oil and Gas.
Collyer Insulated Wire Co. (workers)	Lincoln, RI	5/1/89	4/12/89	22,848	Insulated cable.
Continental Can Co. (USWA)	Wayne, NJ	5/1/89	4/6/89	22,849	Aluminum cans.
Cooper Industries—Kirsch Div.	Scottsville, KY	5/1/89	3/22/89	22,850	Drapery Hardware.
Delisle Fashions, Inc. (workers)	Fitchburg, MA	5/1/89	3/28/89	22,851	Ladies' sleepwear.
Endicott Johnson Corp. (workers)	Tunkhannock, PA	5/1/89	4/12/89	22,852	Shoes.
Etra Handbags (workers)	Long Island City, NY	5/1/89	2/15/89	22,853	Handbags.
Gearhart Industries, (headquarters) (company)	Forth Worth, TX	5/1/89	4/13/89	22,854	Oil and Gas.
Halliburton Co., Halliburton Serv. (headquarters) (company).	Duncan, OK	5/1/89	4/13/89	22,855	Oil and Gas.
Halliburton Co., Halliburton Logging Serv. formerly Welex & Gearhart Industries, Inc. (company).	Houston, TX	5/1/89	4/13/89	22,856	Oil and Gas.
Halliburton Co., Welex Div. (company)	Houston, TX	5/1/89	4/13/89	22,857	Oil and Gas.
Homco International, Inc. (company)	Casper, WY	5/1/89	4/7/89	22,858	Oil and Gas.
ILC Data Device Corp. (workers)	Bohemia, NY	5/1/89	4/12/89	22,859	Data.
Kaypro Corp. (workers)	Solana Beach, CA	5/1/89	4/14/89	22,860	Computers.
(The) Kroger Company (UFCWU)	Atlanta, GA	5/1/89	4/12/89	22,861	Grocery stores.
Lone Star Industries, Inc. (workers)	New Orleans, LA	5/1/89	3/28/89	22,862	Cement and clinker.
Mario Papa & Sons (ACTWU)	Gloversville, NY	5/1/89	3/29/89	22,863	Gloves.
New Orleans Steamship Assoc. (ILA)	New Orleans, LA	5/1/89	4/10/89	22,864	Loading and unloading.
Northern Tank Line (workers)	Miles City, MT	5/1/89	3/29/89	22,865	Oil and Gas.
Parker Drilling Co. (workers)	Mills, WY	5/1/89	4/12/89	22,866	Oil and Gas.
Public Service Co. (workers)	Waterflow, NM	5/1/89	4/2/89	22,867	Electricity.
R&J Fashions (ILGWU)	Long Branch, NJ	5/1/89	4/10/89	22,868	Ladies' dresses and sportswear.
Regina Co. (IUE)	Rahway, NJ	5/1/89	4/11/89	22,869	Jacuzzi units.

APPENDIX—Continued

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition number	Articles produced
Rexon Technology (UAW)	Wayne, NJ	5/1/89	4/13/89	22,870	Electromechanical devices.
Richard Braid Corp. (workers)	New York, NY	5/1/89	2/9/89	22,871	Ribbon for decorating belts, clothing, etc.
Springs Industries, Inc. (workers)	Huntsville, AL	5/1/89	4/13/89	22,872	Finished cloth.
Unocal Pipeline Co. Illinois District (workers)	Olney, IL	5/1/89	4/15/89	22,873	Oil and Gas.
Geosearch, Inc (workers)	Tulsa, OK	11/14/88	11/4/88	[1] 21,627	Oil and Gas.

[1] (Investigation Re-Opened)

[FR Doc. 89-11461 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-22,280]

Fina Oil and Chemical, Co.; Corpus Christi, TX; Negative Determination Regarding Application for Reconsideration

By an application dated March 30, 1989 the workers requested administrative reconsideration of the subject petition for trade adjustment assistance. The denial notice was signed on March 6, 1989 and was published in the **Federal Register** on April 25, 1989 (54 FR 17839).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances;

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if, in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The workers claim that their layoffs were the result of the company expanding its domestic reserves by buying other known domestic reserves from distressed domestic oil companies.

Investigation findings show that the workers are engaged in crude oil exploration and production activities. In November 1988 Fina Oil and Chemical Company acquired two operating divisions of a domestic oil company located in Houston, Texas. Because of the acquisition, staffing levels were reviewed and several positions were eliminated as a result of a company consolidation. A management decision to consolidate would not form a basis for certification.

In order for a worker group to be certified eligible to apply for adjustment assistance benefits, it must meet all three of the Group Eligibility Requirements of the Trade Act of 1974. These worker group criteria are—a significant decrease in employment, an absolute decrease in sales or production and an increase of imports of articles like or directly competitive with those produced at the workers' firm which contributed importantly to worker separations and to declines in production or sales. These conditions were not met for workers at Fina Oil in Corpus Christi since Fina Oil had increased sales and production, in quantity, of crude oil and natural gas in 1988 compared to 1987, the period applicable to the petition.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washigton, DC, this 4th day of May 1989.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 89-11462 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-30-M

Imco Services and Magcobar Drilling Fluids; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In the matter of TA-W-21,285, Houston, Texas, TA-W-21,285A, All Locations in Colorado, TA-W-21,285B, All Locations in Alaska, TA-W-21,285C, All Other Locations in Texas, TA-W-21,285D, All Locations in Wyoming, TA-W-21,289, Houston, Texas, TA-W-21,289A, All Locations in Colorado, TA-W-21,289B, All Locations in Alaska, TA-W-21,289C, All Other Locations in Texas.

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on January 4, 1989 applicable to all workers of IMCO Services and Magcobar Drilling Fluids both of Houston, Texas.

The Certification was amended on April 20, 1989 to include workers separated from Imco Services and Magcobar Drilling Fluids operating in the States of Colorado, Alaska and in other locations in Texas.

The company has informed the Department that additional workers were separated from IMCO Services in Wyoming. The notice, therefore is amended by including all locations in Texas, Colorado, Alaska and Wyoming for IMCO Services and including all locations in Texas, Colorado, and Alaska for Magcobar Drilling Fluids.

The amended notice applicable to TA-W-21,285 and TA-W-21,289 is hereby issued as follows:

All workers of IMCO Services, Houston, Texas and in all other locations in Texas and in the states of Colorado, Alaska and Wyoming and all workers of Magcobar Drilling Fluids, Houston, Texas and in all other locations in Texas and in the states of Colorado and Alaska who became totally or partially separated from employment on or after October 1, 1985 and before January 1, 1987 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 3rd day of May 1989.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 89-11463 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-30-M

Justiss Oil Co.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In the matter of TA-W-21,633, Gena, Louisiana, TA-W-21,633A, All Other Locations in Louisiana, TA-W-21,633B, All Locations in Mississippi, TA-W-21,633C, All Locations in Alabama, TA-W-21,633D, All Locations in Georgia, TA-W-21,633E, All Locations in Florida, TA-W-21,633F, All Locations in Arkansas.

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on

January 13, 1989 applicable to all workers of Justiss Oil Company, Gena, Louisiana.

Based on new information from the company, additional workers were separated from Justiss Oil Company in other locations in Louisiana and in various locations in Mississippi, Alabama, Georgia, Florida and Arkansas during the period applicable to the certification. The notice, therefore is amended by including all locations in the States of Louisiana, Mississippi, Alabama, Georgia, Florida and Arkansas.

The amended notice applicable to TA-W-21,633 is hereby issued as follows:

All workers of Justiss Oil Company in Gena, Louisiana and in other locations of Louisiana and in the States of Mississippi, Alabama, Georgia, Florida and Arkansas who became totally or partially separated from employment on or after October 1, 1985 and before January 1, 1987 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 4th day of May 1989.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 89-11464 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-22,328]

Petroleum Equipment Supply Co., Incorp., Brownwood, TX; Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, an investigation was initiated in response to a worker petition which was filed on November 15, 1988 on behalf of former workers at Petroleum Equipment Supply Company, Incorporated, Brownwood, Texas.

All production workers were separated from Petroleum Equipment Supply Company, Incorporated before October 1, 1985. Section 223 of the Trade Act of 1974 amended by Section 1421(a)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988 provides retroactive benefits to workers separated on or after October 1, 1985. Consequently further investigation in this case would serve no purpose; and the investigation has been terminated.

Signed at Washington, DC, this 2nd day of May 1989.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 89-11465 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-22,001]

Wintershall Oil and Gas Corp. Englewood, CO; Notice of Negative Determination Regarding Application for Reconsideration

By an application dated March 27, 1989 the company requested administrative reconsideration of the subject petition for trade adjustment assistance. The denial notice was signed on January 24, 1989 and was published in the Federal Register on March 3, 1989 (54 FR 9099).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) if it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if, in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The company claims that because foreign oil has had a significant impact on the price of domestic oil, Wintershall has decreased its exploration activity and increased its production, marketing and transportation activities via two acquisition during the past few years.

Investigation findings show that the petition was filed timely for the retroactive provisions of the 1988 amendments to the Trade Act of 1974. However, at the time of the June 1986 layoffs, the company was a production and transmission company.

The retroactive provisions of section 1421 (A)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988 do not apply to workers if such workers were eligible to be certified for benefits under the Trade Act prior to the implementation of the retroactive provisions. The layoffs in 1986 occurred well before November 16, 1987, the earliest possible impact date for firms producing an article under section 223(b)(1) of the Trade Act. Other findings show increased revenues in 1985, 1986 and 1987 compared to the immediately preceding years and in the first 10 months of 1988 compared to the same period in 1987.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 4th day of May 1989.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 89-11466 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-30-M

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large

volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S-3504, Washington, DC 20210.

Withdrawn General Wage Determination Decision

This is to advise all interested parties that the Department of Labor is withdrawing, from the date of this notice, General Wage Determination No. IA89-12 dated January 6, 1989.

Agencies with construction projects pending to which this wage decision would have been applicable should utilize General Wage Determination No. IA89-1. See Regulations (Part 1 (29 CFR), Section 1.5). Contracts for which bids have been opened shall not be affected by this notice. Also consistent with 29 CFR 1.6(c)(2)(i)(A), the incorporation of the withdrawal decision in contract specifications, the opening of bids is within ten (10) days of this notice, need not be affected.

Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions deing modified.

Volume I:

Florida:
FL89-1 (Jan. 6, 1989) ..... p. 100.
FL89-17 (Jan. 6, 1989) ..... p. 142.
Kentucky:
KY89-7 (Jan. 6, 1989) ..... pp. 312-315.
Massachusetts:
MA89-1 (Jan. 6, 1989) ..... pp. 372, 375.
MA89-2 (Jan. 6, 1989) ..... pp. 388, 390.
MA89-3 (Jan. 6, 1989) ..... pp. 402-403.
New Jersey:
NJ89-2 (Jan. 6, 1989) ..... pp. 614, 617.
NJ89-3 (Jan. 6, 1989) ..... pp. 634-637.
New York:
NY89-2 (Jan. 6, 1989) ..... p. 685.
NY89-19 (Jan. 6, 1989) ..... pp. 836b-836f.
Pennsylvania:
PA89-6 (Jan. 6, 1989) ..... pp. 894-896.
PA89-14 (Jan. 6, 1989) ..... pp. 948-951, 953.
Virginia:
VA89-7 (Jan. 6, 1989) ..... p. 1140.

Volume II:

Iowa:
IA89-1 (Jan. 6, 1989) ..... pp. 21-24.
New Mexico:
NM89-2 (Jan. 6, 1989) ..... pp. 762-763.
NM89-3 (Jan. 6, 1989) ..... pp. 768-769.
Ohio:
OH89-29 (Jan. 6, 1989) ..... pp. 893-906b.
Texas:
TX89-3 (Jan. 6, 1989) ..... p. 986.

Volume III:

North Dakota:
ND89-4 (Jan. 6, 1989) ..... p. 238.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from:

Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 5th day of May 1989.

Robert V. Setera,

Acting Director, Division of Wage Determinations.

[FR Doc. 89-11271 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-27-M

Mine Safety and Health Administration

[Docket No. M-89-46-C]

Eastern Associated Coal Corp.; Petition for Modification of Application of Mandatory Safety Standard

Eastern Associated Coal Corporation, 800 Laidley Tower, P.O. Box 1233, Charleston, West Virginia 25324 has filed a petition to modify the application of 30 CFR 75.326 (aircourses and belt haulage entries) to its Federal No. 2 Mine (I.D. No. 46-01456) located in Monongalia County, West Virginia. The petition is filed under Section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that intake and return aircourses be separated from belt haulage entries and that belt haulage entries not be used to ventilate active working places.

2. As an alternate method, petitioner proposes to use belt haulage air in the active working faces of both of the two 4-North Mains development sections, all longwall development sections, and on active longwall faces in order to maximize the efficiency of the ventilation system in the 4-North Mains area.

3. In support of this request, petitioner proposes to install an early warning fire detection system utilizing a low-level carbon monoxide (CO) detection system in all belt entries used as intake aircourses and at each belt drive and

tailpiece located in intake aircourses. The monitoring devices would be capable of giving warning of a fire for a minimum of four hours after the source of power to the belt is removed; a visual alert signal would be activated when the CO level is 10 parts per million (ppm) above ambient air and an audible signal would sound at 15 ppm above ambient air. All persons would be withdrawn to a safe area at 10 ppm and evacuated at 15 ppm. The fire alarm signal would be activated at an attended surface location where there is two-way communication. The CO system would be capable of identifying any activated sensor, monitoring electrical continuity and detecting electrical malfunctions.

4. The CO system would be visually examined at least once during each coal-producing shift and tested weekly to ensure the monitoring system is functioning properly. The monitoring system would be calibrated with known concentrations of CO and air mixtures at least monthly.

5. If the CO system is deenergized for routine maintenance or for failure of a sensor unit, the belt conveyor would continue to operate and qualified persons would patrol and monitor the belt conveyor using hand-held CO detecting devices.

6. The details for the fire detection system would be included as part of the ventilation system, methane and dust control plan.

7. The concentrations of respirable dust in the intake air in the belt conveyor entries used as intake aircourses would comply with the requirements of 30 CFR 70.100(b). Respirable dust samples would be taken in all belt entries used as intake aircourses and the location of the sampling areas would be included as designated areas in the ventilation system and methane and dust control plan.

8. The permanent stopping separating the conveyor belt entries from the intake escapeway would be specifically approved in the ventilation system and methane and dust control plan for the mine.

9. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 12, 1989. Copies of the petition are available for inspection at that address.

Date: May 5, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-11457 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-47-C]

Eastern Associated Coal Corp.; Petition for Modification of Application of Mandatory Safety Standard

Eastern Associated Coal Corporation, 800 Laidley Tower, P.O. Box 1233, Charleston, West Virginia 25325 has filed a petition to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its Federal No. 2 Mine (I.D. No. 46-01456) located in Monongalia County, West Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that trolley wires and trolley feeder wires, high-voltage cables and transformers not be located in by the last open crosscut and be kept at least 150 feet from pillar workings.

2. Petitioner states that the longwall mining sections planned at the mine will require 2,300 horsepower to power the longwall system. In order to supply such power to a longwall system from a power system limited to 1,000 volts, the following problems arise:

a. The ampacity requirements at 1,000 volts are such that very large and heavy cables are required. These large, heavy cables can cause congested work space, handling problems, and the accidents associated with sprains and strains;

b. Poor voltage regulation resulting in motor overheating and lack of torque to be applied to the face conveyor; and

c. At 1,000 volts, the interrupting limits of the available circuit breakers are approached, resulting in a diminished safety factor.

3. As an alternate method, petitioner proposes that Numbers 5, 6, and 7 Right, 4 North Mains longwall sections use high-voltage (2,400) cables to supply power in or in by the last open crosscut with specific conditions and equipment as outlined in the petition.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 12, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Dated: May 5, 1989.

[FR Doc. 89-11458 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-42-C]

Sunnyside Reclamation & Salvage, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Sunnyside Reclamation & Salvage, Inc., P.O. Box 99, Sunnyside, Utah 84539 has filed a petition to modify the application of 30 CFR 75.1105 (housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps) to its Mine No. 1 (I.D. No. 42-00093), its Mine No. 2 (I.D. No. 42-00094), and its Mine No. 3 (I.D. No. 42-00092), all located in Carbon County, Utah. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the equipment in the intake entry connecting the No. 1 and No. 3 Mines.

2. As an alternate method, the petitioner proposes to remove the transformer at Crosscut No. 27 and relocate a battery charger to the main intake. For the two remaining transformers, the petitioner proposes the following:

(a) The air current would flow along the belt and intake entry from the No. 1 Mine to the No. 3 Mine, up the No. 3 Slope directly into the return at 8th Left;

(b) A fireproof structure equipped with automatic-closing doors that activate at a temperature not to exceed 165 °F would be built. When activated, fire doors would provide a reasonably airtight enclosure for all electric components;

(c) An alarm signal would be incorporated in the "Conspec" system. The signal would be heat-activated and

capable of being seen or heard by a responsible person;

(d) The electric equipment would be protected with thermal devices, or the equivalent, designed and installed to interrupt all power circuits supplying electric equipment within the fireproof structure; and

(e) An automatic fire-suppression system would be installed in the fireproof structure.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 12, 1989. Copies of the petition are available for inspection at that address.

Date: May 5, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-11459 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-62-C]

Tippy Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Tippy Coal Company, Route 2, Box 420, Corbin, Kentucky 40701 has filed a petition to modify the application of 30 CFR 75.313 (methane monitor) to its Mine No. 1 (I.D. No. 15-16040) located in Whitley County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A sumary of the petitioner's statements follows:

1. The petition concerns the requirement that a methane monitor be installed on electric face cutting equipment, continuous mining machines, longwall face equipment and loading machines. The monitor is required to be properly maintained and frequently tested.

2. No methane has been detected in the mine.

3. The three-wheel tractors are permissible DC-powered machines, without hydraulics. Approximately 30-40% of the coal is hand loaded into a drag-type bucket. Approximately 20% of the time that the tractor is in use, it is used as a mantrip and supply vehicle.

4. As an alternate method, petitioner proposes to use hand-held continuous oxygen and methane monitors instead of methane monitors on three-wheel tractors. In further support of this request, petitioner states that:

(a) Each three-wheel tractor would be equipped with a hand-held continuous monitoring methane and oxygen detector and all persons would be trained in the use of the detector;

(b) Prior to allowing the coal loading tractor in the face area, a gas test would be performed to determine the methane concentration in the atmosphere. When the elapsed time between trips does not exceed 20 minutes, the air quality would be monitored continuously after each trip. This would provide continuous monitoring of the mine atmosphere for methane to assure the detection of any methane buildup between trips;

(c) if one percent methane is detected, the operator would manually deenergize the battery tractor immediately. Production would cease and would not resume until the methane level is lower than one percent;

(d) A spare continuous monitor would be available to assure that all coal hauling tractors would be equipped with a continuous monitor;

(e) Each monitor would be removed from the mine at the end of the shift, and would be inspected and charged by a qualified person. The monitor would also be calibrated monthly; and

(f) No alterations or modifications would be made in addition to the manufacturer's specifications.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, and Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 12, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 5, 1989.

[FR Doc. 89-11460 Filed 5-11-89; 8:45 am]

BILLING CODE 4510-43-M

NATIONAL SCIENCE FOUNDATION

Advanced Technologies Panel; Meeting

The National Science Foundation announces the following meeting:

Name: Applications for Advanced Technologies Panel Meeting.

Date and Time: Friday June 16, 1989 from 6-9 p.m. Saturday June 17, 1989 8-5 p.m.

Place: National Science Foundation, Room 1242, 1800 G Street, NW., Washington, DC.

Type of Meeting: Closed.

Contact Person: Dr. Andrew R. Molnar, Applications for Advanced Technologies, Room 635A, Phone: (202) 357-7064.

Summary Minutes: May be obtained from the Contact Person at the above address.

Purpose of Meeting: To provide advice and recommendations concerning support for reasearch.

Agenda: To review and evaluate research proposals as part of the selection process for awards.

Reason For Closing: The proposals being reviewed include information of a proprietary of confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are within exceptions (4) and (6) of 5 U.S.C. 552 b (c), Government in the Sunshine Act.

M. Rebecca Winkler,

Committee Management Officer.

May 9, 1989.

[FR Doc. 89-11488 Filed 5-11-89; 8:45 am]

BILLING CODE 7555-01-M

Advisory Committee for Cross-Disciplinary Activities; Meeting

The National Science Foundation announces the following meeting:

Name: Advisory Committee for Cross-Disciplinary Activities, CISE Directorate.

Date and Time: June 7-8, 1989; 8:30 a.m.-5:00 p.m.

Place: National Science Foundation, Room 1242-1243, 1800 G Street, NW., Washington, DC.

Type of Meeting: Open.

Contact Person: Mrs. Barbara H. Palmer, Administrative Officer, CISE Office of Cross Disciplinary Activities, Room 304, National Science Foundation, Wasington, DC 20550. (202) 357-7064.

Summary of Minutes: May be obtained from the contact person at the above address.

Purpose of Committee: To provide regular advice and recommendations, and oversight to the Office in guiding its policy decisions with regard to the programs within its purview.

Agenda: June 7, 1989; 8:30 a.m.–12:00 noon, Review and discussion of current OCDA activities and Advisory Committee functions.

12:00–1:30 p.m. Lunch

1:30 p.m.–5:00 p.m.; Discussions with Assistant Director and Director. Review of OCDA budget and plans.

June 8, 1989 8:30 a.m.–12:00 noon, Review of cross-directorate activities. Advisory Committee review of OCDA plans. Plans for Oversight reviewers.

12:00–1:30 Lunch

1:30 p.m.–3:30 p.m.

Advisory Committee open discussion of OCDA activities and plans.

May 9, 1989.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 89–11489 Filed 5–11–89; 8:45 am]

BILLING CODE 7555-01-M

Statement of Organization, Functions, and Delegations of Authority

Agency: Naitonal Science Foundation.

Action: Notice of amendment to statement of organization, functions, and delegations of authority.

Subject: In accordance with the Administrative Procedures Act (5 U.S.C. 551 et seq.), this notice amends the Statement of Organization published at 52 FR 1540–1549 of January 14, 1987, as amended by 52 FR 49216 of December 30, 1987, and 53 FR 15755 of May 3, 1988.

Effective Date: May 10, 1989.

For Further Information Contact: M. Rebecca Winkler, National Science Foundation, Division of Personnel and Management, Room 208, Washington, D.C. 20550, telephone 202–357–9520.

A. Staff Offices

1. National Science Board

Office of the Inspector General (OIG). The Inspector General Act Amendments of 1988 (Pub. L. 100–504) provide for the National Science Foundation to have an Inspector General, appointed by and under the general supervision of the National Science Board, with powers and duties provided for in the Inspector General Act of 1978, as amended. In keeping with this Act, on April 9, 1989, the Office of Audit and Oversight, formerly reporting to the Office of the Director, was redesignated as the Office of the Inspector General (OIG). This Office is responsible for audit and oversight of the financial, administrative, and programmatic aspects of NSF's activities. OIG is the focal point of contract with other Federal audit organizations in the Executive Branch and with GAO. OIG is organized with four subordinate components: External Audit, Internal Audit, Oversight, and Investigations/Counsel.

2. Office of the Director

(a) *Office of Audit and Oversight (OAO).* On April 9, 1989, most of the OAO functions and staff were transferred to the new Office of the Inspector General. The indirect cost analysis activity and most of its staff were transferred to the Division of Grants and Contact in the Administration Directorate.

(b) *Research Facilities Office (RFO).* RFO was established on December 15, 1988, as a staff office in the Office of the NSF Director. The Office is responsible for providing leadership, coordination and oversight for NSF research facility support activities. In pursuit of its mission, RFO will assess research facility capacity and needs, develop initiatives, and help delineate the roles of those investing in and supporting research facilities.

Funds are not available for this proposed program in FY 89 and none have been included in the FY 90 budget request to Congress. However, RFO is developing NSF's program guidelines in accord with the Academic Research Facilities Modernization Act of 1988. [102 Stat. 2873, 42 U.S.C. 1862a–1862d].

(c) *Office of Information Systems (OIS).* OIS was reorganized on August 28, 1988, to consolidate functions into two new divisions and to create a new staff function in the OIS Office of the Director. OIS now consists of the following organizational units:

(1) *Office of the Director,* with a new Policy and Evaluation Staff responsible for ADP policy development and quality assurance.

(2) *Information Management Division (IMD)* that is responsible for developing automated application systems and data bases. The Division consolidates the work of the former Central Applications Branch and the Information Management Staff.

(3) *Technological Environment Division (TED)* that is responsible for managing NSF's technological infrastructure. The Division consolidates the work of the former Computer Center and Distributed Systems Branches and the ADP Security Officer. The Division's Security Officer is responsible for ADP security programs and procedures.

B. Directorates

1. Directorate for Computer and Information Science and Engineering (CISE)

Office of Cross-Disciplinary Activities (CDA). CDA was established on June 5, 1988, by transferring functions and staff of the CISE Institutional Infrastructure and CISE Instrumentation Programs, Division of Computer and Computation Research (CCR), into CDA. The new Office is responsible for centralizing intra-divisional activities such as those relating to infrastructure building; for providing a central focus for activities between CISE and industry, other governmental agencies, professional societies, and international organizations; and for proposing and initiating new cross-divisional programs.

In addition, the Office will manage and coordinate cross-divisional targeted activities including Science and Technology Centers, CISE Presidential Young Investigators, Research Initiation in Computer and Information Science and Engineering, Research Experiences for Undergraduates, Minority Research Initiation, Research Opportunities for Women, Ethics and Values Studies, and the like.

2. Directorate for Engineering

On March 12, 1989, the Directorate for Engineering (ENG) was restructured. ENG's seven divisions were consolidated into six. The Office of the Assistant Director and the Office of Engineering Infrastructure Development (OEID) remained unchanged. New functional statements for the restructured directorate are below.

The overall mission of NSF's Engineering (ENG) Directorate is to promote the progress of engineering and technology, thereby contributing to national prosperity and security. Specifically, the ENG seeks to strengthen the engineering science base, which provides the foundation for engineering education, research, technological innovation and practice; to develop a knowledge base for technology-driven areas such as design and manufacturing; to encourage technological innovation through the support of research in emerging areas; to promote the cross-disciplinary research approach through the support of research groups and centers; to improve the quality of engineering education in order to attract the most capable students to the engineering profession and produce first-rate engineers; and to provide additional opportunities for minorities, women, and the disabled through programs to remove barriers

and provide incentives for full participation in education and research.

(a) *Assistant Director for Engineering.* The Assistant Director is responsible for the overall planning and management of the directorate in order to meet its stated mission.

(b) *Office of Engineering Infrastructure Development (OEID).* The aim of this office is to develop and provide a Directorate-wide focus for (1) activities that affect one or more of the divisions of the Directorate for Engineering and that will optimize the effective use of university, industry, and other resources; (2) activities that will advance U.S. engineering through international cooperation; and (3) the activities of the Directorate with respect to engineering education.

The Office is responsible for coordination with other organizations concerned with engineering research and engineering infrastructure, including the Office of Science and Technology Policy, the National Academy of Science, the National Academy of Engineering, the National Research Council, foreign research organizations, engineering professional societies, and other parts of the engineering community.

The Office also coordinates the Directorate's effort to increase the participation of women, minorities, and disabled persons in NSF engineering programs and activities.

(c) *Chemical and Thermal Systems Division (CTS).* CTS funds research that strengthens the engineering base for technologies involving chemical, thermal and flow processes. The processes are important in areas like microelectronics, specialty chemicals, pharmaceuticals, energy procuction and transfer, molecular engineering of advanced materials, and chemical processing of hazardous waste.

CTS was formed from parts of the former Chemical, Biochemical and Thermal Engineering (CBTE) and Mechanics, Structural and Materials Engineering (MSME) Divisions to better focus responsibility for supporting engineering research and educational activities in the areas of chemical and thermal systems, including fluids, hydraulics and participates.

The Division is responsible for the following research programs: Chemical Reaction Processes; Interfacial, Transport, and Separation Processes; Thermal Systems Fluid; and Particulate and Hydraulic Systems.

(d) *Mechanical and Structural Systems Division (MSS).* MSS seeks to improve and expand fundamental engineering knowledge in the broad areas of mechanics, structures, and materials engineering. Research is supported that will improve existing industrial processes and create new technology in areas such as the formulation and processing of novel engineering materials, the performance and service life of machines and equipment, and more efficient construction techniques for large scale structures.

MSS was formed from parts of the former Chemical and Electrical Systems (CES) and Mechanics, Structural and Materials Engineering (MSME) Divisions to better focus responsibility for supporting engineering research and educational activities in the areas of mechanics, structures, and materials.

The Division is responsible for the following research programs: Dynamic Systems and Controls; Structures and Building Systems; Materials Engineering and Tribology; and Solid and Geomechanics.

(e) *Electrical and Communications Systems Division (ECS).* ECS directs its efforts towards enhancing the engineering knowledge base for the analysis, synthesis, design and fabrication of materials, devices, systems, and phenomena that involve electrical, electronic, electromechanical or optical technologies.

ECS was formed from parts of the old Electrical, Communications, and Systems Engineering (ECSE) and Emerging Emgineering in Technologies (EET) Divisions to better focus responsibility for supporting engineering research and educational activities in the areas of electrical, computational and communications systems. Through its Engineering Technologies Initiation program, ECS is responsible for promoting the support of emerging technologies throughout the ENG activity.

The Division is responsible for the following research programs: Quantum Electronics, Waves and Beams; Solid-State and Microstructure; Communications and Computational Systems; Engineering Systems; and Emerging Technologies Initiation.

(f) *Design and Manufacturing Systems Division (DDM).* DDM seeks to develop and expand the scientific foundations of design, manufacturing and computer-integrated engineering across a broad spectrum of American industry. This long-term effort is needed: to deepen our understanding of the processes, operations and systems that comprise our manufacturing base; to render this base more competitive; and to make it responsive to new needs and receptive to innovation. Complementing this effort is support of the development of operations research methodologies that underlie the full range of engineering production systems.

DDM was formed from all of the former Design, Manufacturing and Computer-Integrated Engineering (DMCE) Division and the operations research component of the former Electrical, Communications and Systems Engineering (ECSE) Division. Within the ENG activity, DDM provides a focus for engineering research and educational activities in design and manufacturing systems.

The Division is responsible for the following research programs: Operations Research and Production Systems; Design and Computer-Integrated Engineering; and Manufacturing Processes and Equipment.

(g) *Biological and Critical Systems Division (BCS).* BCS was formed from a substantial portion of the former Critical Engineering Systems (CES) Division, the Biochemical and Biomass Engineering Program from the former Chemical, Biochemical, and Thermal Engineering (CBTE) Division, and the Biotechnology, and Bioengineering and Research for the Handicapped programs from the former Emerging Engineering Technologies (EET) Division. Within the ENG activity, BCS provides a focus for engineering research and educational activities focused on biological and environmental problems, and hazard mitigation. The Biological and Critical Systems (BCS) Division is divided into two sections: (1) Bioengineering and Environmental Systems; and (2) Hazard Mitigation.

The Division is responsible for the following research programs: Bioengineering and Aiding the Disabled; Environmental and Ocean Systems; Earthquake Hazard Mitigation; and Natural and Man-Made Hazard Mitigation.

(h) *Engineering Centers Division (ECD).* ECD supports university-based research centers aimed at enhancing our country's industrial competitiveness by strengthening university/industry coupling in research and education. The programs focus research teams on scientific and engineering areas where the infusion of knowledge from several disciplines and viewpoints will enhance the probability of innovative and industrially relevant research. The Division has three broad objectives: to focus and integrate fundamental research on knowledge breakthroughs underlying technological advances; to increase cooperation between university engineers and scientists and their industrial counterparts in order to focus research on current and projected industry needs; and, to better prepare students in designing, synthesizing,

integrating and managing technological systems.

The Division supports two major programs, Engineering Research Centers (ERC) and Industry/University Cooperative Research Centers (IUCRC). Together these programs are developing a network of centers focused on technological areas critical to advancing the knowledge base underlying technological innovation.

3. Directorate for Science and Engineering Education

Division of Undergraduate Science, Engineering, and Mathematics Education (USEME). On September 26, 1988, the *Office* of Undergraduate Science, Engineering, and Mathematics Education (USEME) was renamed the *Division* of Undergraduate Science, Engineering, and Mathematics Education (USEME). The functional statement for USEME is unchanged.

Margaret L. Windus,

Director, Division of Personnel and Management.

Date: May 9, 1989.

[FR Doc. 89-11490 Filed 5-11-89; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-213]

Connecticut Yankee Atomic Power Co.; Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR-61 issued to Connecticut Yankee Atomic Power Company (the licensee) for operating of the Haddam Neck Plant located in Middlesex County, Connecticut.

The proposed amendment provides an extension of the one-time relaxation of the containment integrity specifications issued as License Amendment No. 112, to allow the four containment air recirculation (CAR) fan motor heat exchangers to be cleaned or replaced while at power.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the request for amendment involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

1. *Involve a significant increase in the probability or consequences of an accident previously evaluated.* This Technical Specification change is bounded by the evaluation submitted in CYAPCO's letter dated February 10, 1989, and approved by the NRC staff in Amendment No. 112. The total time restriction of 64 hours for having the service water system open envelopes this proposed change as well. CYAPCO is not requesting an additional 64 hours, but proposes to perform the work allowed by this license amendment under the original 64-hour restriction approved in Amendment No. 112. Therefore, the 10 CFR 50.92 evaluation described in CYAPCO's February 10, 1989, license amendment request bounds this proposed change as well.

The purpose of the proposed change is to clean/replace the CAR fan motor heat exchangers. In so doing, service water flow through the heat exchanger will increase. This increase in heat removal capacity is necessary to restore the CAR unit performance to that assumed in the Updated Final Safety Analysis Report for the design service water temperature. The net effect of the change will be to improve CAR unit cooling system performance, specifically by ensuring proper fan motor cooling.

2. *Create the possibility of a new or different kind of accident from any previously evaluated.* The possibility for an accident or malfunction of a different type than any evaluated previously in the Final Safety Analysis Report is not created since the change and/or failure modes associated with the change do not modify the plant response to the point where it can be considered a new design basis accident.

The compensatory measures, combined with the short duration of containment integrity relaxation, result in an increase in the probability of failure of containment insolation of $7 \times 10^{-}$ when averaged over a year. This low probability, coupled with the low probability of accidents resulting in a release of significant radioactivity into the containment, is judged to be negligible and need not be considered for this maintenance evolution. The basis for this determination is that containment isolation failure in the current configuration has some finite probability, and the incremental increase resulting from the proposed change would be insignificantly small.

The proposed change does not create a new unanalyzed event based on compensatory measures which will be in effect. As described above, the proposed change does not increase the probability of an accident to the point where it should be considered within the design basis of the plant.

3. *Involve a significant reduction in a margin of safety.* The proposed change does not impact the consequences of an accident on the fuel or reactor coolant system protective boundaries. The proposed change will allow the opening of the service water piping inside containment for relatively short periods of time. This piping serves as the containment boundary. The relaxation of containment integrity does not represent a significant reduction in the margin of safety. As noted above, the compensatory measures which will be implemented provide reasonable assurance that the containment boundary will be maintained and that the allowable off-site dose limit will not be exceeded.

Based on the above discussion, the proposed change will not decrease the margin of safety because of:

1a. The compensatory measures to maintain the containment boundary.

b. The relatively short duration when the service water piping inside containment is open.

c. The unavailability of the CAR fan units is bounded by that allowed by both the Technical Specifications and existing administrative controls.

Therefore, based on the above considerations, the Commission has made a proposed determination that the amendment request involves no significant hazards considerations.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Writting comments may be submitted my mail to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of

this **Federal Register** notice. Written comments may also be delivered to Room P-223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland from 7:30 a.m. to 4:15 p.m Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC. The filing of request for hearings and petitions for leave to intevene are discussed below.

By June 12, 1989, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendments under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards considerations. The final determination will serve to decide when the hearing is held.

If the final determination is that the request for amendment involves no significant hazards considerations, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If a final determination is that the amendment involves significant hazards considerations, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards considerations. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to John F. Stolz: (petitioner's name and telephone number), (date petition was mailed), (plant name), and (publication date and page number of this **Federal Register** notice). A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Gerald Garfield, Esquire, Day, Berry & Howard, Counselors at Law, City Place, Hartford, Connecticut 06103-3494.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petitioner has made a substantial showing of good cause for the granting of a late petition and/or request. That determination will be based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated March 31, 1989, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the Local Public Document Room located at Russell Library, 123 Broad Street, Middletown, Connecticut 06457.

Dated at Rockville, Maryland, this 8th day of May, 1989.

For the Nuclear Regulatory Commission.

Alan B. Wang,

Project Manager, Project Directorate I-4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 89-11454 Filed 5-11-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-255]

Consumers Power Co.; Withdrawal of Application for Amendment to Provisional Operating License

The United States Nuclear Regulatory Commission (the Commisstion) has granted the request of Consumers Power Company (the licensee) to withdraw its December 13, 1983 application as supplemented by letter dated May 23, 1985, for proposed amendment to Provisional Operating License No. DPR-20 for the Palisades Plant, located in Van Buren County, Michigan.

The porposed amendment would have revised the Appendix A Technical Specifications concerning the operability of primary coolant system leakage detection systems. The revisions would have added specifications identifying the conditions under which the leakage detection systems would have to be operable, the minimum number of operable channels per system, actions to be taken when less than the minimum specified channels are operable, and periodic surveillance required.

The Commission has previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on August 22, 1984 (49 FR 33362). However, by letter dated January 24, 1989, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amenmdent dated, December 13, 1983, the supplement dated May 23, 1985, and the licensee's letter dated January 24, 1989, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, 2120 L Street, N.W., Washington, DC, and the Van Zoeren Library, Hope College, Holland, Michigan 49201.

Dated at Rockville, Maryland, this 5th day of May 1989.

For the Nuclear Regulatory Commission.

Albert W. De Agazio, Sr.,

Project Manager, Project Directorate III-1, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 89-11455 Filed 5-11-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-389]

Florida Power & Light Co.; Denial of Amendment to Facility Operating License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) has denied a request by the Florida Power & Light Company, (the licensee) for an amendment to Facility Operating License No. NPF-16 issued to the licensee for operation of the St. Lucie Plant, Unit No. 2, located in St. Lucie County, Florida. Notice of Consideration of Issuance of this amendment was published in the **Federal Register** on July 24, 1984 (49 FR 29909).

The purpose of the licensee's amendment request was to revise the Technical Specifications (TS) for the surveillance interval for the actuation logic in the Engineered Safety Features Actuation System/Auxiliary Feedwater Actuation System.

The NRC staff has concluded that the licensee's request cannot be granted. The licensee was notified of the Commission's denial of the proposed change by letter dated May 5, 1989.

By June 12, 1989, the licensee may demand a hearing with respect to the denial described above. Any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for hearing or petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date.

A copy of any petitions should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Harold F. Reis, Esquire, Newman and Holtzinger, 1615 L Street, NW., Washington, DC 20036 attorney for the licensee.

For further details with respect to this action, see (1) the application for amendment dated May 22, 1984, as supplemented on October 31, 1985, and (2) the Commission's letters to the licensee dated June 14, 1985 and May 5, 1989.

These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the Indian River Junior College Library, 3209 Virginia Avenue, Fort Pierce, Florida 33450. A copy of Item (2) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Document Control Desk.

Dated at Rockville, Maryland, this 5th day of May 1989.

For the Nuclear Regulatory Commission.

Herbert N. Berkow,

Director, Project Directorate II-2, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 89-11456 Filed 5-11-89; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF MANAGEMENT AND BUDGET

Center for Information Technology Management Alternatives

AGENCY: Office of Management and Budget.

ACTION: Request for comments; Center for Information Technology Management.

SUMMARY: Under the authority of the Paperwork Reduction Act (U.S.C. 44, Chapter 35), the Office of Management and Budget (OMB) is undertaking an examination of alternatives for a center for imformation technology management. The purpose of such a center would be to provide agencies with advice and assistance regarding the technical management of major government information technology initiatives, not to design or build systems, or provide other functions already available from other sources.

Alternatives being considered include: (1) Using an existing commercial source(s); (2) establishing a center as part of a Federal agency; or (3) establishing a private, not-for-profit entity as a Federally Funded Research and Development Center in accordance with Office of Federal Procurement Policy Letter No. 84-1. OMB is seeking comments on alternatives. As a result of a review of comments received, OMB will determine the need for, and its approach to establishing such a center.

DATE: OMB will accept comments submitted by June 12, 1989.

ADDRESS: Written comments should be submitted to "CITEM" New Executive Office Building, Room 3235, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Judith Poorbaugh, Office of Management and Budget, Office of Information Technology Management, 725 17th Street NW., Room 3235, Washington, DC 20503, (202) 395-7231.

Issued in Washington, DC, May 5, 1989.

Jay Plager,

Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

[FR Doc. 89-11391 Filed 5-11-89; 8:45 am]

BILLING CODE 3110-01-M

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.

ACTION: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s)

(1) *Collection title:* Procurement Requests
(2) *Form(s) submitted:* 1
(3) *OMB Number:* 3220–0139
(4) *Expiration date of current OMB clearance:* Three years from date of OMB approval
(5) *Type of request:* Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection
(6) *Frequency of response:* On occasion
(7) *Respondents:* Businesses or other for-profit, Non-profit institutions, Small businesses or organizations
(8) *Estimated annual number of respondents:* 38
(9) *Total annual responses:* 55
(10) *Average time per response:* 1.08
(11) Total annual reporting hours: 51
(12) *Collection description:* The collection obtains the information needed from bidders to award contracts for services or equipment.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Ronald Ritter, the agency clearance officer (312–751–4692). Comments regarding the information collection should be addressed to Ronald Ritter, Railroad Retirment Board, 844 Rush Street, Chicago, Illinois 60611 and the OMB reviewer, Justin Kopca (202–395–7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Ronald Ritter,

Acting Director of Information Resources Management.

[FR Doc. 89–11422 Filed 5–11–89; 8:45 am]

BILLING CODE 7905–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–16947; 812–7068]

The Advantage Income Opportunity Fund; Notice of Application

May 5, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("1940 Act").

APPLICANT: The Advantage Income Opportunity Fund.

Relevant 1940 Act Sections: Exemption requested under section 6(c) from the provisions of sections 2(a)(32), 2(a)(35), 22(c) and 22(d) of the 1940 Act and Rules 22c–1 and 22d–1 thereunder and under section 11(a) of the 1940 Act.

Summary of Application: The Applicant seeks an order that would permit it and other investment companies in the same family of funds created in the future to assess a contingent deferred sales load ("CDSL") on certain redemptions and to waive the CDSL under certain circumstances and to permit certain exchange privileges.

FILING DATE: The application was filed on July 14, 1988 and amended on March 3, 1989.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m., on May 30, 1989, and accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reasons for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

Addresses: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, c/o Boston Security Counsellors, Inc., 60 State Street, Boston, MA 02109.

FOR FURTHER INFORMATION CONTACT: H. R. Hallock, Jr., Special Counsel, at (202) 272–3030 (Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231–3282 (in Maryland (301) 258–4300).

Applicants Representations

1. The Applicant is an open-end diversified management investment company registered under the 1940 Act which will be the fifth fund in the "Advest Advantage" group of investment companies (as that term is defined in Revised Proposed Rule 11a–3). Each of the four existing funds in the Advest Advantage group of funds is a registered open-end management investment company under the 1940 Act. Under a previous order issued by the SEC in Investment Company Rel. No. 14927 (January 30, 1986) and an amended order in Investment Company Rel. No. 15490 (December 22, 1986) the four existing funds were granted exemptions substantially identical to those now sought by the Applicant. The Applicant requests that the exemptive relief extend to it and to subsequently organized but substantially identically situated investment companies or series of one or more investment companies, in either case within the Advest Advantage group of investment companies.

2. Boston Security Counsellors, Inc. ("BSC") will act as the Applicant's investment adviser and Advest, Inc. ("Advest") will act as the Applicant's principal underwriter. BSC and Advest are wholly-owned subsidiaries of The Advest Group, Inc., which is a publicly-owned holding company the subsidiaries of which offer diverse financial services.

3. Applicant proposes to enter into a distribution agreement with Advest (the "Distribution Agreement") and to adopt a distribution plan pursuant to Rule 12b–1 under the Act (the "Distribution Plan"). The Distribution Agreement and the Distribution Plan will be substantially identical to the parallel agreement and plan for each of the four existing funds. It is currently proposed that under its Distribution Plan the Applicant would be authorized to spend an amount, calculated at the rate of .95% annually of its average daily net asset value (or portion thereof included in the period for which the computation is being made), on activities primarily intended to result in the sale of its shares. In its periodic review of the Distribution Plan, the Applicant's Board of Trustees will consider, among other things, the amount of revenues received by Advest as a result of imposition of the contingent deferred sales load described below.

4. Applicant proposes to impose a deferred sales load at the time of redemption of certain shares within four years after purchase. The contingent deferred sales load will be imposed as a declining percentage ranging from 4% to 1%, depending on the length of time the shares have been held, of the lesser of (i) the net asset value of the shares being redeemed or (ii) the total purchase cost of such shares. No deferred sales

load will be imposed when a shareholder redeems amounts derived from (i) increases in the value of his or her account above the total cost of such shares due to increases in the net asset value per share or (ii) shares acquired through reinvestment of dividend income and capital gains distributions. In addition, no deferred sales load will be imposed with respect to redemptions of shares which have been held for four years. In determining whether a deferred sales load will be payable and, if so, the percentage charge applicable, it will be assumed that shares held the longest are the first to be redeemed.

5. The Applicant further proposes to permit exchanges of its shares with shares of the other investment companies in the Advest Advantage group, as more fully described in paragraph 7 below. Applicant represents that no CDSL will be imposed on exchanges of shares among the Applicant and other funds in the Advest Advantage group; however, if shares are subject to a CDSL, the CDSL (and the date of purchase for purposes of determining the applicable percentage) will carry over to the shares being acquired.

6. Under Applicant's proposal, the CDSL would be waived with respect to the following redemptions: (i) Any partial or total redemption of shares of a shareholder who dies or becomes disabled, so long as the redemption is requested within one year of death or the initial determination of disability; (ii) any partial or complete redemption in connection with certain distributions from Individual Retirement Accounts ("IRAs") or other qualified retirement plans; (iii) redemptions effected pursuant to Applicant's systematic withdrawal plans; (iv) redemptions effected pursuant to Applicant's right to liquidate a shareholder's account if the aggregate net asset value of the shares held in the account is less than $500; (v) redemptions effected by (a) employees of The Advest Group, Inc., and its subsidiaries, (b) IRAs, Keogh plans and employee benefit plans for those employees, and (c) spouses and minor children of those employees, so long as orders for Applicant's shares on behalf of the spouses and children are placed by the employees; (vi) redemptions effected by accounts managed by investment advisory subsidiaries of The Advest Group, Inc. registered under the Investment Advisers Act of 1940; (vii) redemptions effected by directors or trustees of any investment company for which Advest serves as distributor; (viii) redemptions effected by an investment company registered under the 1940 Act in connection with the combination of the investment company with Applicant by merger, acquisition of assets, or by any other transaction; and (ix) redemptions the proceeds of which are deposited into the Advantage Insured Account (although withdrawals from such Account may be subject to the CDSL if made within four years from the initial purchase of shares). (The Advantage Insured Account is a money market deposit account maintained for the benefit of shareholders of the Advest Advantage group of investment companies.) Applicant also proposes to institute a one-time only reinvestment privilege under which a shareholder who redeems shares subject to the CDSC and reinvests the proceeds of the redemption within 30 days of the redemption would receive a credit against the amount of the CDSL paid. The percentage of the CDSL credited to the shareholder would be the same as the percentage of the redemption proceeds which are reinvested.

7. Applicant proposes to offer to exchange its shares with shares of other members of the Advest Advantage group of investment companies at their relative net asset values. A $5.00 service fee, however, will be deducted on each exchange. The service fee is an administrative charge that will be paid by a shareholder to defray the expense of facilitating the exchange. When shares of the Applicant are exchanged pursuant to the exchange privilege, the date of purchase of such shares will continue to apply for purposes of any future deferred sales load.

Applicant's Legal Analysis

1. The proposals are fair and in the best interest of shareholders for a number of reasons. The operation of the CDSL will enable Applicant's shareholders to have the advantage of greater investment dollars working for them from the time of their purchase of shares than would be the case if shares were sold subject to a traditional front-end sales load. Further, the CDSL is fair to shareholders because it applies only to redemptions of amounts representing purchase payments for shares and does not apply to either increases in the value of a shareholder's account through capital appreciation or to increases representing reinvestment of dividends or distributions.

2. Certain of the waivers from the CDSL are justified on basic considerations of fairness to shareholders. For example, waiving the CDSL in the extraordinary circumstances of death or disability of a shareholder is inherently fair to shareholders. Waiving the CDSL with respect to an involuntary redemption effected pursuant to the right to liquidate shareholder accounts is justified on basic considerations of fairness, because to impose a charge for an involuntary redemption would be equivalent to imposing a penalty upon a shareholder. The proposed waiver with respect to redemptions effected pursuant to Applicant's systematic withdrawal plans is fair because it will enable shareholders to receive the full benefit of those plans. Waiving the CDSL with respect to redemption proceeds deposited in the Advantage Insured Account is fair and beneficial to shareholders because it allows them to change the nature of their investment (to an interest-bearing deposit account) without paying the CDSL.

3. The proposed waiver of the CDSL with respect to redemptions in connection with certain distribution from IRAs or other qualified retirement plans is appropriate for public policy reasons. Waiving the CDSL on certain distributions from qualified retirement plans is fully consistent with the provisions of the International Revenue Code granting favored tax treatment to accumulations under those plans and imposing additional taxes on early distributions from IRAs and other plans.

4. A number of the proposed waivers from the CDSL are appropriate because they involve the redemptions of shares sold at little or no selling expense to Advest. Included in this group of waivers are those waivers with respect to (i) redemptions effected by accounts managed by registered investment advisory subsidiaries of The Advest Group, Inc., (ii) redemptions by employees of The Advest Group, Inc., (ii) redemptions by employees of The Advest Group, Inc. and its subsidiaries, and individuals and plans related to those employees, (iii) redemptions effected by directors or trustees of any investment company for which Advest serves as distributor, and (iv) redemptions effected by a registered investment company in connection with the combination of the investment company with the Applicant.

5. Like the proposed waivers of the CDSL, the proposed one-time only credit of all or a portion of the CDSL application to a shareholder who redeems shares subject to the CDSL and reinvests the proceeds of the reemption within 30 days of the redemption is in the interestes of shareholders. The crediting procedures will afford a shareholder the opportunity to determine without fear of being subjected to the CDSL whether the redemption was the best means of

satisfying his or her current financial needs.

6. The proposed exchange privilege will provide shareholders the opportunity to change their investment objective from time to time. The imposition of the $5.00 service fee is fair and will not harm shareholders or discriminate among shareholders. The service charge is designed merely to compensate for the costs incurred in facilitating those transactions. Revised proposed Rule 11a-3 (Investment Company Act Release No. 16504, July 29, 1988) (53 FR 30299 (Aug. 11, 1988)), if adopted, would permit the Applicant to institute the exchange privilege of the type described above and in the application.

Applicant's Conditions

If the requested order is granted, Applicant agrees to the following conditions:

1. Applicant will comply with the provisions of Rule 22d-1 under the 1940 Act with respect to the CDSL to the same extent it would be required if any contingent deferred sales load imposed by Applicant were a sales load within the meaning of section 2(a)(35) of the 1940 Act.

2. Applicant will comply with the provisions of Rule 12b-1 (or any successor rule) under the 1940 Act, as such rule may be amended from time to time.

3. Applicant will comply with the provisions of Rule 6c-10 (or any similar rule) as it currently is proposed and as it may be further revised and adopted.

4. Applicant will comply with the provisions of revised proposed Rule 11a-3 (or any similar rule) under the 1940 Act as it currently exists and as it may be further revised and adopted.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-11413 Filed 5-11-89; 8:45 am]

BILLING CODE 8010-01-M

[File No. 500-1]

Novaferon Labs, Inc.; Order of Suspension of Trading

May 9, 1988.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Novaferon Labs, Inc., a Colorado corporation with executive offices located at 120 East Mill Street, Suite 346, Akron, Ohio 44308, and that questions have been raised about the adequacy and accuracy of publicly disseminated information concerning, among other things, the valuation of the company's assets, the results of its business operations, and the identity of the owners of its common stock and warrants. The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Novaferon Labs, Inc.

Therefore, it is Ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Novaferon Labs, Inc., over-the-counter or otherwise, is suspended for the period from 9:30 a.m. (E.D.T.) on May 9, 1989, through 11:59 p.m. (E.D.T.) on May 18, 1989.

By the Commission.

Jonathan G. Katz,

Secretary

[FR Doc. 89-11452 Filed 5-11-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-16946; 812-7176]

Piper Jaffray Investment Trust; Application for Exemption

May 5, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("1940 Act").

Applicants: Piper Jaffray Investment Trust Inc. (including the following ten series: Value Fund; Sector Performance Fund; Balanced Fund; Government Income Fund; Money Market Fund; U.S. Government Money Market Fund; Tax-Exempt Money Market Fund; National Tax-Exempt Fund; Minnesota Tax-Exempt Fund; and Institutional Government Income Portfolio), American Government Income Fund Inc., American Government Income Portfolio, Inc., American Government Term Trust Inc., and all future series of Piper Jaffray Investment Trust Inc. and all future investment companies for which subsidiaries or affiliates of Piper Jaffray Incorporated serve as investment adviser (the "Funds") and Piper Capital Management Incorporated.

Relevant 1940 Act Sections: Exemption requested under section 17(d) of the 1940 Act and Rule 17d-1 thereunder.

Summary of Application: Applicants seek an order permitting the Funds to deposit uninvested cash balances into a single joint account to be used to enter into one or more large repurchase agreements.

Filing Date: The application was filed on November 12, 1988 and amended April 28, 1989. An additional amendment, the substance of which has been set forth in a letter to the SEC dated May 4, 1989, and which thus is included herein, will be filed during the notice period.

Hearing or Notification of Hearing: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, pesonally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 30, 1989, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

Addresses: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicants, Piper Jaffray Tower, 222 South Ninth Steet, Minneapolis, Minnesota 55402.

For Further Information Contact: Barbara Chretien-Dar, Staff Attorney, at (202) 272-3022 or Stephanie Monaco, Branch Chief, at (202) 272-3030 (Office of Investment Company Regulation).

Supplementary Information: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commerical copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations

1. The Funds are investment companies registered under the 1940 Act. American Government Income Fund Inc., American Government Income Protfolio, Inc., and American Government Term Trust Inc. are closed-end management investment companies. Piper Jaffray Investment Trust Inc. is an open-end management investment company the shares of which are currently offered in ten series. Each of the Funds has entered into an investment advisory contract with Piper Capital Management Incorporated.

2. Each of the Funds is presently authorized to invest in repurchase agreements and has established certain systems and standards that comply with the requirements regarding repurchase agreements set forth by the SEC in its

published releases, guidelines and interpretations.

3. In the normal case, at the end of each trading day each of the Funds has uninvested cash balances in its custodial bank account. The uninvested cash of each Fund is normally invested in short-term money market securities, overnight repurchase agreements with a bank or broker-dealer, or other short-term investments authorized by its investment policies in order to earn additional income for that Fund. Currently each Fund separately pursues, secures and implements such investments, resulting in certain inefficiencies and increased costs, and limiting the return which some or all of the Funds could otherwise achieve. In addition, there can remain, in the respective account of each Fund, some amount which is received too late in the day or is too small to be effectively invested in a separate transaction and/or at a rate reflecting the cost and investment risk of the transaction.

4. The Funds propose to establish a joint account for the purpose of entering into repurchase agreements. In the future, in the event the Funds have more than one custodian bank, the respective Funds propose to establish a joint account at each such custodian bank pursuant to the conditions set forth below. At the conclusion of its daily trading activity, each Fund participating in the joint account on that day, would automatically transfer its remaining uninvested cash into the joint account. The joint account would not be distinguishable from any other account maintained by a Fund with its custodian bank except that monies from each Fund could be deposited in the custodian bank on a commingled basis. The account would not have any separate existence which would have indicia of a separate legal entity. The sole function of this account would be to provide a convenient way of aggregating what otherwise would be the one or more individual daily transactions for each Fund necessary to manage their respective daily uninvested cash balances.

5. Each of the Funds would participate in the proposed joint account on the same basis as every other Fund in conformity with its respective fundamental investment objectives, policies and restrictions. Piper Capital Management Incorporated would have no monetary participation in the joint account, but would be responsible for investing monies in the account, establishing accounting and control procedures, ensuring the equal treatment of each Fund, and ensuring that the assets of the Funds would continue to be held under proper bank custodial procedures.

6. The joint account would save the Funds substantial amounts in yearly transaction fees, allow the Funds to negotiate higher rates of return, and reduce the possibility of errors by reducing the number of trade tickets. The joint account would also allow the Funds to increase the amount of a repurchase agreement in the event that excess cash becomes available late in the day. This possibility generally does not exist with smaller repurchase agreements where the institution may have already committed its eligible securities early in the day. Applicants estimate that, had the joint account been in place, the Funds would have had an aggregate savings of approximately $100,000 in transaction fees alone for the twelve months ended September 30, 1988 (annualizing amounts spent by certain Funds that were in existence for less than the twelve-month period).

7. Any future Funds that participate in the joint account would be required to do so on the same terms and conditions as the existing Funds.

8. Any joint repurchase agreement transaction will comply with the standards and guidelines set forth in Investment Company Act Release No. 13005 (February 3, 1983) and with other existing and future positions taken by the SEC or its staff by rule, release, letter or otherwise relating to joint repurchase agreement transactions.

Conditions

As an express condition to obtaining an exemptive order, Applicants agree to operate the joint account according to the following procedures:

(1) A separate cash account would be established at the custodian bank into which each Fund would deposit its daily uninvested net cash balances;

(2) Cash in the joint account would be invested solely in repurchase agreements collateralized by suitable United States Government obligations; such repurchase agreements would satisfy the most restrictive standards for repurchase agreement transactions set by any of the Funds participating in a particular repurchase agreement transaction;

(3) All investments held by the joint account would be valued on an amortized cost basis;

(4) Each Fund valuing its assets on the basis of amortized cost would use the average maturity of the joint account for the purpose of computing the Fund's average portfolio maturity with respect to the portion of its assets held in such account on that day;

(5) In order to assure that there would be no opportunity for one Fund to use any part of a balance of the joint account credited to another Fund, no Fund would be allowed to create a negative balance in the joint account for any reason, although it would be permitted to draw down its entire balance at any time; each Fund's decision to invest in the joint account would be solely at its option, with a Fund being required neither to invest a minimum amount nor to maintain a minimum balance; each Fund would retain the sole ownership rights to any of its assets invested in the joint account, including interest payable on the assets invested in the joint account; each Fund's investment in the joint account would be documented daily on the books of the Fund and of the Fund's custodian bank;

(6) Each Fund would participate in the income earned or accrued in the joint account and all instruments (*i.e.*, cash and United States Government securities) held in the joint account on the basis of the percentage of the total amount in the account on any day represented by its share of the account;

(7) Piper Capital Management Incorporated would administer the investment of the cash balances in and operation of the joint account and would not collect any separate fees for the management of the joint account;

(8) The administration of the joint account would be within the fidelity bond coverage required by section 17(g) of the 1940 Act and Rule 17g-1 thereunder; and

(9) The governing bodies of each existing Fund and any future Funds participating in any joint account would evaluate annually the joint account arrangements, and would continue participation in the account only if there was a reasonable likelihood that the Fund and its shareholders would benefit from continued participation.

For the Commission, by the Division of Investment Management, under to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-11414 Filed 5-11-89; 8:45 am]

BILLING CODE 8010-01-M

[File No. 500-1]

Westminister Financial Corp.; Order of Suspension of Trading

May 8, 1989.

It appears to the Securities and Exchange Commission that there is a lack of adequate current information

concerning the securities of Westminister Financial Corporation ("Westminister") and that questions have been raised about the adequacy and accuracy of publicly disseminated information concerning, among other things, Westminister's financial condition, its assets and equity, the identity and background of its officers and affiliates, and other matters. The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Westminister.

Therefore, it is ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Westminister, over-the-counter or otherwise, is suspended for the period from 9:30 a.m. (EDT) on May 8, 1989 through 11:59 p.m. (EDT) on May 17, 1989.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-11415 Filed 5-11-89; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

Region I Advisory Council; Public Meeting

The U.S. Small Business Administration, Region I Advisory Council, located in the geographical area of Montpelier, will hold a public meeting at 4:00 p.m. on Thursday, May 18, 1989, at the Holiday Inn, White River Junction, Vermont, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Ora H. Paul, District Director, U.S. Small Business Administration, Federal Building, 87 State Street, P.O. Box 605, Montpelier, Vermont 05602, phone (802) 828-4422.

Jean M. Nowak,

Director, Office of Advisory Councils.

May 3, 1989.

[FR Doc. 89-11389 Filed 5-11-89; 8:45 am]

BILLING CODE 8025-01-M

[Application No. 03/03-0188]

Dominion Capital Markets Corp.; Application for a Small Business Investment Company License

An application for a license to operate a small business investment company under provisions of section 301(c) of the Small Business Investment Act of 1958, as amended, (the Act), (15 U.S.C. 661 *et seq.*) has been filed by Dominion Capital Markets Corporation, 213 South Jefferson Street, Roanoke, Virginia 24011, with the Small Business Administration (SBA) pursuant to 13 CFR 107.102 (1989).

The officers, directors and major shareholder of the Applicant are as follows:

Name	Title or relationship	Percent of ownership
Gregory West Feldmann, 102 Wycliffe Ave., Roanoke, Virginia 24014.	President	
Carlyle Evans Stull, Jr., 3306 Holyfield Circle, Roanoke, Virginia 24018.	Exec. Vice President.	
Rodney Wayne Rowan, 5111 Meadow Creek Drive, Roanoke, Virginia 24019.	Treasurer	
Robert Louis Taylor, 1247 Hamilton Terrace, Roanoke, Virginia 24014.	Secretary	
Barbara Nall Hicks, 440 Highland Avenue, SW., Roanoke, Virginia 24016.	Assistant Secretary.	
Edward Moore Newman, 3915 Sandpiper Drive, SW., Roanoke, Virginia 24018.	Taxation Officer.	
Thomas Michael Smith, 2015 Carter Road, Roanoke, Virginia 24015.	Chairman of the Board Director.	
James Richard Carling, 2703 Jefferson Street, SW., Roanoke, Virginia 24014.	Director	
Donald Marshall Kinzer, 8261 Lomon Drive, Roanoke, Virginia 24019.	Director, CFO	
Dominion Bank, National Association, 213 South Jefferson Street, Roanoke, Virginia 24011.		100

Dominion Capital Markets Corporation (DCMC) will be a wholly-owned subsidiary of Dominion Bank, National Association.

The Applicant, DCMC, a Virginia Corporation, will begin operations with $3,000,000 paid-in capital and paid-in surplus. DCMC will conduct its activities primarily in the State of Virginia, but will consider investments in businesses in North Carolina, Tennessee, West Virgina, Washington, DC and Maryland.

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 company under their management, including adequate profitability and financial soundness, in accordance with the Small Business Investment Act of 1958, as amended, 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 Applicant. Any such communication should be addressed to the Deputy Associate Administrator for Investment, Smalll Business Administration, 1441 "L" Street NW., Washington, DC 20416.

A copy of this notice shall be published in a newspaper of general circulation in Roanoke, Virginia.

(Catalog of Federal Domestic Assistance Program No. 59-011, Small Business Investment Companies)

Robert G. Lineberry,

Deputy Associate Administrator for Investment

Dated: May 4, 1989.

[FR Doc. 89-11390 Filed 5-11-89; 8:45 am]

BILLING CODE 8025-01-M

UNITED STATES INFORMATION AGENCY

United States Advisory Commission; on Public Diplomacy

A meeting of the U.S. Advisory Commission on Public Diplomacy will be held May 24, 1989 in Room 600, 301 4th Street, SW Washington, DC from 10:30 a.m. to 12:15 a.m.

The Commission will meet with Mr. Jake Gillespie, Deputy Director, Press and Publications Division, USIA and Mr. Michael Canning, Chief, Publications Division, USIA for a discussion of USIA's magazines and other pubications. The Commission will also meet with Mr. G. Michael Eisenstadt, Director, Office of European Affairs, USIA, for a follow-up discussion of the London PAO Conference and CSCE London Information Forum.

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: May 8, 1989.

Ledra L. Diddy,

Staff Asst., Federal Register Liaison.

[FR Doc. 89-11470 Filed 5-11-89; 8:45 am]

BILLING CODE 8230-01-M

Determination To Close Radio Engineering Advisory Committee Meeting

May 25, 1989.

I hereby determine that the meeting scheduled by the Radio Engineering Advisory Committee on May 25, 1989, to discuss current operations and future plans of the Voice of America (VOA) may be closed to the public.

This meeting will concern issues relating to negotiations with other governments. The information relating to such negotiations is specifically authorized under criteria established by Executive Order to be kept secret in the interest of foreign policy and is properly classified pursuant to Executive Order.

I hereby determine, therefore, that the meeting scheduled by the Radio Engineering Advisory Committee on May 25, 1989, may be closed to the public (5 USC 552b(c)(1)).

Date: May 5, 1989.

Bruce S. Gelb,

Director.

[FR Doc. 89-11471 Filed 5-11-89; 8:45 am]

BILLING CODE 8230-01-M

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; Amendment of System Notice; Changes Other Than Routine Use Statements

Notice is hereby given that the Department of Veterans Affairs is amending the system of records identified as 43VA71, "Veterans and VA Beneficiaries Who Have Responded to VA Sample Surveys—VA", as set forth on page 795 of the **Federal Register** document entitled "Privacy Act Issuances", 1987 Compilation, Volume V.

Changes are being made to the system name to reflect a modest extension of the nature of the system. Other sections affected are the sections on System Location, Categories of Individuals Covered by the System, Retrievability, Safeguards, Retention and Disposal, and Record Source Categories.

A "Report of Altered System" and an advance copy of the revised system notice have been sent to the Chairman of the House Committee on Government Operations, the Chairman of the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB), as required by 5 U.S.C. 552a(r) (Privacy Act), guidelines issued by the OMB (50 FR 52730), December 24, 1985, and Pub. L. 100-503.

The Privacy Act of 1974, 5 U.S.C. 552a(e), as amended by Pub. L. 97-375, requires agencies to inform the public of any changes to their system of records. However, since these changes do not alter the routine uses of the information in the system of records, public comment is not required.

The Office of Management and Budget requires that an altered system report be distributed not later than 60 days prior to implementation. OMB has been requested to waive this requirement.

Approved: April 28, 1989.

Edward J. Derwinski,

Secretary of Veterans Affairs.

Notice of Amendment to System of Records

The system identified as 43VA71, "Veterans and VA Beneficiaries Who Have Responded to VA Sample Surveys—VA", appearing on page 795 of the **Federal Register** publication, "Privacy Act Issuances", 1987 Compilation, Volume V, is amended by revising the entries shown below:

43VA71

SYSTEM NAME:

Veterans, Dependents of Veterans, and VA Beneficiary Survey Records—VA.

SYSTEM LOCATION:

Tape and disk records are located and maintained at the VA Data Processing Center (DPC), 1615 East Woodward Street, Austin, Texas 78772; at VA Central Office, 810 Vermont Avenue, NW., Washington, DC 20420; or with private contractors acting as agents of the VA. Paper records are stored at the Washington National Records Center (WNRC) or with private contractors acting as agents of the VA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The following categories of individuals are covered by this system: (1) Veterans, (2) dependents of veterans, and (3) other VA beneficiaries.

* * * * *

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

* * * * *

RETRIEVABILITY:

Records may be retrieved by name, social security number, date of birth, other potentially unique identifier, or a combination of identifiers which are unique when used in combination.

SAFEGUARDS:

Access to the tape copies at the VADPC is restricted to authorized VA employees. Access to the computer room where the tapes are maintained within the DPC is further restricted to authorized VA employees on a need-to-know basis and is protected from unauthorized access by an alarm system, the Federal Protective Service, and VA security personnel. Access to the duplicate tapes at Central Office, when such tapes exist, is restricted to authorized VA employees on a need-to-know basis. The tapes are maintained in a locked drawer and protected from outside access by the Federal Protective Service and VA security personnel.

The paper records are maintained in a locked room at the WNRC and are protected from outside access by the Federal Protective Service. Both paper and tape records maintained by contractors are held in equally secured conditions.

RETENTION AND DISPOSAL:

Paper records (questionnaries) are sent to storage in the WNRC or held by contractors and are retained for 10 years, subject to review at 3 year intervals, and then destroyed by burning or shredding. The magnetic tapes retained by the VA Office of Information Management and Statistics, the VADPC, or contractors, are subject to review at 3 year intervals; final disposition is by erasure of the magnetic tape.

* * * * *

RECORD SOURCE CATEGORIES:

Information in the record is obtained from survey questionnaries provided by veterans, dependents, or VA beneficiaries in the survey sample and from veterans, dependents, or VA beneficiaries on particular VA benefit rolls.

* * * * *

[FR Doc. 89-11287 Filed 5-11-89; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 91
Friday, May 12, 1989

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:30 a.m. on Tuesday, May 16, 1989, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors, pursuant to sections 552b (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of Title 5, United States Code, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Application for consent to purchase assets and assume liabilities and to establish a branch:

West Alabama Bank & Trust, Reform, Alabama, for consent to purchase certain assets of and assume the liability to pay the deposits made in First State Bank of Carrollton, Alabama, Carrollton, Alabama, and for consent to establish the sole office of First State Bank of Carrollton as a branch of West Alabama Bank & Trust.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal proceedings, or assessment of civil money penalties) against certain insured banks or officers, directors, employees, agents or other persons participating in the conduct of the affairs thereof:

Names of persons and names and locations of banks authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(6), (c)(8), and (c)(9)(A)(ii)).

Note.—Some matters falling within this category may be placed on the discussion agenda without further public notice if it becomes likely that substantive discussion of those matters will occur at the meeting.

Recommendation regarding the Corporation's assistance agreement with an insured bank.

Reports of the Director, Office of Corporate Audits and Internal Investigations:

Audit Report re: Audit of Loan Management and Liquidation, DOL Northern California Consolidated Office (Memo dated April 12, 1989).

Audit Report re: Audit of Accounts Payable Controls (Memo dated March 21, 1989).

Audit Report re: Audit of Outside Legal Fees (Memo dated March 31, 1989).

Discussion Agenda:

Application for Federal deposit insurance:

Westcoast Thrift and Loan Company, a proposed new industrial bank to be located at 299 West Hillcrest Drive, Suite 100, Thousand Oaks, California.

Recommendation regarding the liquidation of a bank's assets acquired by the Corporation in its capacity as receiver liquidator, or liquidating agent of those assets:

Case No. 47,315—First Service Bank for Savings, Leominster, Massachusetts

Personnel actions regarding appointments, promotions, administrative pay increases, reassignments, retirements, separations, removals, etc.:

Names of employees authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(2) and (c)(6) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(2) and (c)(6)).

Matters relating to the possible closing of certain insured banks.

Names and locations of banks authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 500-17th Street, NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Deputy Executive Secretary of the Corporation, at (202) 898-3811.

Dated: May 9, 1989.

Federal Deposit Insurance Corporation.
Robert E. Feldman,
Deputy Executive Secretary.

[FR Doc. 89-11568 Filed 5-10-89; 12:07 am]
BILLING CODE 6714-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10:00 a.m. on Tuesday, May 16, 1989, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous meetings.

Reports of actions approved by the standing committees of the Corporation and by officers of the Corporation pursuant to authority delegated by the Board of Directors.

Discussion Agenda:

Memorandum and resolution re: Proposed amendments to Part 335 of the Corporation's rules and regulations, entitled "Securities of Nonmember Insured Banks," which amendments would revise the Corporation's securities disclosure regulations issued under The Securities Exchange Act of 1934 in order to bring them into substantial similarity with those of the Securities and Exchange Commission.

Memorandum and resolution re: Proposed Statement of Policy on Minimum Recommended External Auditing Procedures for State Nonmember Banks.

The meeting will be held at the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, N.W., Washington, D. C.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Deputy Executive Secretary of the Corporation, at (202) 898-3811.

Dated: May 9, 1989.

Federal Deposit Insurance Corporation.
Robert E. Feldman,
Deputy Executive Secretary.

[FR Doc. 89-11567 Filed 5-10-89; 12:07 pm]
BILLING CODE 6714-01-M

Corrections

Federal Register
Vol. 54, No. 91
Friday, May 12, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 1

[Docket No. 88-013]

Animal Welfare—Definition of Terms

Correction

In proposed rule document 89-5611 beginning on page 10822 in the issue of Wednesday, March 15, 1989, make the following corrections:

§ 1.1 [Corrected]

1. On page 10833, in the second column, in § 1.1, in the definition for "Euthanasia", in the first line "human" should read "humane".

2. On the same page, in the third column, in the definition for "Federal research facility", in the second line, "such" should read "each".

3. On page 10834, in the second column, in the definition for "Primary enclosure", in the second line, "devide" should read "devise".

4. on page 10835, in the first column, in the definition for "Transportation device", in the first line, "Transportation" should read "Transporting".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 2

[Docket No. 88-014]

Animal Welfare Regulations

Correction

In proposed rule document 89-5612 beginning on page 10835 in the issue of Wednesday, March 15, 1989, make the following corrections:

1. On page 10854, in the first column, in the eighth line, "§ 2.30(s)(4)" should read "§ 2.30(e)(4)".

§ 2.11 [Corrected]

2. On page 10886, in the first column, in § 2.11(a)(1), in the fourth line, "§ 2.5" should read "§ 2.6".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 3

[Docket No.87-004]

Animal Welfare—Standards

Correction

In proposed rule document 89-5613 beginning on page 10897 in the issue of Wednesday, March 15, 1989, make the following corrections:

1. On page 10898, in the first column, in the last paragraph, in the third line "in" should read "to".

2. On page 10901, in the first column, in the second complete paragraph, in the sixth line "§ 3.4(4)(1)" should read "§ 3.4(a)(1)".

3. On the same page, in the third column, the second heading should read "*Specific Provisions for Sheltered Housing Facilities*".

4. On page 10902, in the first column, in the second complete paragraph, in the 16th line, after "clean" insert a comma.

5. On page 10908, in the first column, in the second complete paragraph, in the fifth line, after "sit", insert "stand,".

6. On page 10909, in the first column, after the 21st line, insert "primary enclosure be positioned in a", and in the 32nd line, after "only" insert "if".

7. On page 10912, in the third column, under *Miscellaneous*, in the first line, after "§ 3.41,", insert "3.65,".

8. On page 10920, in the first column, in the last paragraph, in the fifth line, "are" should read "and".

9. On page 10929, in the third column, in the table, under "Costs," the entry beginning "APHIS" should read "APHIS program costs $2 million" and the next entry should read "Impact on Federal sites*".

§ 3.6 [Corrected]

10. On page 10934, in the second column, in § 3.6(d)(2), in the sixteenth line, "no" should read "so".

§ 3.13 [Corrected]

11. On page 10937, in the first column, in § 3.13(f)(3), in the seventh line, "now" should read "not".

§ 3.14 [Corrected]

12. On page 10938, in the first column, in § 3.14(d)(2), in the fourth line, "acts" should read "cats".

§ 3.28 [Corrected]

13. On page 10940, in the second column, in § 3.28(b)(2)(ii), in the table, the heading for the second and third columns should read "Minimum floor space".

§ 3.53 [Corrected]

14. On page 10941, in § 3.53(b), in the section of the table pertaining to "Females with litters", in the fourth column of figures, "7.0" should read "7.5".

§3.80 [Corrected]

15. On page 10946, in the table, make the following corrections:

a. In the heading in the fifth column, the first line should read "Shelter" and the second line should read "Dens/Nest Boxes".

b. In the first column, insert "1." above "Prosimians".

c. In the second column, "Smaller species." should begin directly under "Loris".

d. In the fifth column, in the third entry (corresponding with "Larger Species") after "(18.8in)" insert "for each adult in upper half of exhibit."

e. In the same column, in the fourth entry (corresponding with "Lemurs"), in the last line, remove "and".

16. On page 10947, in the table, make the following corrections:

a. In the heading in the fifth column, the first line should read "Shelter" and the second line should read "Dens/Nest Boxes".

b. In the first column, insert "2." above "Marmosets".

c. In the same column, insert "3." above "Other New".

d. In the same column, insert "4." above "Langurs".

e. In the same column, insert "5." above "Other Old".

f. In the same column, insert "6." above "Lesser Apes".

g. In the same column, insert "7." above "Greater Apes".

h. In the fourth column, in the fourth entry (corresponding with "Avahis"), "(167.4ft) should read "(16.4ft)".

i. In the same column, the 16th entry (corresponding with "Howler") should read "3m L × 3m W × 3m H".

j. In the same column, in the first line of the 20th entry (corresponding with "Baboons, Drills,") "54" should read "5".

k. In the same column, in the 22nd entry (corresponding with "Siamangs"), "(14 ft" should read "(14 ft)'.

§3.87 [Corrected]

16. On page 10950, in the third column, in § 3.87(a)(3), in the third line, "continued" should read "contained".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Forest Service

Screening of Effects of Proposed Emissions on Air Quality Related Values in Class I Wilderness Areas

Correction

In notice document 89-9733 beginning on page 16382 in the issue of Monday, April 24, 1989, make the following correction:

On page 16383 in the 2nd column, in the 27th through 66th lines the text that appears between "workshop." and "The Regional screening" is duplicate material and should be removed.

BILLING CODE 1505-01-D

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1 and 2

[Docket No. 90363-9063]

RIN 0651-AA40

Patent and Trademark Automated Search System Fees

Correction

In proposed rule document 89-10779 beginning on page 18907 in the issue of Wednesday, May 3, 1989, make the following corrections:

On page 18907, in the first column, in the **SUMMARY**, in the fifth line, "changes" should read "charges".

On page 18908, in the third column, under *Cost Calculations*, in the first paragraph, in the second line, insert "User Fees", after "A-25".

On page 18910, in the first column, in the paragraph following the second table, in the first line, "period" should read "printed".

On the same page, in the second column, under "Training", insert the following as the first paragraph:

To enable prospective public users to become effective on APS-Text, approximately fourteen (14) hours of free basic training is being offered. Ten (10) members of the public may be trained during each class. Training is expected to be held in the Crystal City complex, probably during evening hours.

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 69

RIN 2115-AC67

[CGD-015b]

Tonnage Measurement of Vessels

Correction

In proposed rule document 89-9557 beginning on page 17968 in the issue of Wednesday, April 26, 1989, make the following correction:

On page 17968, in the first column, under **FOR FURTHER INFORMATION CONTACT**, in the second line, the telephone number should read "(202) 267-2992".

BILLING CODE 1505-01-D

Federal Register

Friday
May 12, 1989

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Parts 1910 and 1926

Occupational Exposure to 4,4′ Methylenedianiline (MDA); Proposed Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910 and 1926

[Docket No. H040]

Occupational Exposure to 4,4' Methylenedianiline (MDA)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule.

SUMMARY: By this document, the Occupational Safety and Health Administration is proposing to promulgate new standards regulating exposure to MDA. The basis for this action is a determination by the Assistant Secretary, based on animal and human data, that exposure to MDA at the current occupational exposure levels causes adverse effects on employee health including an increased risk of cancer and that limiting occupational exposure to MDA to an eight-hour time weighted average (TWA) of 10 parts per billion (ppb), establishing a short-term exposure limit (STEL) of 100 ppb, and implementing associated provisions will significantly reduce this risk. In addition to establishing permissible exposure limits (PELs) for MDA, this regulation includes requirements such as medical surveillance, exposure monitoring, hygiene facilities, engineering controls and work practices, proper respirator use, and recordkeeping. An action level of 5 ppb is included in this proposal as a mechanism for exempting employers from the obligation to comply with certain requirements, such as employee exposure monitoring, in instances where the employer can demonstrate that employee exposures are at or below the action level.

For the most part, the provisions being proposed by OSHA in these standards were recommended by the MDA Mediated Rulemaking Advisory Committee (Committee) (52 FR 26776).

DATES: Comments and requests for a hearing concerning the proposed standard must be postmarked on or before June 26, 1989.

ADDRESSES: Comments are to be submitted to the Docket Officer, Docket No. HO40. Occupational Safety and Health Administration, Room N2634, 200 Constitution Avenue, NW., Washington, DC 20210. Requests for a hearing are to be submitted to Mr. Tom Hall, OSHA, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue, NW., Washington DC, 20210.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster, Director, Office of Public Affairs, OSHA, Rm. N-3641, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone (202) 523-8151.

SUPPLEMENTARY INFORMATION:

Clearance of Information Collection Requirements

On March 31, 1983, the Office of Management and Budget (OMB) published a new 5 CFR Part 1320, implementing the information collection provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* (48 FR 13666). Part 1320, which became effective on April 30, 1983, and was revised May 10, 1988 (53 FR 16617), sets forth procedures for agencies to follow in obtaining OMB clearance for information collection requirements. The sections of the proposed MDA standard which may create recordkeeping requirements are paragraphs on scope and application, exposure monitoring, methods of compliance, and medical surveillance.

In accordance with the provisions of the Paperwork Reduction Act and the regulations issued pursuant thereto, OSHA certifies that it has submitted the information collection requirements contained in its proposed rule on occupational exposure to MDA to OMB for review under section 3504(h) of the Act.

Public reporting burden for this collection of information is estimated to average 12,259 hours (or minutes) per response for general industry and 2,872 hours (or minutes) per response for construction, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, Department of Labor, Room N-1301, 200 Constitution Avenue, NW., Washington, DC 20210; and to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503.

Regulatory and Legal Authority Background

An Advance Notice of Proposed Rulemaking (ANPR) on MDA (48 FR 42836; September 20, 1983), was published jointly by the Environmental Protection Agency (EPA) and OSHA. The comments and information received in response to this ANPR were submitted to the EPA Docket No. OPTS-64000A and are now a part of the OSHA Docket (H-040). In addition, the record evidence accumulated and relied upon by the Committee is also available in the OSHA Docket (H-040).

On July 5, 1985, EPA published a **Federal Register** notice which indicated that any MDA rulemaking would be referred to OSHA in accordance with section 9 of the Toxic Substances Control Act (TSCA) (90 Stat. 2030; 15 U.S.C. 2608) (50 FR 27674). OSHA responded to this notice in a February 26, 1986 **Federal Register** Notice (51 FR 6748) by indicating that a significant risk at the current workplace levels did exist and that a workplace standard could significantly reduce this risk.

Earlier OSHA indicated in its **Federal Register** notice of October 22, 1985 (50 FR 42789) that Mediated Rulemaking would be used to assist OSHA in its MDA rulemaking activities. The notice also set forth the basic concepts of negotiated rulemaking and outlined the participant selection criteria which OSHA expected to use in establishing an MDA Advisory Committee.

OSHA established the committee in accordance with the Federal Advisory Committee Act (FACA) and section 7(b) of the Occupational Safety and Health Act (OSH Act) to mediate issues associated with the development of a Notice of Proposed Rulemaking (NPRM) on MDA.

This notice also solicited participants for the mediation process. As a result of the request for participants, three unions, the United Auto Workers (UAW), the United Steel Workers of America (USWA) and the Oil, Chemical, and Atomic Workers (OCAW) offered names of potential representatives for the Committee. OSHA selected representatives from the UAW and Steel Workers to participate in these mediation activities. The International Association of Machinists and Aerospace Workers (IAM) submitted a request for representation on the Committee and a representative from this group was appointed. Later, as a result of scheduling conflicts, the UAW representative resigned and was replaced by a labor representative from the United Brotherhood of Carpenters and Joiners of America.

In addition to the unions that nominated participants, three trade associations representing employer groups also expressed an interest in participating in this rulemaking effort: The National Electrical Manufacturers Association (NEMA), the Suppliers of Advanced Composite Materials Association (SACMA) and the Chemical Manufacturers Association (CMA). Representatives from these groups

reflect employer interests in primary and secondary manufacturing and, to some extent, downstream use in the construction industry of MDA. The other recommendations for representation came from the Department of Energy, Brookhaven National Laboratory, Sandia National Laboratories, the National Institute for Occupational Safety and Health (NIOSH), EPA, and the Occupational Safety and Health Administration for the State of California. A list of the candidates selected, the date of the first meeting, and the agenda for the first meeting were published in the **Federal Register** on July 3, 1986 (51 FR 24452).

OSHA also clearly denoted, in the October 22nd notice, the relevance which the Mediated Rulemaking efforts would have on the development of its proposed rule for occupational exposure to MDA:

> While the Committee's work product will likely serve as the basis for a proposed rule, it will not negate the need for adherence to traditional rulemaking procedures. This negotiated rulemaking procedure is supplemental to the normal section 6(b) rulemaking procedures specified in the OSH Act and is intended to aid OSHA in developing a proposed standard for occupational exposure to MDA (at 42790).

Furthermore, OSHA's participation in these mediated rulemaking endeavors was clearly delineated and was in fact, substantial. OSHA would be an active participant in these efforts. An OSHA representative provided draft regulatory text and the necessary expertise in standard drafting which the Committee needed.

To the extent that OSHA could not accept the Committee's recommendations and use such as its notice of proposed rulemaking, OSHA agreed to publish its rationale for such non-acceptance. In this NPRM OSHA is complying with the good faith pledge which was made to the Committee and is, for the most part, basing its NPRM on the Committee's recommendations.

The format of the Preamble of this document reflects both the substance and the procedure of the mediated rulemaking process. In subsection (A) or (i) of each substantive section, the document discusses the MDA Committee recommendations which include both the regulatory text and the attendant rationale (see 52 FR 26776, July 16, 1987). In addition, in subsection (B) or (ii) OSHA makes its findings which specifically adopt the Committee's recommendations, sometimes with further analysis.

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I. Introduction

A. Background Information

1. Need for a Standard

EPA issued a notice under section 4(f) of TSCA on April 27, 1983 (48 FR 19078) which indicated that MDA presents a significant risk to humans of serious harm from cancer. EPA was then required to either initiate "appropriate action" or announce that the risk was not "unreasonable."

The section 4(f) notice was based on a draft study undertaken by the National Toxicology Program (NTP). The study demonstrated that the dihydrochloride salt of MDA is carcinogenic in both sexes of rats and mice at two oral dose levels. This study plus the following factors formed the basis for the section 4 (f) notice: (1) A lack of any mandatory workplace standard; (2) the apparent inadequacy of protection afforded at the American Conference of Governmental Industrial Hygenists (ACGIH) recommended threshold limit value (0.1 parts per million (ppm)); (3) evidence that some processors may be exceeding even the ACGIH limit; and (4) evidence that several thousand workers may be exposed.

The "appropriate action" taken by the Agency was the issuance of an Advance Notice of Proposed Rulemaking (ANPR) on September 20, 1983 (48 FR 42898). The ANPR announced the joint effort by EPA and OSHA to initiate regulatory action to determine and implement the most effective means of controlling occupational exposure to MDA.

At the time of the issuance of the ANPR, only limited data were available on exposure levels and the number of workers potentially exposed. The ANPR requested detailed information on the operations used to manufacture and process MDA; the potential for exposure at each stage, including air and work

surface monitoring data; and descriptions of workplace practices. The second area of inquiry was the production and use of MDA. Detailed descriptions of the uses of MDA and updated information of the identity of processors and users was sought. The third area of inquiry was the availability; costs; and the suitability, and toxicity of substitutes for MDA. Finally, information was sought on methods of controlling exposure. The ANPR invited views and data from interested parties in any of these areas.

In response to the ANPR, comments were received from four parties: Diamond Shamrock; National Resources Defense Council, Inc.; DuPont; and CMA. These comments have been analyzed and where appropriate are reflected in this document.

On July 5, 1985, EPA published a **Federal Register** notice, in accordance with section 9 TSCA provisions (50 FR 27674) which described the occupational risks associated with worker exposure to MDA and requested that OSHA respond to EPA and indicate what regulatory activity would be implemented, if any. Under section 9(a)(2) of TSCA, EPA was prohibited from taking any regulatory action pending a response from OSHA.

In response (51 FR 6748, February 26, 1986), OSHA determined that there is a reasonable basis to believe that the manufacture and use of MDA presents a significant risk to the health of exposed workers and that the risk described by EPA may be eliminated or reduced to a significant extent by a workplace standard which regulates workers exposure. Further, OSHA determined on the basis of preliminary data, that the adoption of an occupational standard for worker exposure to MDA is economically and technologically feasible.

2. Regulatory Approach

In the course of considering an appropriate regulatory action under the Occupational Safety and Health Act of 1970 (84 Stat. 1590; 29 U.S.C. 655) ("OSH Act"), OSHA examined various regulatory scenarios before determining the process which might be followed in developing a comprehensive regulation for occupational exposure to MDA. The Administrative Conference of the United States (ACUS) had recently studied the rulemaking process of various federal agencies and found that:

> The complexity of government regulation has increased greatly compared to that which existed when the Administrative Procedure Act (APA) was enacted, and this complexity has been accompanied by a formalization of the rulemaking process beyond the brief expeditious notice and comment procedures envisioned by section 553 of the APA. Procedures in addition to notice and comment may in some instances provide important safeguards against arbitrary or capricious decisions by agencies and help ensure that agencies develop sound factual basis for the exercise of the discretion entrusted them by Congress, but the increased formalization of the rulemaking process has also had adverse consequences. The participants, including the agency, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another and to attack the legitimacy of opposing positions. Because of the adversarial relationships, participants often do not focus on creative solutions to problems, ranking of the issues involved in a rulemaking, or the important details involved in a rule. Extensive factual records are often developed beyond what is necessary. Long periods of delay result and participation in rulemaking proceedings can become needlessly expensive. Moreover many participants perceive their roles in the rulemaking proceeding more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level. Finally, many participants remain dissatisfied with the policy judgments made at the outcome of rulemaking proceedings.
>
> (Recommendation 82-4 "Procedures for Negotiating Proposed Requlations" 47 FR 30708, June 18, 1982).

Therefore, ACUS recommended that agencies consider using regulatory mediation, in which the parties in interest identify the major issues, gauge their importance, identify the information necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the regulatory agency's statute.

In considering whether this approach would be suitable in developing regulations controlling workplace exposure to MDA, OSHA considered the selection criteria adopted by the Environmental Protection Agency. (See 49 FR 17576, 17579; April 24, 1984.) OSHA concluded that MDA met the selection criteria for mediation: The regulatory effort was at the pre-proposal phase of development; affected parties were relatively few in number and readily identifiable; there were indications that affected parties would mediate in good faith; and sufficient information was available to resolve key issues. Thus, OSHA employed mediated rulemaking in developing an occupational standard for worker exposure to MDA.

A number of parties interested in OSHA affairs have expressed concern regarding the use of mediated rulemaking in developing complex health regulations. Strictly speaking, it appears inappropriate to suggest that human suffering and lives become the trade off items in a mediation attempt. The Agency's use of mediated rulemaking in this instance did not anticipate that that would be the methodology of these endeavors. Instead, OSHA expected to produce a consensus recommendation on the various aspects or issues involved in developing a complex health standard. This differs from the typical labor management negotiations where one or two issues must be resolved and bargaining or trade off become the method to form a compromise. The key difference here involves the final product expected. On the one hand a compromise is reached: on the other hand a consensus is achieved.

In addition, OSHA's approach entailed the Agency setting forth the issues on which the Committee must come to consensus. OSHA had the knowledge and experience needed to develop complex health standards. Furthermore, OSHA is cognizant of its own legal requirements and limitations. Thus, OSHA provided the Committee with the issues to be resolved, the record evidence accumulated to date, and the suggested draft regulatory language. The Committee used the record evidence and draft language provided by OSHA, along with information supplied by some of its members and, of course, the personal expertise of its members to achieve its consensus recommendations. The recommendations developed by the Committee reflect the consensus reached regarding the risk associated with occupational exposure to MDA, the PELs and standard provisions necessary to reduce this risk, and the technological and economic feasibility of implementing these recommended standards. The Committee's Products were comprehensive regulations with accompanying rationales.

The Committee also agreed that unanimous agreement to all the issues was not necessary for consensus to be reached. This is different than typical negotiations in which all the issues must be resolved in order to culminate successfully.

OSHA also required that the Committee be established in accordance with, and that it follow the requirements established by, the Federal Advisory Committee Act (5 U.S.C. App. 1). The Mediated Rulemaking Committee was set up in the fashion that OSHA previously had established Advisory Committees under section 7(b) of the Act. Thus, all the Committee's meetings unlike typical labor/management -

negotiations were open to the public and a record was kept and made available to the public.

Further, representation of the interests involved was mandatory; not representation of all the parties but of all the interests. The recommendations proposed by this consensus building group were developed by representatives from labor, management, and state and federal interests.

The Committee met formally on seven occasions. The first meeting consisted of organizational activities (defining consensus, establishing agendas and topics for discussions). The subsequent meetings were used to develop consensus recommendations. The last meeting ended on May 21, 1987. In this meeting the Committee made and rendered its final recommendations on the proposed standards regulating occupational exposure to MDA in both general and the construction industry to the Assistant Secretary. These recommendations were published on July 16, 1987 (50 FR 26776).

OSHA has based this NPRM primarily upon the recommendations made by the Committee. Furthermore, in the infrequent situations where the Committee's recommendations could not be used by OSHA in its NPRM, OSHA, as agreed, has provided its rationale for this non-acceptance.

OSHA has also consulted as required by section 107(e) of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333 (e)); and section 7(b) of the OSH Act (29 U.S.C. 656); and (29 CFR 1912.3), with the Construction Advisory Committee concerning this proposed rule for Construction. This meeting took place on November 3, 1987. This Committee recommended that OSHA adopt the recommendations made by the MDA Mediated Rulemaking Advisory Committee for the construction industry and use such as the basis for its NPRM for construction.

B. Physical Properties, Manufacture, and Uses of MDA

Methylenedianiline (CAS 101-77-9) (MDA) is a light brown, or tan, crystalline solid with a faint amino-like odor. MDA is slightly soluble in water and very soluble in alcohol and benzene. MDA is produced commercially by the condensation of aniline and formaldehyde. Crude MDA (40-60% MDA) is a liquid or a hard wax-like substance. Purified (99%) MDA is in the form of either light yellow crystalline flakes or white granules.

Ninety-eight percent of the MDA produced is used directly in the manufacture of methylenediphenyl diisocyanate (MDI), the remaining two percent is used as a precursor for the manufacture of plastic fibers, antioxidants, dyestuff intermediates, corrosion preventatives, and special polymers.

The MDI is produced in two grades, monomeric (pure) and polymeric. Ninety percent of the crude MDA is used to produce polymeric MDI, and another 8% of the crude MDA is converted to monomeric MDI. MDI is used to produce flexible and rigid polyurethane foams, elastomers, coatings, thermoplastic resins, foundry core binders, adhesives, sealants, and spandex fibers.

The remaining MDA is produced in the pure form for other uses: epoxy resin curing agents, wire coating applications, polyurethane co-reactants, in pigments and dyes, and defense applications.

There are eleven principal industry sectors where workers are potentially exposed to MDA. These sectors are: (1) MDA Production for MDI Synthesis/ MDA Sale and Import; (2) Reprocessing; (3) Filament Winding; (4) Potting and Encapsulation; (5) Molding/Bonding of Tools and Specialty Small Parts; (6) Wire Coating; (7) Coatings; (8) Intermediate for TGMDA and PACM-20 Production; (9) Polyurethane Curing; (10) Advanced Composite Materials Production; and (11) Use of PMR-15 Pre-preg Materials. There are also seven other industrial sectors where MDA was once used and may still be used limitedly. These minor sectors are: (1) Coatings (Polybismalimides) of Printed Circuit Boards and Fabrication of Airplane Parts; (2) Dyes and Pigments; (3) Quiana Yarn; (4) Intermediate for Pharmaceuticals, Herbicides, etc.; (5) Rubber Processing; (6) Anti-Oxidants; and (7) Ketamine Production. Maintenance workers have been separately identified from each of these sectors for purposes of analysis.

There are six firms which produce MDA for MDI production, MDA for sale, or which import MDA. MDA is manufactured by 6 companies at 7 locations in four states: Dow Chemical Co. (LaPorte, TX); BASF (Geismar, LA); E.I. DuPont (Belle, WV); Mobay Chemical (New Martinsville, WV and Baytown, TX); Rubicon Chemical (Geismar, LA); and Uniroyal Chemicals division of Avery (Naugtuck, CT). Three of these companies, Mobay, Rubicon, and Dow account for over 90% of the MDA production. It is estimated that approximately 600 million pounds of MDA are produced for MDI conversion, 4,474,000 pounds are produced domestically for sale, and an additional 1.8 million pounds are imported. In addition, it is estimated that the percentage of MDA in the product made domestically ranges from 40-70% while the percentage in the imported product is approximately 98%.

II. Pertinent Legal Authority

Authority for issuance of this standard is found primarily in sections 6(b), 8(c), and 8(g)(2) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. 655(b), 657(c), and 657(g)(2). Section 6(b)(5) governs the issuance of occupational safety and health standards dealing with toxic materials or harmful physical agents. Section 3(8) of the Act (29 U.S.C. 652(8)), defines an occupational safety and health standard as:

> * * * a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

The Supreme Court has said that section 3(8) applies to all permanent standards promulgated under the Act and requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment. *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607 (1980).

The "significant risk" determination constitutes a finding that, absent the change in practices mandated by the standard, the workplaces in question would be "unsafe" in the sense that workers would be threatened with a significant risk of harm. *Id.* at 642. A significant risk finding, however, does not require mathematical precision or anything approaching scientific certainty if the "best available evidence" does not warrant that degree of proof. *Id.* at 655-656; 29 U.S.C. 655 (b)(5). Rather, the Agency may base its finding largely on policy considerations and has considerable leeway with the kinds of assumptions it applies in interpreting the data supporting it. *Id.* 655-656; 29 U.S.C. 655(b)(5). The Court's opinion indicates that risk assessments, which may involve mathematical estimates with some inherent uncertainties, are a means of demonstrating the existence of significant risk.

After OSHA has determined that a significant risk exists and that such risk can be reduced or eliminated by the proposed standard, it must set the standard "which most adequately assures, to the extent feasible on the basis of the best available evidence, that no employee will suffer material impairment of health * * *". Section 6(b)(5) of the Act. The Supreme Court

has interpreted this section to mean that OSHA must enact the most protective standard necessary to eliminate a significant risk of material health impairment, subject to the constraints of technological and economic feasibility. *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490 (1981). The Court held that "cost-benefit analysis is not required by the statute because feasibility analysis is." *Id.* at 509.

Authority to issue this standard is also found in section 8(c) of the Act. In general, this secrion requires the Secretary to require employers to make, keep, and preserve records regarding activities related to the Act. In particular, section 8(c)(3) gives the Secretary authority to require employers to "maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 6." Provisions of OSHA standards which require the making and maintenance of records of medical examinations, exposure monitoring, and the like are issued pursuant to section 8(c) of the Act.

The Secretary's authority to issue this proposed standard is further supported by the general rulemaking authoriry granted in section 8(g)(2) of the Act. This section empowers the Secretary "to prescribe such rules and regulations as he may deem necessary to carry out (his) responsibilities under the Act"—in this case as part of or ancillary to, a section 6(b) standard. The Secretary's responsibilities under the Act are defined largely by its enumerated purposes, which include:

Encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions (29 U.S.C. 651(b)(1));

Setting mandatory occupational safety and health standards applicable to business affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act (29 U.S.C. 651(b)(3));

Building upon advances already made through employee and employer initiative for providing safe and healthful working conditions (29 U.S.C. 651(b)(4));

Providing for the development and promulgation of occupational safety and health standards (29 U.S.C. 651(b)(9));

Providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem (29 U.S.C. 651(b)(12));

Exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions * * *. (29 U.S.C. 651(b)(6));

Encouraging joint labor-management efforts to reduce injuries and diseases arising out of employment (29 U.S.C. 651(b)(13)); and

Developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems (29 U.S.C. 651(b)(5)).

Because the MDA standard is reasonably related to these statutory goals, the Secretary finds that this standard is necessary to carry out his responsibilities under the Act.

III. Health Effects

A. Summary of the Committee's Recommendations

1. Introduction

The Committee reviewed the record evidence concerning the acute and chronic effects of exposure to MDA in both animals and humans and concluded that MDA should be treated as a hepatotoxic agent and as a suspect human carcinogen. The Committee also concluded that an occupational standard regulating worker exposure to MDA should be developed. The following discussion provides the Committee's findings with respect to the hepatotoxic and carcinogenic hazards posed by occupational exposure to MDA.

2. Acute Effects of Exposure to MDA

a. *Hepatotoxicity.* The record evidence on the acute effects of occupational exposure to MDA indicates that occupational exposure to MDA may result in hepatotoxicity (poisoning of the liver). The Committee relied on an abundance of human and animal data to support this finding. (See Hepatotoxicity Section of the Committee's Document, Ex. 9.)

The Committee found that one or a few exposures to high doses of MDA may result in toxic hepatitis. However, in all cases the clinical signs and symptoms of hepatitis produced by this exposure were reversible. The Committee's discussion concerning the acute effects resulting from acute exposures can be found at 52 FR 26779 and 26780. In summary the Committee stated clearly that "The predominance of data reflect the induction of disease as a result of dermal absorption of MDA" and further provides a data analysis from Kopelman, McGill and Motto, and Brooks et al. An analysis of the data did not rule out the possibility that liver toxicity might result from low doses. Furthermore, the analysis did not determine the effects long term low dosing might have on liver function. However, the Committee tentatively did conclude that at the present occupational levels the clinically observed non-neoplastic effects of exposure to MDA appear to be totally reversible. This conclusion was based solely on review of the data found in the acute human studies (human chronic exposure studies are not available). Animal data however, did indicate that long term MDA dosing at low levels produced various levels of liver damage. Thus while making a finding that occupational exposure to MDA may result in liver toxicity, the Committee was unable to develop dose-response data which could predict with some certainty the exposure necessary to produce liver toxicity. More precisely, the Committee was unable to conclude that at 5 ppb, liver toxicity would not occur.

In an effort to make these findings, the Committee extensively reviewed the record evidence to determine the levels of exposure at which a No Observed Effect Level (NOEL) for the clinical observation of hepatitis could be expected to occur in a worker population. The available literature on workers occupationally exposed to MDA provided limited data on the occupational doses to which the workers were exposed. This is due in part to a lack of ambient sampling data but more often because the primary mode of exposure was through the skin and not through inhalation. The Committee further acknowledged that in the case of MDA, unlike many acutely toxic chemicals which are associated with acute inhalation effects such as irritation and pulmonary edema, the primary effect has been liver damage following ingestion or skin absorption. The only available data the Committee could use to estimate a NOEL for liver toxicity due to occupational exposure to MDA are the data reported by Kopelman *et al.* from the Epping Jaundice incident. This data suggested that levels in excess of 100 ppb would be necessary to produce acute hepatitis in worker populations. The Committee relied on these findings in making its recommendations for the TWA and the STEL.

b. *Dermal Irritation.* The Committee believed that the ability of MDA to induce contact sensitization has not

been studied sufficiently to conclude that MDA causes sensitization.

c. *Retinal Effects.* The Committee reviewed the record evidence concerning the effects which might result from eye contact with MDA. The Committee concluded that direct contact between MDA and the eye should be avoided. In addition, the Committee noted that ingestion of MDA might also result in damage to the eye and as such should also be avoided.

3. Chronic Effects of Exposure to MDA

a. *Hepatotoxicity.* The Committee found that at the present occupational levels, the observed or clinical non-neoplastic effects resulting from exposure appear to be totally reversible (Ex. 9). This conclusion is based on review of the data found in the acute human studies. Animal data indicate that long term MDA dosing at low levels produces various levels of liver damage, but since most of the studies have involved the dosing of the animals until sacrifice, it is difficult to determine if the observed effects would or could have been reversed if sufficient time had been allotted for healing.

b. *Carcinogenicity.* The Committee concluded that MDA is a carcinogen in F344/N rats and B6C3F1 mice of each sex. Furthermore, it appears that carcinogenicity is induced either through ingestion, inhalation, or dermal absorption of the substance.

The Committee considered extensively the type of data needed to determine carcinogenicity in animals and to relate the observed effects in animals with that expected in humans. The Committee generally accepted the policy set forth by public health agencies, that test results in mammalian species (including the mouse), are acceptable data for predicting potential hazards to exposed humans.

The Committee also recognized that confounding factors associated with long term bioassays could cause carcinogenicity findings to be questioned. First, the Committee recognized the need to use control groups, as was done in the NTP and ORNL bioassays, and to validate the carcinogenic findings in rodent species that normally exhibit a high spontaneous incidence of tumors.

Second the Committee also discussed the effect that high dosing and subsequent acute toxicity may have on the production of liver and thyroid tumors found in the female mice of the NTP study. The Committee determined that the observed incidence of tumors found in the female mice of the NTP study did not occur as a result of high dosing but occurred from exposure to MDA.

Third the Committee noted that the presence of tumor viruses in mice does not necessarily invalidate the identification of MDA as a carcinogen. In making this determination, the Committee made use of the policies advocated by numerous health agencies, including OSHA, which require that, to make a viral etiology finding, the virus must be established to be the sole direct mechanism producing the carcinogenic effect. Not finding this necessary evidence, the Committee agreed that the carcinogenic response was not the result of viral etiology.

The Committee found that the NTP study was conducted properly, and therefore used this study as the principal basis for its carcinogenicity findings.

In addition, a majority of the Committee members concluded that 9DA induces cancer by a genotoxic rather than a non-genotoxic mechanism and, as such, a threshold level for the carcinogenic response did not exist. The Committee concluded that the evidence offered for the existence of thresholds for this carcinogen was insufficient to overcome the extant evidence for a genotoxic mechanism. The Committee relied on two basic concepts to make this decision. First, the members required that if a threshold was to be considered, data indicating at what level a threshold would occur must be provided. Secondly, once a threshold is established in experimental animals, the threshold must be shown to be applicable to any exposed group of workers. No evidence was offered which meets these minimum criteria and thus the Committee made a recommendation that a no-threshold-effect be used to predict the risk associated with occupational exposure to MDA. In addition, the Committee believed that, even if a threshold for specific carcinogens could be demonstrated in experimental test animals or even in a specific human population, it might not be applicable to any given human population at risk. No data were furnished which equated a threshold observed in animals with that expected in humans.

Other concerns raised by some of the Committee members involve the use of MDA dihydrochloride rather than MDA itself as the administered dose in the NTP bioassays. The Committee noted that test animals in the Oak Ridge National Laboratories study were exposed dermally to MDA and not the hydrochloride as in the NTP study. Furthermore, the Committee noted that in the Oak Ridge test animals the carcinogenic response seen in the female mouse livers was approximately double that noted in the NTP study. Thus, the Committee concluded that exposure to MDA produced the carcinogenic effect, and not exposure to the salt.

The Committee also examined supportive evidence of carcinogenicity derived from short term mutagenicity tests. The Committee recognized that the various short-term tests do not measure the same mutagenic endpoint; thus positive and negative findings are not uncommon, since no single short-term test can measure all the events which might lead to mutagenesis. The Committee agreed that there is a wide variety of opinions on the reliability of using short-term studies as indicators of potential carcinogenicity. Many of the Committee members believed, however, that such tests provide meaningful indicative results and that substances which give positive results in well validated systems are likely to be carcinogenic. Further, it appears that the probability of a false-positive result for a chemical which is positive in one well-conducted bioassay and one well-validated short term-test is extremely small. Thus, based on record evidence consisting of both bioassays and short-term tests the Committee concluded that MDA causes cancer in experimental animals.

The Committee also analyzed the data to relate the findings of "pooled tumors" incidence in mice to some common site in man. The Committee acknowledged that scientific investigations have shown that target sites for the carcinogenic action of a substance in humans are not necessarily the same as those found in animal experiments. There were basically three pieces of suggestive evidence examined by the Committee to link the carcinogenic response in animals to the expected response in humans (bladder cancer):

(1) The NIOSH-Vertol Health Hazard Evaluation (HHE) study (Ex. 1–255);

(2) The presence of bladder transitional cell papillomas in three MDA treated rats in the NTP-Bioassay (Ex. 1–36); and

(3) Some structure-activity links with the proven human and animal bladder carcinogen, benzidine, and the dog bladder carcinogen, methylenebis-(2-chloroaniline)(MBOCA).

The only available human data implicating MDA as a human carcinogen were from the HHE. The Committee reviewed these data thoroughly before concluding that the data were insufficient to positively identify MDA as a human bladder carcinogen or to use the data contained in this report to

establish permissible exposure limits. However, the Committee did not exclude the fact that the report did develop a hypothesis regarding MDA exposure and bladder cancer which warrants further investigation using the more rigorous epidemiologic methods.

The Committee also found that the development of bladder transitional cell papillomas in the female rats in the NTP bioassays to be significant. These relatively rare tumors were benign although progression to malignancy in this class of tumors may occur. Furthermore, the Committee recognized that the appearance of transitional cell papillomas in MDA treated rats was unique and demonstrated the chemical specificity of the results observed.

The Committee analyzed the structure activity relationships between MDA and several other substances identified by EPA as structural analogs. A majority of the Committee members maintained that there are significant structural differences between benzidine and MDA and that a strong analogy does not exist. The Committee generally believed, however, that while the structural analogy data are not conclusive, nonetheless these data should be relied upon to suggest that MDA may cause bladder cancer in humans. Although the Committee could not positively link occupational exposure to MDA with bladder cancer in workers, the Committee recommended stringent standard provisions to protect workers against the carcinogenic potential posed by MDA regardless of the target site.

4. Reproductive Effects

The majority of the Committee members concluded that, while the data suggest that there may be hormonal changes at relatively high doses, the occupational significance of these changes could not be assessed.

5. Teratogenic Effects

The Committee has reviewed the data on the teratogenic effects of exposure to MDA and could not relate the significance of these observed effects in animals with those anticipated in the occupational setting.

6. Absorption, Distribution, and Deposition

The majority of the Committee members agreed that where sufficient data exist which are MDA specific (e.g., dermal absorption data), these data should be used to determine the biological activity of the chemical. However, the Committee found that data obtained through the El-Hawari study (Ex. 1–251) were not sufficient to make determinations concerning the gastro-intestinal and respiratory absorption of MDA. The Committee anticipated that future research on the gastrointestinal and respiratory absorption of MDA will also substantiate the findings made from the structural analogue comparisons and demonstrate that these assumptions are also conservative.

The Committee agreed that a 100% absorption through the gastro-intestinal tract of the mouse be used in generating the risk assessment model rather than 50% absorption proposed by EPA. The Committee realizes that this is a conservative approach because it assumes that the observed effect is a result of absorption of the entire dose administered and not a result of the absorption of a lesser portion of the administered dose. This assumption has the effect of reducing the expected risks predictable from occupational exposure to MDA by 50%.

The Committee agreed, however, with EPA's assumption that absorption through lung tissue is roughly equivalent to gastro-intestinal absorption (50%), especially if MDA is in the vapor phase or has a particle size of less than 2 microns.

The Committee also concluded that MDA is actually dermally absorbed at approximately 2% per hour and not 1% as previously assumed (Ex. 1–251). Therefore, an absorption rate of 2% can also be applied to MDA exposure which occurs through dermal deposition and absorption.

The Committee also stressed the significance which the hazard of dermal exposure posed. Data from the Oak Ridge National Laboratory study (Ex. 8) heightened the Committee's concern over these hazards. The Committee concluded that when a chemical is ingested, it is transported through the hepatocellular detoxification system and is not generally diluted as a result of passing through the general circulatory system. In the case of chemicals applied to the skin, however, a significant dilution takes place as a result of the absorbed chemical passing through the general circulatory system before passing through the hepatocellular detoxification system. Compared with the findings of the NTP study in which animals were exposed through ingestion, the Oak Ridge data reported almost a two-fold increase in the liver tumor incidence observed in the female test animals dermally exposed to MDA. These findings are additional evidence that occupational dermal exposure to MDA should be prevented.

In addition, the Committee was concerned with the findings of El-Harawi (Ex. 1–251) indicating that once deposited on the skin, MDA cannot be completely removed by cleansing. The data suggest that the use of solvents to remove MDA from the skin actually increases the absorption of MDA. It also appears that soap and water provide the best medium for removing the substance from the skin, but only remove approximately 60% of the material deposited on the skin. These findings support the provisions to the recommended standard which require the use of personal protective clothing and equipment to prevent MDA exposure and medical surveillance to assure that the integrity of the protective equipment and clothing is being maintained.

B. OSHA's Findings

OSHA has reviewed the record evidence concerning the acute and chronic effects of exposure to MDA in both animals and humans. OSHA has also reviewed the recommendations made by the Committee regarding the health effects associated with occupational exposure to MDA and agrees that the Committee has properly evaluated the record evidence and that their recommendations are appropriate. OSHA also agrees with the Committee's assessment of the carcinogenic potential posed by occupational exposure to MDA and concludes also that MDA be treated as a human carcinogen for regulatory purposes.

Regarding the use of a NOEL, OSHA found that the Committee's findings that adverse hepatotoxic effects do not occur until well above the 100 ppb STEL to be somewhat imprecise. Kopelman et al. (Ex. 1–69, 1966) reported on clinical findings of acute hepatitis resulting from MDA contaminated bread ingested by humans in a non-occupational setting. The investigators clearly state that it was not possible to determine whether the individuals ate the bread on one or several occasions or how much bread they consumed per occasion. The actual level of MDA consumed by any individual varied according to the amount of bread comsumed and the degree of contamination of the flour used to bake individual loaves of bread. The average dose which the investigators estimated was based on the percentage of MDA found in the bread and the weight of the average loaf of bread. At no time was the amount of bread ingested and the observed clinical effects of exposure experienced by the individual workers correlated. Other investigators such as Malten et al. (Ex. 1–71, 1973) and Kopelman et al. (Ex. 1–68, 1966) performed several studies in animals using extracts of the bread

involved in the Epping jaundice outbreak. In each of these studies, with varying doses of exposure liver changes and "toxic manifestations" were noted.

OSHA recognizes the significances which establishing a NOEL has on recommending acceptable TWA's and STEL's. OSHA finds it imprecise to use the data which the Committee used in establishing its NOEL to establish either a TWA or a STEL. OSHA does note the difficulty which the Committee experienced with respect to establishing a NOEL and subsequently recommended a TWA and STEL from these data. Firstly, OSHA recognizes as did the Committee that the data are somewhat scant regarding the correlation of observable clinical effects of exposure with occupational doses. Secondly, OSHA recognizes as did the Committee that the predominance of human occupationally related data indicates that clinical manifestations of disease result from the dermal absorption of MDA and that there was no correlation made to equate clinical manifestations of hepatitis with dermal absorption (although, correlations between skin absorption and potential cancer development were made). Thirdly, OSHA recognizes as did the Committee that the available human data involve only the observation of clinical manifestations and cessation of disease and that none of the data refer to acute effects (e.g., changes in liver function or subclinical indicators of disease in acutely exposed workers or chronically exposed workers).

While the Committee did attempt to make some computations regarding inhalation doses and expected observable clinical manifestations of disease, the Committee believed that relying totally on these computations to establish Pels which would prevent liver toxicity in occupationally exposed workers is not acceptable and OSHA agrees with this finding. Thus, both OSHA and the Committee considered other facrors in establishing the TWA and the STEL (See PEL discussion).

IV. Risk Assessment

A. Summary of the Committee's Recommendations

Having analyzed all the data and the respective scenarios with their varied assumptions the Committee agreed that it was impractical to consider risk as ranges for the purpose of establishing permissible exposure limits in that the ranges of risk and the associated permissible exposure limits vary too greatly. Furthermore, having examined all of the scenarios and the varied assumptions, the Committee believed that the following assumptions and risk estimates will offer the best description of occupational risk associated with worker exposure to MDA (See Ex. 9, Risk Assessment Section):

1. Qualitatively, the dose-response in animals is similar to that in humans.
2. The one-stage linear mathematical model was selected and is assumed to hold for doses outside the range of observation.
3. There is no threshold for all effects.
4. Gastro-intestinal absorption for rats and mice is assumed to be 100%.
5. The target organ in test animals is not necessarily the same as the target organ in humans.
6. The average amount of MDA-2HCl containing water consumed daily (5.0 gm) divided by the average animal body weight (mice) in grams (38.0 gm) can be used to estimate dose.

The Committee recognizes that OSHA calculated the exact weights of the animals used in the NTP study rather than using a standard weight for the animals as was done by EPA. The Committee agreed that it is more accurate to use the average of the exact weights rather than an assumed weight.

7. Body weight conversion is used rather than the surface area conversion for extrapolating from animal data to humans.

The Committee recognized that there is much scientific controversy over the use of surface area scaling factors for conversion of doses from animals to man. However, the Committee believed that evidence has not been presented which indicates that it is more appropriate to use the surface area scaling factor and therefore recommended the use of the body weight conversion factor.

8. The daily occupational dose from inhalation was based upon 50% absorption of MDA through the lungs at 1.2 m^3/hr respiration rate.
9. The daily occupational dose from dermal exposure was assumed to be directly proportional to a combination of deposition rate, absorption rate, body surface areas determined by Snyder *et al.*, and ½ of the square of exposure time (per shift). The total surface areas assumed to be potentially exposed and thus used in these computations can be found in Exhibit 9.
10. Deposition rate of MDA from dermal exposure was assumed to be uniform over time and absorption through all skin areas to be at a uniform rate of 2% per hour of deposited material. (See Absorption Section.)
11. The worker's lifetime risk (through age 74) was calculated on exposures of 8 hours per day, 5 days per week, 46 weeks per year for 45 years starting at age 20.

The Committee agreed to recommend that 8 hours/day of exposure be used to generate risk estimates. The Committee recognized, however, that this assumption might lead to risk estimates that greatly overstate the risks to workers exposed to MDA for less than 8 hours per day. There are several reasons why the Committee took this position. In most industrial settings and other work environments, employee exposures to harmful substances are regular and long term in nature. Based upon the limited data presently available, however, the Committee believed that a substantial number of employees may be exposed to MDA on a somewhat irregular or intermittent basis. A wide variety of factors makes it difficult to account for these highly intermittent exposure patterns in a quantitative manner. There is no widely accepted risk model presently in use which takes into account the effects of intermittent exposure. There may be elimination or deactivation of MDA to some extent when it is introduced into the system in small quantities at infrequent intervals. Also very little deactivation or repair may occur despite relatively sporadic exposures. Such a highly intermittent exposure pattern may, at least theoretically, allow for the repair of damaged systems or cells. These factors may result in a greater reduction of risk than a model simply adjusted for decreased exposure time might reflect. Therefore, the Committee felt that limitations in the available data and science are such that a credible quantifiable extrapolation of risk for intermittent exposure to MDA is not possible at this time.

Secondly, the Committee recommended that occupational exposure data reflect an 8-hour day, a 40 hour work week, over a 45 year working lifetime. These three assumptions are also standard OSHA policy assumptions. OSHA has come under some criticism for relying on these assumptions. It is charged that OSHA errs toward over prediction of risk by assuming, without substantiation, that workers will experience exposures at the PEL of the standard for up to 45 years. While theoretically possible, the Committee agreed it is not the workplace norm for workers to be exposed for 8 hours per day, 40 hours per week for a 45 year period. However, when determining whether a hazardous substance poses a significant risk and that reduction of a PEL is warranted, the Committee realized that OSHA is bound to consider what degree of risk would be

permitted by the existing standard, even though many workers may in fact be at lesser risk because their exposures are to levels below or of a shorter duration than those required by that standard. The Committee recognized that it is for this reason that OSHA bases its determinations of significant risk on the assumption that exposure at the PEL occurs throughout the entire workday.

Thirdly, the Committee acknowledged that the use of the lifetime exposure (45-year) assumption is based on guidance given in the OSH Act. As specified in section 6(b)(5):

The Secretary in promulgaring standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

OSHA believes that it is reasonable to assume that a person begins work at age 20 and continues until the age of 65, a 45 year span of employment. Under section 6(b)(5) of the Act, OSHA is compelled to promulgate standards that ensure that employees, even those exposed to the hazardous agent for their entire working lifetime, are at the lowest risk that can feasibly be attained. Therefore, OSHA's determinations of significant risk must take into account the fact that many workers may be exposed throughout their entire working lives, and reflects the view that OSHA is regulating workplace conditions and not specific employees.

Having considered these various assumptions the Committee selected from these considerations what it felt to be the most reasonable assumptions and recommended that OSHA use the risk estimates found in Table 1 below (Table 49, Ex. 1–269). The underlying assumptions used in predicting these risks are: (1) 100% GI absorption; (2) 2, 4 hr work shifts; (3) 2% dermal absorption rate; (4) non-surface area correction factor; and (5) upper body absorption set forth in Scenario III.

TABLE 49—MEDIATED RULEMAKING COMMITTEE'S RECOMMENDED TABLE FOR ESTIMATED EXCESS OCCUPATIONAL LIFETIME CANCER RISK FOR WORKERS EXPOSED TO MDA[a] TABLE HAS NOT BEEN SURFACE AREA CORRECTED 100% GI/2–4 hr/2% ASSUMES DERMAL, ABSORPTION IN SCENARIO III

CASE	Type of MDA plants	Airborne[b] Level mg/m³ (ppm & ppb)	Dermal[c] deposition ug/cm²/hr	Inhalational exposure mg/kg/day	Dermal exposure mg/kg/day	Total exposure mg/kg/day	MLE (U95CL)[d] excess cancer risk	Comments
I(a)	Manufacturing	0.57 (0.070 ppm) (70 ppb).	9.0 (palms) 2.5 (upper) body, etc.).	0.021	0.0749	0.0959	6(7)/1000	Worst existing case.
(b)	Processing	0.38 (0.047 ppm) (47 ppb).	250 (palms) 27 (upper body etc.).	0.014	0.4186	0.4326	3(3)/100	Worst existing case.
II(a)	Manufacturing processing (dermal only).	0.00	4.2	0.00	0.0041	0.0041	3(3)/10,000	Existing case with (zero airborne level) lowest dermal deposition.
(b)	Manufacturing processing.	0.00	2.1	0.00	0.0021	0.0021	1(2)/10,000	Proposed case with (zero airborne level) lowest dermal reduced ½.
III(a)	Manufacturing	0.01 mg/m³ (.0012ppm) (1 ppb).	0.03	0.00036	0.00087	0.0012	8(9)/100,000	Proposed case with upper body absorption feasible to monitor.
(b)	Manufacturing	0.001 (.00012ppm) (.12ppb).	0.003	0.000036	0.000087	0.00012	7(9)/M	Proposed case with upper body absorption deposition; not feasible to monitor and not sure about maintenance.
(c)	Manufacturing	0.0001 (.00001ppm) (.012ppb).	0.0003	0.0000036	0.0000087	0.000012	7(9)/10M	Proposed case with zero dermal deposition; not sure if feasible to monitor or maintain.
(d)		0.16 (0.020ppm) (20 ppb).	0.6	0.0072	0.0175	0.0247	2(2)/1000	Proposed case with upper body absorption; feasible to monitor and maintain.
(e)		0.1 mg/m³ (.01 ppm) (10 ppb).	0.3	0.0036	0.00875	0.01235	8(9)/10000	Proposed case with upper body absorption; feasible to monitor and maintain.

[a] Based on one-stage version of Crump's multistage model and on the assumption of 100% absorption through the G-I tract tissues of the NTP female mice; p-value of chi-squared goodness-of-fit test 1 0.25 (adequate fits show p 1 0.10).
[b] 1.0 ppm=8.1 mg/m³; assumes 50% absorption through the lung (at a breathing rate of 1.2 m³/hr.)
[c] I(a) & (b) dermal-palms forearms and the rest of the upper body. II (a) & (b) dermal-palms.
[d] Based on 40 hours per week for 45 years of exposure in a 54-year adult life span.
[e] According to Dr. Boeniger of NIOSH, newer techniques to be developed in their laboratory may monitor these levels more accurately.
[f] Maintain means to effectively use engineering controls to keep MDA exposures below the PEL.

The Committee strongly recommended that OSHA note the significance that dermal absorption has on worker exposure to MDA. The Committee recommended the establishment of stringent provisions regarding the use of personal protective equipment to prevent dermal exposure to MDA; however, the Committee recognized that in some cases total prevention might require the use of "full-body space suits". The Committee recognized that such a requirement is impractical; workers cannot be expected to work under such conditions. The Committee believed that suitable gloves can be used to prevent absorption through the palms (major route of exposure) and that aprons, coveralls, etc., can also prevent dermal contact in the body areas they cover. Nonetheless, the Committee recognized that some exposure may occur through deposition and subsequent absorption of MDA on the upper body, neck, etc., and as such would recommend that consideration be given to these confounding factors when establishing levels of risk. The Committee's recommendations reflect an awareness of the increased risks associated with these dermal exposures. Adherence to permissible exposure limit, use of personal protective clothing and equipment, and the other standard provisions aid in preventing dermal exposure to the greatest extent feasible.

B. OSHA's Findings

OSHA agrees with the recommendations of the Committee and makes use of the Committee's assumptions in predicting expected risks resulting from occupational exposure to MDA. While OSHA has accepted the Committee's recommendations regarding the use of the "surface area correction factor", OSHA notes that this technique is used by many health agencies, such as EPA. These agencies have expressed their belief that this factor allows a more positive correlation between the dose/response noted in animals and that expected in man. OSHA also recognizes that applying this factor to the risk estimates generated by the Committee would result in estimates of excess risk of death from a working lifetime exposure to MDA of 60–300 per 1,000. The Committee cautioned against the use of any of the risk estimates as definitive indications of what can be expected in man. Rather, the Committee believed that these are truly estimates or indications or what might be expected. OSHA agrees that risk estimates are only estimates and are not to be used as definitive indications. Thus while OSHA has examined the benefits (see below) expected from implementation of the Committee's recommendations, OSHA has also examined the benefits expected if the surface area correction factor were employed. Thus, in some instances, benefits are examined as ranges.

V Significance of Risk

A. Summary of the Committee's Recommendations

The Committee did not specifically state that a significant risk exists from worker exposure to MDA. The Committee would only state that the risk estimates accepted by the Committee fit the framework applied by OSHA in making policy decisions leading to the determination of significant risk in previous rulemakings. The Committee s decision not to make a significance of risk finding was due in part to the belief of some of the Committee members that such a finding is a legal conclusion based on scientific considerations. Furthermore, they contended that OSHA must make such a finding as a prerequisite to promulgating a new standard under Section 6(b) of the Occupational Safety and Health Act, interpreted by the U.S. Supreme Court in *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607 (1980). It must then publish its conclusions in the preamble to the standard *OSHA* proposes. Some Committee members believed that the Committee's making such a finding would constitute an improper transference of the Agency's obligation.

While representatives from OSHA, EPA, and the State of California, accepted the decision of the majority of the Committee regarding the language proposed by the Committee for this section, they nonetheless were concerned with the Committee's failure to state precisely that a significant risk exists at current MDA occupational exposures. These Committee members emphasized that at the current occupational levels MDA represents a significant risk.

The preambular language recommended by the Committee for this significance of risk section takes into consideration the sensitive nature of this particular recommendation. In addition, the Committee was provided the policy and past practices of OSHA regarding significant risk findings in other rulemakings. Thus, while the Committee did not specifically make a finding of significant risk, the Committee did address the necessary evidence needed to make this determination. It was for these reasons that the Committee recommended that a standard be established which reduced exposures to the lowest extent feasible.

B. OSHA's Findings

OSHA previously made a preliminary finding of significant risk resulting from occupational exposure to MDA in responding to EPA's referral (51 FR 6748). In making this determination, OSHA was guided by a number of factors that are consistent with recent court interpretations of the OSH Act and rationale, and policy formulation regarding significance of risk. As prescribed by Section 6(b)(5) of the OSH Act, the Agency examined the body of "best available evidence" on the toxic effects of MDA to determine the nature and extent of possible health consequences resulting from workplace exposure. The quantitative risk assessment recommended by the Committee was used with other relevant information by OSHA to determine whether establishing a permissible exposure limit and other standard provisions would substantially reduce the risk.

For guidance in determining whether regulatory activity would substantially reduce the risk, OSHA had followed some general guidance given to the Agency by the Court for arriving at findings of the significance of an occupational health risk. The Court stated as follows:

> It is the Agency's responsibility to determine in the first instance what it considers to be a "significant" risk. Some risks are plainly acceptable and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it (*IUD* v. *API* 448 U.S. at 655).

Although the Court's example is based on a quantitative expression of the risk, the Court indicated that the significant risk determination required of OSHA is

not "a mathematical straitjacket," and that "OSHA is not required to support the finding that a significant risk exists with anything approaching scientific certainty." The Court ruled that "a reviewing court [is] to give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge [and] * * * the Agency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of overprotection rather than underprotection" (448 U.S. at 655, 656).

OSHA largely bases its findings that a particular level of risk is "significant" on policy considerations (*IUD* v. *API*, 448 U.S. 655, 656, n.62). As part of the significant risk determination, OSHA examined a number of factors consistent with its policy (see Arsenic, 48 FR 1864, January 14, 1983; ethylene oxide, 48 FR 17284, April 21, 1983; formaldehyde, 52 FR 46167, December 4, 1987; and Asbestos (51 FR 22611, June 20, 1986)). These include the type of risk presented, the quality of the underlying data, the reasonableness of the risk assessments, and the statistical significance of risk.

OSHA reviewed the toxicological and epidemiological literature and the record evidence on MDA described in the Health Effects section. The record, as summarized herein, shows that MDA exposure is associated with a wide range of health effects. The NTP study indicates that MDA is carcinogenic in both rats and mice. The study appears to have been conducted in accordance with good laboratory practices and is adequate for use as the basis for quantitative risk assessment. The Oak Ridge National Laboratories data also support the findings that MDA is a carcinogen in test animals. The ability of MDA to induce tumors in animals, suggestive evidence that MDA may induce bladder tumors in humans, and data indicating that MDA interacts with genetic material lead to the conclusion that this chemical is an animal carcinogen and is a possible carcinogen to humans.

In animals, MDA has also been associated with genotoxicity, retinopathy, allergic dermatitis, and hepatotoxicity. In addition, human studies strongly indicate that MDA causes a characteristic acute toxic hepatitis.

The quantitative risk assessment, which is used to predict risk in man is based on animal studies by NTP. This correlation is achieved by reliance upon generally accepted health policies, which indicate that carcinogenicity demonstrated by a chemical in mammalian species is sufficient to conclude that carcinogenicity is possible in humans. The fit of the experimental cancer data to the model used in making the extrapolations is good and the risk assumptions recommended by the Committee and accepted by OSHA are reasonable. Therefore, the resulting assessment appears appropriate.

The preliminary preferred estimate of risk of death from a working life time exposure to MDA at the highest reported levels ranges from 6–30 per 1,000 depending upon the amount of dermal absorption which is occurring. OSHA concludes that the present adoption of the Committee's recommended standard would substantially reduce the risks. These findings are consistent with OSHA determinations or preliminary determinations from other rulemakings, such as: Inorganic arsenic (Jan. 14, 1983; 48 FR 1864, 1896) and ethylene oxide (April 21, 1983; 48 FR 17284, 17295. Those estimates per 1,000 employees for a working life time exposure were 148–425 lung cancer deaths from inorganic arsenic; and 63–109 cancer deaths from ethylene oxide, based on the PEL's which applied prior to the completion of new lower standards.

In evaluating significant risk a framework is provided by an examination of occupational risk rates and legislative intent. For example, in the high risk occupations of fire fighting and mining and quarrying the average risk of death from an occupational injury or an acute occupationally related illness from a lifetime of employment (45 years) is 27.45 and 20.16 per 1,000 employees respectively. Typical lifetime occupational risks of death in occupations of moderate risk are 2.7 per 1,000 for all manufacturing and 1.62 per 1,000 for all service employment. Typical lifetime occupational risks of death in occupations of relatively low risk are 0.48 per 1,000 in electric equipment and 0.07 per 1,000 in retail clothing. These rates are derived from 1979 and 1980 Bureau of Labor Statistics data from employers with 11 or more employees adjusted to 15 years of employment for 46 weeks per year.

There are relatively few data on risk rates for occuparional cancer as distinguished from occupational injury and acute illness. The estimated cancer fatality rate from the maximum permissible occupational exposure to ionizing radiation is 17 to 29 per 1,000. (47 years at 5 rems; Committee on the Biological Effects of Ionizing Radiation (BEIR) III predictions.) However, most radiation standards require that exposure limits be reduced to the lowest achievable exposure limit. Approximately 95% of radiation workers have exposures less than one-tenth the maximum permitted level. This risk at one-tenth the permitted level is 1.7 to 2.9 per 1,000 exposed employees.

In considering all these findings, OSHA recognizes that the estimates of risk recommended by the Committee fit well within the range of other risks which OSHA has previously concluded are significant. These estimates are higher than risks of fatality in occupations of average risk, and are substantially higher than the examples presented by the Supreme Court (*IUD* v. *API*, *Id.*).

The mathematical models used to predict estimates of occupational risk resulting from inhalation and dermal contact with MDA were generated from data (approximately 1983) collected by NIOSH, EPA, and CMA which indicate that current exposures are in the range of 50 to 70 ppb (Scenarios I and II of Table 49). Hence, the estimates of lifetime risk resulting from occupational exposure were estimated to be approximately 6–30 per 1,000. OSHA, like the Committee, uses this actual exposure monitoring data rather than assuming that current occupational exposures were in compliance with the ACGIH recommended limit of 100 ppb. Since the ACGIH limits are not mandatory and there is no existing PEL, relying on observed exposure values to predict risk is acceptable.

While the Committee did rely on these data to develop its mathematical models, the Committee used more recent data provided by ICF, Heiden Associates, and many of its own members to estimate benefits (Ex. 9). Thus baseline estimates of current exposures for the eleven industry sectors examined range from levels as low as 1 ppb to as high as 41 ppb. The Committee believed that these new exposure estimates represent many but not all of the firms with potential exposure to MDA and as such it was more appropriate to make use of these estimates in predicting benefits than the occupational exposures used to develop the mathematical models.

Based on the risk estimates, OSHA agrees with the Committee's recommendation that the risk resulting from occupational exposure to MDA be reduced to the extent feasible. It is for the reasons stated above that OSHA accepts the Committee's recommendations for a proposed standard for exposure to MDA. OSHA believes that the rationale offered by the Committee regarding significant risk supports the basic criteria which OSHA traditionally makes use of in making these determinations. All that appears to be lacking from the Committee's recommendation is the actual statement

"occupational exposure to MDA constitutes a significant risk". OSHA, in using the rationale recommended by the Committee, now finds that occupational exposure to MDA poses a significant risk of harm to workers.

VI. Economic and Technological Feasibility

A. General Industry

1. Summary of the Committee's Recommendations

a. *Introduction.* The Committee examined the following three regulatory alternatives in the analysis: (1) A 20 ppb (0.160 mg/m ^{3}) PEL with a 10 ppb action level, (2) a 10 ppb (0.08 mg/m ^{3}) PEL with a 5 ppb action level, and (3) a 1 ppb (0.008 mg/m ^{3}) PEL with a 0.5 ppb action level. The technological feasibility of implementing a STEL was assumed to be feasible for any of the TWA/PEL alternative examined, in that, the same controls needed to reduce the TWA would also assure that the STEL is met. The Committee's preliminary findings are as follows:

- It is technologically feasible for industry to comply with a 10 ppb PEL by installing some readily available engineering controls and incorporating some new work practices. Although it may also be feasible for some industry sectors to achieve 1 ppb as an exposure level, that level is not feasible for major sectors of industry.
- Lowering the PEL from the present levels to 10 ppb, the proposed PEL, in conjunction with other provisions of the standard, would result in annualized compliance costs of approximately $8.2 million and save an estimated 1.8 production workers lives per year of exposure. In addition, compliance with the recommended standard will cost an estimated $0.6 million and save an estimated 0.5 maintenance workers' lives per year of exposure.
- The recommended standard is economically feasible for the sectors studied and will not significantly affect either the competitive structure or the long-term profitability of these sectors.
- The recommended standard is economically feasible and will not result in significant or differential impacts on small business establishments covered under the scope of the standard.
- There are no nonregulatory alternatives that adequately protect most workers from the adverse health effects associated with MDA exposure.

A summary of the benefits and costs estimated by the Committee for the recommended PEL of 10 ppb and two other alternative PELs (20 ppb and 1 ppb) is provided in Exhibit 10, OSHA's RIA. The remainder of this discussion summarizes the analyses upon which these findings are based.

b. *Industry and Exposure Profiles.* The Committee also estimated that there are eleven principal industry sectors (maintenance workers for each sector have been separately identified for purposes of analysis) where workers are potentially exposed to MDA. These sectors are: (1) MDA Production for MDI Synthesis/MDA Sale and Import; (2) Reprocessing; (3) Filament Winding; (4) Potting and Encapsulation; (5) Molding/Bonding of Tools and Specialty Small Parts; (6) Wire Coating; (7) Coatings; (8) Intermediate for TGMDA and PACM–20 Production; (9) Polyurethane Curing; (10) Advanced Composite Materials Production: and (11) use of PMR–15 Pre-preg Materials. Further, the Committee asserted that there are also seven other industrial sectors where MDA was once used and may still be rarely found. These minor sectors are: (1) Coatings (Polybismalimides) of Printed Circuit Boards and Fabrication of Airplane Parts; (2) Dyes and Pigments; (3) Quiana Yarn; (4) Intermediate for Pharmaceuticals, Herbicides, etc.; (5) Rubber Processing; (6) Anti-Oxidants; and (7) Ketamine Production.

The Committee's analysis concluded that MDA is made primarily to serve as an intermediate in the production of methylenediphenylisocyanate (MDI) and MDI is used in a wide variety of products. However, one to two percent of all MDA produced is sold for uses such as epoxy or polyurethane curing, or production of polyamides. In addition, some MDA is imported and used to produce a crude MDI known as PAPI or used for other non-MDI uses such as tetraglycidyl methylenedianiline (TDGMA) or PMR–15 manufacture.

The Committee further concluded that there are six firms which produce MDA for MDI production, MDA for Sale, or which import MDA. MDA is manufactured by 6 companies at 7 locations in four states. Dow Chemical Co. (LaPorte, Texas); BASF (Geismar, La); E.I. Dupont (Belle, WV); Mobay Chemical (New Martinsville. WV and Baytown, TX); Rubicon Chemical (Geismar, La); and Uniroyal Chemicals division of Avery (Naugtuck. Ct). Three of these companies, Mobay, Rubicon, and Dow, account for over 90% of the MDA production. Further, the Committee estimated that approximately 600 million pounds of MDA are produced for MDI conversion, 4,474,000 are produced domestically for sale, and an additional 1.8 million pounds are imported. In addition, it is estimated that the percentage of MDA in the product made domestically ranges from 40–70%, while the percentage in the imported product is approximately 98%.

Uses of MDI are far reaching and include areas of construction, refrigeration, transportation, tank and pipe insulation, packaging, casting systems for solid products, and systems for microcellular products. Consumer products include polyurethane foams (rigid, and flexible), elastomers, coatings, thermoplastic resins, foundry core binders, adhesives and sealants, and spandex fibers. Thus, because MDA is the reactant chemical in the production of MDI, the significance of and the need for MDA depends upon the need to produce MDI. However, since there are so many products containing MDI and the extent of MDI use is increasing, it can be assumed that MDA use will also continue to increase. In addition, the non-MDI uses of MDA (2% of total MDA consumption) are also expected to increase as product demand in the areas of nuclear energy, weapons manufacture, and space exploration increases.

The Committee further estimated that the number of exposed production workers is 3,836 in the eleven principal industry sectors and an additional 189 maintenance workers are also exposed in these sectors. The average weighted exposure levels ranged from 1 ppb in PMR–15 use to 19 ppb in Filament Winding. For maintenance workers the estimated average exposure level is 250 ppb. The average days of MDA exposure per year ranged from 47 for Advanced Composite Manufacture to 250 for production and some of the other sectors.

c. *Benefit Analysis.* The major benefit of the proposed standard would be a reduction in the occurrence of occupational illnesses. Some aspects of these benefits can be quantified, such as the reduced risk of cancer due to direct exposure to MDA. The number of cancer cases that would be prevented because of the proposed MDA regulation is based on the the Committee's recommended model for quantitative assessment of the risk of cancer, resulting trom occupational exposure to MDA. The model is based on "realistic worst-case" assumptions; yet, in some respects, the use of the model also tends to underestimate the true benefits of the proposed regulation, because the only benefits quantified in the analysis are those resulting from a reduced incidence of cancer. They do not include an estimate of the reduction in the incidence of other adverse health impacts potentially associated with MDA exposure such as liver disease. Because of data limitations, the

Committee could not quantify these additional benefits, but expects that they will be substantial.

Based on the methodology detailed in Chapter III of the Committee's recommendation, the Committee estimated the excess cancer cases that are expected to occur among MDA-exposed workers in the eleven principal industry sectors described above. Estimates of risk are based on both airborne and dermal exposure to MDA. Based on current MDA exposure levels, the Committee estimates that by lowering the PEL to 10 ppb and implementing other components of the standard, the number of excess deaths would be reduced by 1.8 for each year of exposure. These estimates apply to production workers only; an additional 0.5 excess cancer deaths would be avoided each year among maintenance workers as a result of the standard. Promulgating the proposed rule with a 10 ppb PEL would result in a total of 2.3 cases of cancer averted each year. The analysis indicates that most of the potential risk results from dermal exposure.

In addition to the lives saved as a result of reduced MDA exposure levels, the Committee expects the medical surveillance provisions to further reduce the number of excess deaths. Workers exposed to MDA often exhibit early signs of liver disease that can be detected by a proper medical examination. Better control of the MDA exposures of these workers would, at least in some cases, provide an opportunity to observe the abnormalities prior to the development of potentially fatal disease.

d. *Technological Feasibility*. The Committee has determined that the recommended standard is technologically feasible. The methods that can be used to reduce employee exposure to MDA include conventional technologies such as general and local exhaust ventilation, pneumatic feed systems, and glove boxes. Such technologies are commonly known and currently used in the affected industries. In addition, provisions of the recommended standard that are not related to the PEL, such as medical surveillance and raining, are judged to be feasible.

e. *Costs of Compliance*. The Committee made estimates of the compliance costs that would be incurred by employers in the eleven principal industry sectors which handle MDA and would be primarily affected by the recommended standard. Because there are industry-specific differences in exposure characteristics and equipment usage, cost estimates for each sector were developed separately.

A baseline of current industry practice was identified for each sector. This baseline was derived from information on current production methods, exposure levels, and hazard control techniques obtained from information supplied to the Committee. The costs of the controls which would be needed to achieve each successively lower PEL Were then estimated based on the assumption that new controls could be added to those controls already in place.

It should be noted that the lower the target PELs, the higher the uncertainty associated with estimates of the effectiveness of control technology and housekeeping practices and their related costs. The Committee is confident that a 10 ppb PEL can generally be reached and maintained on an 8-hour TWA basis but is unsure that all industry sectors could generally achieve a 1 ppb PEL.

The Committee has estimated the following total annualized compliance cost (for production workers) as $8.2 million for the 10 ppb permissible exposure limit. The major component of the estimated costs for production workers are the costs of hygiene facilities and practices, which constitute approximately 50% of the total estimated costs for the 10 ppb PEL. The second major element of cost is for protective clothing and equipment, which is approximately 30% of the total cost of compliance of achieving the 10 ppb PEL. Housekeeping costs constitute approximately 10% of the total estimated costs. The estimated costs of engineering controls constitute only a small percentage (4%) of the total estimated annualized costs of compliance for production workers.

f. *Economic Feasibility Analysis*. The Committee acquired a substantial amount of data regarding compliance technologies in the course of its feasibility analysis. While this material was extremely useful for the Agency's technological feasibility and compliance cost analysis, it was not sufficient to support detailed, rigorous economic and regulatory flexibility analysis. None of the submissions, for example, presented data on the profitability of specific product lines, and detailed financial and economic data were available for only a few firms which produce or use MDA. The Committee therefore relied heavily on the material gathered by both Heiden Associates, employed by CMA, and ICF, employed by OSHA, to perform a preliminary analysis of the economic impact of the recommended proposal at the industry sector level, under a set of simplified assumptions about the economic and financial conditions of the MDA industries.

A substantial amount of information is needed to analyze the economic impacts described above. Not all of it could be developed given the scope and resources of the Committee's investigation. However, in previous work, ICF has investigated the costs of substitute chemicals for MDA in many of its broadly defined uses. In addition, a subcontractor for ICF gathered information on substitute costs from individual firms during their site visits. While conducting these visits, this subcontractor also collected some information on current costs of the production activities that use MDA. Finally, ICF has collected and developed some general economic information on the affected industries and the markets of their products and a small number of firms in the MDA industry. Using these data, the Committee has been able to examine the economic effects of the regulations in terms of potential price increases, employment and output effects, and impacts on firms' profitability.

The overall conclusions reached in the Committee's economic impact assessment are: (1) Most, if not all, of the affected industries ought to be able to pass the regulation's costs through to product purchasers (because of market and other considerations described below); (2) to the extent that output good prices rise in the process of passing these costs through to product purchasers, these price increases are not likely to be very large relative to the pre-regulation prices of the products; and (3) to the extent that prices of products do not rise (so that pass-through of these regulatory costs to product purchasers does not occur), the regulatory costs are not large relative to the other production costs and the net incomes of the companies examined. Consequently, the Committee has concluded that the proposed regulations will not pose a substantial burden to the affected industries, their employees, or consumers of their products.

Hence, the Committee's conclusion is that it is economically feasible for the eleven principal industry sectors to comply with the provisions of the recommended MDA standard and that none of the sectors studied by the Committee would experience significant economic impacts.

g. *Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96–353, 94 Stat. 1164 (5 U.S.C. 601 *et seq.*), the Committee has given special consideration to the mitigation of the economic impacts of

the recommended standard on small entities. The Committee does not anticipate that the recommended standard would adversely affect small entities.

In developing a recommended standard for occupational exposure to MDA, the Committee carefully considered size factors such as number of employees, total assets, and gross revenues to ensure that the proposed standard would minimize the impact on small firms while continuing to protect workers. Furthermore, the Committee determined in the economic feasibility analysis that most, if not all, of the affected industries would be able to pass the regulatory costs through to product purchasers reasonably rapidly. Thus, most of the affected firms probably will not have to bear all of the compliance costs for these regulations.

Finally, the Committee examined the financial conditions of a sample of firms affected by the regulations and determined that even if these firms were to bear the compliance costs of the regulations, these would not impose substantial burdens for these firms. Therefore, the Committee's conclusion is that the proposed regulation will not significantly affect small entities.

h. *Assessment of Nonregulatory Alternatives.* The Committee believes that there are no nonregulatory alternatives that would adequately protect most workers from the adverse health effects associated with MDA exposure. The tort liability and Workers' Compensation systems do not provide adequate worker protection due to their unpredictability and inconsistency from state to state. Other government regulations do not provide adequate worker protection due to their limited scope. OSHA does not have a current workplace standard for occupational exposure to MDA; thus, no regulatory protection is currently being provided.

Note: Many employers offer voluntary protection e.g. personal protective equipment, showers, change rooms, etc.

i. *Cost-Effectiveness of Regulatory Alternatives.* The available scientific evidence demonstrates that MDA exposures can pose a hazard in the workplace. The Committee believes that this hazard can be significantly reduced through the implementation of the 10 ppb PEL. The Committee further believes that this PEL is obtainable and that it is feasible.

2. OSHA's Findings

OSHA reviewed the Committee's recommendations regarding the economic and technological feasibility in general industry of complying with the PEL of 10 ppb proposed by the Committee and the accompanying standard provisions and believes that the 10 ppb PEL the 100 ppb STEL, and the accompanying standard provisions will substantially reduce the risk to worker health, and it is feasible.

Included in the Committee's recommendations for economic and technological feasibility are also recommendations for examining the benefits expected from implementation of the Committee's recommendations. The Committee's benefit analysis reflect the number of lives saved which would occur if the Committee's recommended standards were implemented. OSHA recognizes that in calculating the benefits expected that the Committee relied upon the risk determinations which were made. OSHA further recognizes that the methodology used by the Committee does not propose the use of the surface area correction factor in making risk calculations. While OSHA did adopt the Committee's risk methodology, OSHA is cognizant of the impact that application of the surface area correction factor has on the risk estimates and subsequent benefits. In fact, OSHA acknowledges that application of the correction factor results in risk estimates of one order of magnitude greater. When applying this factor, the excess cancers averted are escalated from 1.8 to 18 per year of MDA exposure at the 10 ppb PEL.

OSHA is also cognizant of the fact that many regulatory agencies, such as EPA, recommend using the surface area correction factor because, it is the opinion of these groups, that application of this factor makes the correlation between dose in animal and dose in man more precise. Many groups, including the Committee, have stressed the importance of acknowledging the lack of certainty expressed by estimates of risk. Clearly, these estimates are just estimates and should not be relied upon as definitive indications of the risk anticipated from occupational exposure to MDA. OSHA is guided by the Committee's recommendations in this instance and believes that benefits should be derived using the range of risk expected from applying and not applying the surface area correction factor. The result of OSHA's position is that the benefits from implementing a 10 ppb PEL and the associated duty provisions could result in as few as 1.6 to as high as 18 cancers averted per year of exposure.

B. Construction Industry

1. Summary of the Committee's Recommendations

a. *Industry Profile.* For the purposes of estimating costs, risks, and benefits, the Committee made a number of reasonable assumptions in order to estimate the number of potentially exposed employees. These assumptions are based on the amount of MDA which reportedly goes into paints and coatings, the rate (lbs/hr) of paint application under spray and roll-on conditions, and the average hours of work of a typical painter. Assuming that 200,000 lbs of MDA are used yearly in coatings [1], and that it constitutes 20% by weight of the final product, the Committee estimated that one million pounds of MDA containing coatings are applied each year. Estimates provided to the Committee by the International Brotherhood of Painters and Allied Trades suggest that the average application rate of spray methods is 20 lbs/hr, while that for the roll-on methods is 30 lbs/hr. The Committee combined these estimates with the assumption that a typical painter spends only four hours/day painting,[2] with the rest of the time taken up by preparation, set-up and clean up of work areas. The Committee further assumed, in the absence of any available data, that a typical painter would spend only 10% of his work time (25 days) each year using MDA-containing coatings.[3] The result of these assumptions is that a typical painter would spend some 100 hours/year applying MDA coatings.

For spray applications, each painter would thus apply 2000 lbs/yr; and for roll-on application, 3000 lbs/yr.[4] Since

[1] ICF, Inc. provided this estimate for OSHA in its preliminary technological and economic analysis. Thus the Committee made use of the 200,000 lbs. per year figure in its computations. The International Brotherhood of Painters and Allied Trades provided the estimate that the paint was composed of 20% MDA and 80% other products. (Ex. 9)

[2] The number of hours per day engaged in painting operations was furnished by Research Triangle Institute in a document prepared for OSHA in 1980 entitled "Economic Impact Statement for Abrasive Blasting". (Ex. 9)

[3] Estimated from discussions with representatives of the International Brotherhood of Painters and Allied Trades. Since approximately 1 million pounds of this are MDA coatings, the Committee conservatively estimated that MDA containing coatings are approximately 10% of the applied coatings and should require 10% of the workers time to be applied. (Ex. 9)

[4] The estimate of 2000 lbs/yr for spray painters and 3000 lbs/yr for roll-on application came from the discussions with the International Brotherhood of Painters representative. (Ex. 9)

an estimated 400,000 lbs of MDA paint are consumed each year in spray operations and 600,000 lbs in roll-on operations, the sum of these assumptions yields an estimate of 200 potentially exposed workers (400,000 lbs/yr divided by 2000 lbs/worker year) in spray operations and 200 workers (600,000 lbs/year divided by 3000 lbs/worker year) in roll-on applications. These estimates are obviously tenuous, but the Committee considered them a reasonable basis to estimate costs, risks, and benefits. The Committee believed that both spray and roll on application methods entail risk of airborne and dermal exposure. Spray applications, in the view of the Committee, are especially likely to pose potentially serious hazards. In addition, the Committee is aware of two reported cases involving acute hepatitis after application of MDA-containing coating products, and sources in the scientific literature and at least one trade union have reported that skin problems are common among painters using epoxy paints. The latter reports confirm the common occurrence of dermal exposures, and thus the potential for skin absorption of MDA.

For the purpose of risk estimation in spray operations, the Committee assumed that TWA airborne levels of exposure to MDA could reasonably be estimated to be similar to those experienced by maintenance workers, 250 ppb (2 mg/m ^{3}). Dermal exposure levels were also assumed to be 0.50 mg/cm ^{2}-hr for the palms and 0.00134 mg/cm ^{2}-hr for the forearms and upper body [5]. These are twice that expected for maintenance workers. The Committee believed that the spray applications presented twice the potential for skin deposition and absorption as would be expected for maintenance workers. For manual roll-on applications, it is reasonable to assume lower levels of both airborne and dermal exposures. The Committee estimated that airborne and dermal exposures would be comparable to those estimated for the polyurethane curing sector, or 0.160 mg/m ^{3} (airborne), 0.25 mg/cm ^{2}-hr for the palms, and 0.00067 mg/cm ^{2}-hr for the forearms and upper body [5].

The Committee has estimated that 400 workers are exposed to MDA-containing paints and coatings, 200 in spray applications and 200 in roll-on applications. Based on the limited data available, an average of 6 painters per employer or firm was assumed. The total number of potentially affected firms would thus be approximately 66 (400 workers/6 workers per firm). Spray applications were assumed to entail higher exposure, both airborne and dermally, than roll-on applications. Data describing exposure levels, number of employers, or number of employees were not available to the Committee, so that the exposure profiles were constructed with the use of reasonable assumptions.

b. *Benefits.* In this section, the Committee estimated the potential benefits (in terms of deaths avoided) accruing as a result of its recommendations for a proposed standard for the Construction Industry. The analysis of this section demonstrates that as a result of the recommendations being made by the Committee, approximately .042 painters applying MDA containing coatings through spray applications and .019 painters applying MDA containing coatings through roll-on applications will be saved for every year of reduced exposure by establishing a permissible exposure limit of 10 ppb and reducing to the extent feasible dermal absorption of MDA. A significant proportion of the estimated lives saved are the result of the reduction in dermal exposure, whereas the reduction in airborne exposure levels makes a much smaller contribution to the reduction in risk.

While the Committee was able to estimate the benefits from reducing the risks due to occupational cancer, it was unable to quantify the effects that the recommended standard provisions would have on reducing other occupational risks resulting from MDA exposure (e.g., reduced incidence of dermatitis, liver toxicity, etc.).

c. *Technological Feasibility.* This section assesses the technological feasibility of achieving the alternative levels. The Committee has reviewed the technological feasibility and believes that while it may be feasible and necessary in some instances to use local (or general exhaust ventilation) to reduce exposures, these controls alone will not provide adequate protection for painters (applying coatings through spray application). These controls in conjunction with the use of respiratory protection will be necessary to ensure that workers applying paints through a spray technique are adequately protected. In many instances, the Committee believes that it will not be feasible to use local or general exhaust ventilation, and in these cases only respiratory protection will be used. The Committee recognizes that many coating applications in the Construction Industry will be to concrete structures, pipes, flooring, etc. These surfaces may be located inside or outside of buildings but are usually outdoors. It is often times difficult to use traditional control technologies in these instances. However, the Committee acknowledges that some of these construction activities may be conducted inside of facilities or perhaps in confined spaces (e.g., tanks, pipes). In these instances, the Committee expects that employers will provide the usual and necessary engineering controls in addition to the necessary respiratory protection. The Committee also recognizes that the use of engineering controls in these instances is mandated by existing OSHA regulations (e.g. confined spaces, spray painting).

For purposes of feasibility, the Committee believes that compliance will be achieved primarily through the use of the appropriate respiratory equipment and not through the use of engineering controls. The Committee made these recommendations based on its findings that in the construction sector MDA appears to be used exclusively in coating application. No other use was identified. While workers applying coatings through roll-on techniques were not expected to need respirators, those engaged in spray application would be required to use a respirator.

Based on the analysis discussed above, the Committee recommended that the following preliminary determination of feasibility in these sectors be used by OSHA:

- It is technologically feasible for the painters applying MDA-containing coatings to achieve compliance with a PEL of 10 ppb or less through the use of the appropriate respiratory protective equipment.
- It is also considered feasible to eliminate dermal exposure by the use of appropriate personal protective equipment and clothing.

d. *Costs of Compliance.* This discussion presents estimates of the compliance costs that would be incurred by employers in the Construction Industry subsequent to the promulgation of a PEL of 10 parts per billion (0.08 mg/m ^{3}), with an action level of 5 parts per

[5] The Committee estimated that exposures for spray applications would be roughly twice that of maintenance operations. The Committee did attempt to substantiate these assumptions by making comparable comparisons. A spray painting evaluation by NIOSH provided the comparison. Comparables indicate that paint mist concentrations ranged from 2.0–43.3 mg/m ^{3}. Assuming 20% MDA by weight, then the mist would range from 0.4–8.7 mg/m ^{3} respirable MDA. The Committee's estimates that 0.160 mg/m ^{3} of MDA would be respirable for roll-on applications and that 2 mg/m ^{3} would be respirable for spray applications appear to be conservative and perhaps underestimates the true worker exposures but the Committee's assumptions are reasonable. (Ex. 9)

billion. The cost to achieve this PEL would be the result of the use of personal protective equipment, hygiene measures, education, and other measures. The costs of engineering controls are not included in the analysis, since such controls would only occasionally be implemented. The total estimated cost of compliance is $355,428/year for the entire sector to achieve compliance with any of the PELs whether it be 1, 10, or 20 ppb.

e. *Economic Feasibility and Regulatory Flexibility Analysis.* In accordance with Executive Order No. 12991 (46 FR 13193, February 19, 1981), OSHA has assessed the potential economic impacts of the proposed MDA standard. The preliminary determination is that the regulatory requirement limiting MDA exposure in the workplace, including PEL levels reduced to 10 ppb, would not result in significant adverse economic impact on any of the industry sectors for which detailed financial and compliance data are available.

Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96–353, 94 Stat. 1164 (5 U.S.C. 601 *et seq.*)), consideration has been given to the mitigation of the economic impacts of the proposed standard on small entities. Based on the available data, it is not anticipated that the proposed standard would significantly affect a substantial number of small entities.

The proposed regulations limiting exposure to MDA in the construction industry affects workers in approximately 66 firms. The Committee has conducted a preliminary assessment of the economic impact likely to be experienced by these 66 affected firms and has determined that these are likely to be minimal based on the nature of the applications involved and the probability that these compliance costs will be passed through to the purchasers of their services. The supporting analysis for this finding is presented below, and is based on the same methodology for determining economic impacts used to assess the impact of the proposed regulations on the producers and primary users of MDA.

The annualized compliance costs faced by the affected construction firms will be approximately $5,450. Several factors suggest that these costs will be passed through to the purchasers of the services of these construction firms. Approximately 90% of these costs are variable compliance costs, which implies that if these costs can be passed through to the purchasers of the services of these firms, they will be passed through relatively rapidly. A second and perhaps more important reason why these compliance costs will probably be passed through to the purchasers of these firms' services is that the purchasers are large firms and government entities managing large projects (e.g., chemical plants, reactors, and defense-related activities). As such, the incremental costs associated with limiting worker exposure to MDA are likely to be extremely small relative to the economic size of these projects. Furthermore, in many cases, contractual and engineering specifications may require that the MDA-related products be used for their desirable physical properties. In these cases, the incremental compliance cost will certainly be passed through to these purchasers. Given these considerations, it is likely that these compliance costs will be fully passed through in a relatively short period of time.

If these compliance costs are passed through to purchasers of these firms' services, the increase in the price of these services is likely to be extremely small. First, the annual compliance costs are quite low per firm, and constitute an even smaller portion of the costs of the activities of these firms. That is, compliance costs of several thousand dollars per year are quite low when compared to these firms' labor costs—on the order of tens of thousands of dollars per year per worker—and relative to the total costs of the construction services provided. Thus, it is unlikely that the price increase that may result from the proposed regulations will be large, so that plant closures or employment contractions will result.

Finally, if the compliance costs are not passed through to the purchasers of the services of these affected firms, given the size of the incremental costs, it is highly unlikely that these costs would pose a significant burden to the firms involved. Relative to the workers and other costs of construction activities affected by the proposed regulations, the incremental compliance costs of $5,450 per firm are extremely small. Thus, it is unlikely that any significant economic impact will arise from the proposed regulations even if the compliance costs are not passed through to the purchasers of these firms' services.

Based on these considerations the Committee concluded that the proposed regulations will not cause significant economic impacts to the affected construction firms because the compliance costs are small relative to the economic size of the affected firms and the activities into which these construction services are inputs.

2. OSHA's Findings

OSHA reviewed the Committee's recommendations regarding the economic and technological feasibility of construction industry compliance with the proposed PELs and the accompanying standard provisions and believes that compliance is feasible.

In general, the Committee recommended in these feasibility findings that construction employers could implement engineering and work practice controls to the extent feasible, to achieve the PELs. Yet, while favoring this traditional hierarchy of control, the Committee did conclude that: "while it may be feasible in some instance to use local exhaust or general exhaust ventilation to reduce exposures, these controls alone will not provide adequate protection for painters" (FR 26849). Thus, for purposes of estimating costs and selecting control technology, the Committee assumed in its feasibility findings that compliance for workers engaged in application of paint through spray techniques would be achieved through the use of an air-supplied respirator.

OSHA, like the Committee, is also cognizant of the fact that coating application in the construction sector often involved the application of surface coatings to large concrete structures, (e.g., nuclear power plants) and that in these instances the traditional engineering controls which would apply to spray painters in spray booths or rooms might not be feasible and it might become necessary to reduce worker exposure to MDA through respiratory usage. On the other hand, in those instances where engineering controls were not feasible for workers actually engaged in the spray application process, engineering controls such as isolation would be necessary to protect workers on neighboring work sites. OSHA, like the Committee, also recognizes that worker protection might freguently rely solely on work practices which in turn rely very heavily on worker participation in order to be effective; in these instances respirator use would serve as a back up for work practice failures. OSHA further recognized that the Committee's recommendations were made primarily from a concern with ingestion and absorption of MDA, since the available data suggest that blindness had resulted from ingestion as well as cancer and hepatitis from absorption, and a realization by OSHA that coating applicators are potentially exposed to very high concentrations of MDA in the paint mists. It appeared more protective

to require the use of respirators for coating applicators in addition to feasible engineering and work practice controls and thus the Committee's feasibility determinations assumed that compliance with the PELs would be achieved primarily through the use of a respirator in this limited instance.

Thus, OSHA recognizes that although the Committee favors the hierachy of controls requiring engineering and work practice controls, the Committee believed that in the construction sector, where MDA was applied as surface coatings, feasible engineering controls and work practices might not be sufficient to provide adequate protection and that these controls in conjunction with the proper respirator and personal protective equipment are necessary to assure that workers engaged in spray painting operations are protected. In addition, it is relevant to note that the Committee was unable to identify any use of MDA in construction except for coating application through spray techniques or roll-on application in non-barriered areas. Based on the Committee's recommendation for general industry, OSHA can assume that for other construction uses that the traditional hierachy for control would apply.

Before concluding that the Committee's recommendations for feasibility for construction were appropriate, OSHA examined its existing rules to determine if spray painters applying paints to non-barriered surfaces were required by existing regulations to rely exclusively on engineering controls and work practices rather than an air-supplied respirator to achieve compliance. OSHA's purpose was to establish "baseline" data reflective of current feasibility practices. While OSHA does have a general industry standard for spray finishing operations found in § 1910.94(c), this standard applies to the automatic, manual, or electrostatic deposition of coatings in enclosed or confined spaces. This section, however, delineates performance orientated ventilation requirements to achieve the PELs found in § 1910.1000 as well as respirator requirements. Thus MDA, used as coatings, in any of these processes, would fall under the traditional hierarchy of control strategies. These standards, however are not applicable to roll-on application nor spray operations which are not confined by barriers. OSHA believes that the Committee was correct in assuming that coating applications in barriered or confined areas other than would be regulated by existing standards and traditional control strategies applied. Furthermore, it is clear that non-barriered spray operations and roll-on applications are not covered by existing standards which require engineering controls and work practices such as those recommended by the Committee and now proposed by OSHA.

OSHA, like the Committee, was unable to identify any existing regulations which would require the use of engineering controls and work practices, or respirators for that matter in these application processes.

Since existing regulations did not appear to cover this select group of exposed workers, OSHA sought further guidance in the appropriateness of the Committee's feasibility determinations. OSHA recognizes as did the Committee that spray application is a unique and very specific work situation. Basically, it involves the application of MDA coatings to the exterior surfaces of large structures, application is primarily through traditional spray applications, and workers are potentially exposed to extremely high concentrations of paint mists which include MDA along with other contaminants. It is often times difficult to perform monitoring and in fact breathing zone samples of paint mists are monitored and calculations of per cents by weight of substances contained in the paints are often times used to estimate individual contaminants, such as MDA. A recent NIOSH publication "An Evaluation Of Engineering Control Technology For Spray Painting" provided the necessary technical information which OSHA needed to make its findings on the Committee's recommendations. This document gave several recommendations for protecting workers engaged in spray operations. These recommendations and OSHA s conclusions regarding these findings can be found below.

First, the document found that the level of airborne paint mist is a more reliable indicator of the degree of control in manual spray finishing than the concentration of solvent vapors. Solvent concentrations were well below the recommended maximums even when paint mist levels exceeded the maximum concentration permitted for nuisance dusts. If the paint composition is known, the concentration of paint mist can also be used as a guide in estimating the potential exposure to specific non-volatile paint components. For example, if the concentration of paint mist is 5 mg/m^3, and lead represents 1 percent by weight of the paint solids, then the airborne concentration of lead could be estimated at 50 ug/m^3.

Thus this document confirmed that the technique of using percent by weights to estimate contaminants was the current state of the art. OSHA was further guided by the statement found in this document which states; "Present analytical techniques do not permit the evaluation of the presence of these amines in a curing agent/paint aerosol." It appears that the percent by weight approach would be necessary in this unique situation. Given the uncertainity of this monitoring approach, it seems more appropriate to select a respirator which will protect against paint mists generally, rather than any one chemical specifically. This is what the Committee recommended.

Second, the report found that application methods are assumed to be key to reducing exposure. Where feasible, airless techniques are recommended over the more conventional spray guns; monitoring data indicate that paint mist concentrations where airless methods are used are approximately 10 times less than those using the conventional methods. NIOSH concludes in this document that in many operations, ventilation is impractical, and efficient application techniques are the only logical choice. The recommendation is that application equipment should be selected that minimizes the energy expended in the atomization process, thus reducing the amount of stray mist that is generated.

While OSHA agrees that airless methods and roll-on application should be used whenever feasible, OSHA believes as did the Committee that the primary use for coatings in the construction sector involves the traditional method of spray application. The NIOSH document indicates that less paint is also lost through these techniques and OSHA believes that this will be an additional incentive to use these preferred techniques when feasible. OSHA believes as did the Committee that a respirator is still necessary for painters applying MDA coatings and using airless techniques.

Third, the study also recommends that respiratory protection be required in those spray finishing operations that employ significant quantitites of highly toxic materials, such as lead, chromium, or reactive compounds (MDA). Respiratory protection is also necessary against paint mist and organic solvents in painting enclosed spaces or other areas where ventilation is compromised.

OSHA finds this recommendation to be consistent with those made by the

Committee and believes that a properly selected and functioning respirator along with feasible engineering controls is necessary to protect workers from the hazards posed by coating application.

Fourth, the report recommends that a conventional half facepiece respirator, with mist-removing prefilters and organic vapor-removing cartridges, should provide adequate respiratory protection in cases where the hazards can be identified and quantified. In many instances, the variety of paints employed on a given workshift make quantification of the hazard impractical. In other cases, painting may be done in an enclosed area. These situations warrant the use of a supplied-air respirator.

OSHA finds this recommendation consistent with those made by the Committee and notes that the Committee's feasibility determinations for workers engaged in spray application included the use of an air-supplied respirator.

Fifth, the report notes that many paint constituents can be injurious to the eyes and the skin as well as to the respiratory system. Full facepiece or hood-type respirators are recommended where these consitituents are present. In addition, the full facepiece is more comfortable than a half-mask because the pressure of the attaching straps is distributed over a larger facial area and no goggles are required to protect the eyes.

The recommendations made by the Committee closely parallel those made by NIOSH. Applicable engineering controls along with the appropriate respirator and personal protective equipment must be worn by workers engaged in spray painting applications in the construction sector. OSHA further recognizes, as did the Committee, that for the most part the only feasible control which will protect the worker from his work place environment, in this instance, may be only a respirator. In making this finding, OSHA is not deviating from its traditional approach to achieving control through recognized and accepted strategies, nor is OSHA not requiring the application or use of engineering controls in feasible situations. Clearly, OSHA already has standards which require the use of such controls in confined or enclosed spaces. Rather, OSHA is recognizing, as did the Committee that the use of MDA in spray painting operations in the construction sector (mostly involve painting of large structures e.g. nuclear power plants) represents a unique work situation and that feasibility findings for spray application can only be made if reliance is given to the use of the appropriate respirator, supplemented with engineering and work practice controls were feasible. OSHA believes that as a result of these feasibility findings the standard provisions now being proposed will provide adequate protection for workers engaged in spray operations regardless of the constitution of the paint being used. In addition, OSHA as did the Committee would require adherence to traditional control strategies for employers engaged in activities in operations involving work situations other than the application of MDA through spray techniques.

OSHA recognizes that the Committee assumed that no engineering controls would be used by painters engaged in the spray application of MDA in the construction sector, thus no costs for engineering controls were computed. Hence, the Committee's feasibility determinations were based on the assumption that respirators would be the sole means of protection, aside from personal protective clothing in this sector. Since the Committee recognized respirators as the only feasible method of control, OSHA solicits comments on the appropriateness of allowing spray painters to rely solely on the use of respirators rather than also requiring engineering controls and work practices in this unique situation to achieve the PELs for workers engaged in spray application techniques. OSHA also requests comments on whether or not MDA is used elsewhere in the construction sector, and, if so, what control techniques are currently being used, and whether it is feasible to achieve the proposed PELS by exclusive reliance on engineering controls and work practices or whether respirators are the only feasible control.

VII. Summary and Explanation of the Standard for General Industry

A. Committee's Recommendations

Paragraph (a). Scope and Application

(a)(1) The Committee's recommended general industry standard would apply to all "oocupational exposures" to MDA with the specific exceptions set forth in the scope and application section and would apply to all workplaces in all industries, except for construction, where MDA is produced, released, stored, handled, used, or transported, and over which OSHA has jurisdiction.

The Committee developed a separate recommended standard for the construction industry. The two standards, general industry and construction, would, however, cover all industries covered by the Act. The general industry standard covers all activities and operations including ship repair and rebuilding, manufacturing, secondary processing, and downstream use of MDA. Employees of the Construction Industry are covered by the construction standard. Construction activities are defined in 29 CFR 1910.12(b) as work for construction, alteration and/or repair, including painting and decorating.

As noted above, ship repair and shipbreaking activities are covered by the general industry standard. The Committee believes the provisions of the general industry standard are appropriate for the operations involving MDA which will occur on ships.

(a)(2) This paragraph contains exclusions for workplaces that process, handle, or use products containing MDA where initial monitoring data show that the product cannot release MDA at or above the action level and where the likelihood for dermal exposure does not exist. The criterion for exemption under paragraph (a)(2) requires monitoring data that show that the material is incapable of releasing airborne MDA at or above the action level under the expected conditions of processing, handling or use, and the likelihood of dermal exposure does nor exist.

The Committee recognized that in some segments and operations, exposures are below the action level and do not result in dermal exposure because of the nature of the process or use. In those circumstances, the Committee has proposed an exemption from the proposed MDA standard. In general, the Committee agreed that because of the low vapor pressure of MDA, the inhalation potential is minimal provided the substance is not heated. However, the Committee would only recommend this exclusion provided that dermal exposure was not likely. Further, the Committee believed that continued monitoring for many operations, where the evidence clearly demonstrates that exposures will be consistently below the action level and where dermal exposure does not exist, does not appear to be necessary to protect employees, nor does it appear to be cost-effective. Moreover, the Committee noted that the recommended proposed rule has been structured so that any compliance burden imposed by the standard is related to the extent and duration of the employees' exposure in the employer's workplace. The Committee agreed, however, that in order to be exempt from these provisions the employer must monitor to make this determination. The Committee did not feel that the employer should rely on data generated by manufacturers

and believed to be applicable to downstream users.

The Committee did, however, agree to allow the employer to demonstrate that its employee exposures are below the action level by using historical monitoring data, i.e., monitoring results for these employees obtained within a one year period preceding publication of this proposed standard.

The Committee distinguished this exemption from the exemption found in (a)(3) on the basis of "capability of release." In this exemption the employer must know, based on information available to him, that MDA is capable of being released, but based on his own initial monitoring, will never exceed the action level. On the other hand, to rely on the exemption found in (a)(3) the employer must determine, based on his reasonable reliance on objective data, that MDA is, in fact not capable of being released at all. Again, both require worst case exposure assumptions and that the likelihood for dermal exposure is non-existent.

(a)(3) Employers may also rely on objective data as the basis for an exemption but only when the data indicate that no MDA is ambiently or dermally released. The Committee believes that the primary and intermediate users will be in the best position to test their products and to supply the necessary objective data which indicates that MDA is not ambiently released and there is no likelihood for dermal exposure. This recommended proposed standard thus would not require downstream employers to generate their own objective data on the MDA levels likely to be released from a product if they can obtain it from producers or other processors.

(a)(4) The proposed standard also would include an exemption for the storage, transportation, distribution, or sale of MDA in intact containers sealed in such a manner as to contain the MDA dusts, vapors, or liquids, except for the provisions of 29 CFR 1910.1200 as incorporated into this standard and the emergency provisions of this standard. Containers would be covered by the Hazard Communication standard, 29 CFR 1910.1200 (52 FR 31852; Aug. 24, 1987), which requires, in conjunction with the proposed MDA standard, labeling containers to indicate that they contain MDA (a suspect carcinogen), employee training specifying what to do if the container was opened or broken, and supplying material safety data sheets to users/employees.

The basis for this exemption is that sealed containers are unlikely on a regular basis to leak sufficient MDA to expose employees over the action level or pose a dermal exposure problem. The labeling and training provision of the hazard communication standard provides sufficient protection in those situations where a container breaks so that employees will know how to handle and clean up a spill safely. The intention of this exemption is to cover warehouses, distributors, supply rooms, and similar operations where chemical containers are stored, transported, or sold, and not normally opened. However, operations where the containers are opened and the contents used or tested would be covered because of the possibility of exposure in excess of the action level or dermal exposure.

(a)(6) The Committee agreed that the employer must appropriately document the information which supports any exemption, and the employer must maintain a record of this information.

Paragraph (b). Definitions

Paragraph (b) of the recommended MDA standard for general industry defines a number of terms used in the standard. In some instances, the definitions recommended by the Committee are consistent with those found in other OSHA standards, e.g., "Director," "Assistant Secretary," and "Authorized person". However, certain other terms require definition because they are used in accordance with their meanings in general industry.

Action Level. The Committee recommends that an "action level" of approximately one-half of the established permissible exposure limit be established in the proposed regulation. The Committee acknowledged that the purpose of the action level is to relieve the burden on employers by providing a cut-off point for required compliance activities under the standard.

The Committee also agreed that OSHA's statistical basis for determining the action level as discussed in connection with several other OSHA health standards (see, for example, acrylonitrile, 43 FR 4794) is appropriate. In brief, although all measurements on a given day may fall below the permissible exposure limit, some possibility exists that on unmeasured days the employee's actual exposure may exceed the permissible limit. Where exposure measurements are above one-half of the permissible exposure limit, i.e. the action level, the employer cannot reasonably be confident that the employee may not be overexposed. (Leidel, N.A. *et al.*, "Exposure Measurement Action Level and Occupational Environmental Variability." DHEW, PHS, DCD, NIOSH, DLCK (August 1975)). Therefore, requiring periodic employee exposure measurements to begin at the action level provides the employer with a reasonable degree of confidence in the results of the measurement program.

The Committee also agreed that, in the absence of a demonstrated safe level of exposure for a carcinogen, it is appropriate to begin some protective actions at one-half the PEL or in the case of MDA, 5 parts per billion. Establishing an action level serves such a purpose.

Emergency. The Committee also recommended including a definition of an emergency in the proposed standard. Emergency is defined to mean any occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which results in an unexpected and potentially hazardous release of MDA. Sections of the proposal that include provisions to be met in case of emergencies will include respiratory protection, medical surveillance, and employee information and training.

Employee Exposure. The Committee also recommended that the proposed regulation define "employee exposure" to mean that exposure which would occur if the employee were not using a respirator or personal protective equipment. The employee's exposure measurements would be made without regard to any use of personal protective equipment. The Committee agreed that exposure monitoring is not a single-purpose activity. It is necessary to know employee exposure levels without the use of respiratory protection to evaluate the effectiveness of engineering and work practice controls and to determine whether additional controls must be instituted. In addition, monitoring is necessary to determine which respirator, if any, must be used by the employee. This definition is consistent with OSHA's previous use of the term "employee exposure" in other health standards.

Definition of MDA. The Committee recommended that the proposed regulation include the salts of MDA in the definition of MDA. The Committee examined the data furnished by the NTP bioassays and found that a salt of MDA, methylenedihydrochloride was used. Further the Committee examined data which indicate that the salts of MDA are converted to the free amine which presents the final exposure problem. Thus the Committee recommended including the salts of MDA in the definition of MDA. The Committee was not aware of a commercial use of any of the salts of MDA although information

furnished by Eastman Kodak indicated that the company of Psaltz and Bauer did produce the dihydrochloride for resale (Ex. 9).

The Committee also recommended excluding from the definition unreacted MDA contained in solid materials and physically bound thereby preventing the release of MDA. Since it is unlikely that the unreacted MDA contained in solids will impose a significant health hazard, the Committee agreed to exclude it from the scope of the standard. The exclusion proposed is intended to omit from the standard's coverage products that do not release MDA.

Regulated Areas. The Committee recommended that the proposal require the employer to establish regulated areas wherever MDA exposures reasonably can be expected to exceed the permissible exposure limits or where the likelihood for dermal exposure exists. The Committee recommended that access to these areas be regulated and limited to authorized persons. In addition, regulated areas are to be demarcated in any manner that minimizes the number of employees exposed to MDA within these areas.

Paragraph (c). Permissible exposure limit (PEL)

The Committee recommended that OSHA promulgate a standard for occupational exposure to MDA. The Committee believes that the provisions of its proposed standard will dramatically reduce dermal exposure to MDA and will limit airborne exposure to MDA by establishing a PEL of 10 ppb as an 8-hour TWA. The Committee also recommends that the standard contain a STEL for airborne MDA exposures of 100 ppb determined in any 15-minute sampling period. The recommendations contained in the Committee's proposed standard are supported by the Committee's findings that occupational exposure to MDA under current occupational conditions poses a risk to the health of employees and that the proposed standard, if adopted, can achieve the desired reduction in that risk.

Paragraph (d). Emergency Situation

The Committee agreed that available health data suggest that elevated short-term exposure to MDA should be viewed with concern. The Committee recommended that an unexpected high exposure must be viewed as an emergency situation. A written plan would be required where there is a possibility of an emergency and procedures for alerting employees in the event that an emergency occurs.

The recommended provisions also include a requirement to alert employees other than those who have the potential to be directly exposed in an emergency situation. Such employees may be employees from neighboring work sites who may inadvertently approach the emergency site. They may also include employees from other work shifts or employees who may be later exposed to work surfaces or equipment contaminated as a result of the emergency.

The Committee also recommended the development of a written plan for each workplace where there is a possibility of an emergency. The plan shall include the elements prescribed in 29 CFR 1910.38, "Employee emergency plans and fire prevention plans."

The Committee believed that the performance language of the emergency situation paragraph will give employers the flexibility to choose any effective method of alerting employees, including communications systems, voice communication, or a bell or other alarm.

Paragraph (e). Exposure Monitoring

The Committee noted that section 6(b)(7) of the Act (29 U.S.C. 655) mandates that any standard promulgated under section 6(b) shall, where appropriate, provide for monitoring or measuring employee exposure at such locations and intervals and in such manner as may be necessary for the protection of employees.

Thus, the Committee recommended that any proposed MDA standard would require each employer to conduct monitoring to determine employee exposure to MDA.

The Committee agreed that it is appropriate for employers to measure employee exposure to MDA for the following reasons. First, exposure monitoring informs the employer whether the employer's legal obligation to keep employee exposure below the permissible exposure levels is being met. Second, exposure monitoring evaluates the effectiveness of engineering and work practice controls and informs the employer whether additional controls need to be instituted. Third, exposure monitoring is necessary to determine whether respiratory protection is required at all and, if so, which respirator is to be selected. Fourth, section 8(c)(3) of the Act (29 U.S.C. 657) requires employers to notify promptly any employee who has been or is being exposed to toxic materials or harmful physical agents at levels which exceed those prescribed by an applicable occupational safety or health standard, and to inform such employee of the corrective action being taken. Exposure monitoring is necessary in order to determine whether employees are being exposed to MDA at levels exceeding those prescribed by this standard. Finally, the results of exposure monitoring constitute a vital part of the information which must be supplied to the physician and may contribute information on the causes and prevention of occupational illness.

The exposure monitoring recommendations made by the Committee would require the employer to determine the exposure for each employee exposed to MDA. It is not necessary to provide separate measurements for each employee. If a number of employees perform essentially the same job under the same conditions, it may be sufficient to monitor a fraction of such employees to obtain data that are representative of the remaining employees. Representative personal sampling for employees engaged in similar work and exposed to similar MDA levels can be achieved by measuring that member of the exposed group reasonably expected to have the highest exposure. This result would then be attributed to the remaining employees of the group.

In many specific work situations, the representative monitoring approach can be more cost-effective in identifying the exposures of affected employees. Furthermore, employers may use any monitoring strategy which correctly identifies the extent to which all employees are exposed.

Because of the nature of the MDA exposure hazard, it is necessary that the scope of the proposal be as broad as possible to protect potentially exposed employees. However, many employers will be required only to perform initial monitoring to determine employee exposures. If the results of initial monitoring demonstrate that an employee's exposure to MDA is below the action level, the employer is allowed to discontinue monitoring and other activities under this provision of the standard for that employee. The Committee established this provision to reduce the burden on employers, while providing them with an objective means of determining whether they must take additional steps for compliance with the standard.

The Committee recommendation also contains provisions for periodic monitoring. The more frequent the measurement, the higher the accuracy of the employee exposure profile. Selecting an appropriate interval between monitoring efforts is a matter of judgment. Where exposure

measurements are determined to be above the permissible exposure limits, the employer is required to monitor every 3 months. Where exposure measurements are above the action level but at or below the PELs, monitoring may be required only at 6 month intervals. Additional monitoring may also be required for a particular job position if any changes in production, processes, control measures, or personnel result in new or additional exposure to MDA. The redetermination of employee exposure is necessary to assure that the most recent results accurately represent existing exposure conditions. This is necessary so the employer may take appropriate action such as instituting additional engineering controls or providing appropriate respiratory protection.

The Committee also recommended that provisions for visual monitoring of exposed skin areas be made. The employer would be required to make routine inspections of employee dermal areas potentially exposed to MDA. If the employer determines that the employee has been exposed to MDA the employer shall:

(a) Determine the source of exposure;

(b) Implement protective measures to correct the hazard; and

(c) Maintain records of the corrective actions in accordance with paragraph (n) of this section.

The Committee fully realized that visual monitoring of exposed skin for yellow staining is a useful tool in controlling employee exposure to some hazardous substances.

Finally, the Committee recommended that the employer must maintain a record of the corrective actions which he has taken.

Paragraph (f). Regulated Areas

The Committee-recommended proposal requires the employer to establish regulated areas where the potential for airborne concentrations of MDA in excess of the permissible exposure limits exists; and where the likelihood of dermal exposure exists. This requirement is designed to minimize the number of employees exposed to concentrations of MDA. The requirement has been tiered to reflect the difference in employee exposure to ambient concentrations of MDA and the potential for dermal deposition. Unauthorized employees are restricted from entering the regulated areas. Other purposes of this section are to designate those areas where precautionary signs are to be posted and to designate areas where employees may be subject to three-month monitoring when their exposure is above the PEL and where activities such as smoking, eating, are prohibited. Additionally, employees working in regulated areas are required to wear the appropriate type of personal protective equipment.

The Committee recommended that regulated areas are to be demarcated in any manner that minimizes the number of employees exposed to MDA within these areas. To increase the performance-orientation of the standard and minimize recordkeeping, the Committee recommended that no detailed requirements be specified regarding the demarcating of an area.

The Committee recommendation for establishing a requirement for regulated areas is tiered. A traditional approach is recommended for establishing regulated areas at all worksites where the permissible exposure limit is exceeded. This approach covers areas within worksites where there are frequent leaks, or where exposures may be of high concentration but of short duration, e.g., maintenance operations. Where the likelihood for exposure results only from contact with liquid mixtures in the low vapor state, the Committee recommends that a regulated area be established where employees are engaged in routine or non-routine processes requiring the handling, application, or use of MDA. The Committee recognized that at its low vapor state liquid mixtures probably would not exceed the PELs; however, the potential for contact and inadvertent exposure was great and thus a mechanism to prevent incidental exposure of employees not actively engaged in the process was very much needed. The purpose of a regulated area is to ensure that employers make employees aware of the presence of MDA and attempt to restrict access. By limiting access, the number of employees inadvertently splashed and subsequently exposed to MDA can be minimized.

The Committee agreed that the establishment of regulated areas is an effective means of limiting the risk of exposure to as few employees as possible. This is consistent with good industrial hygiene practice when exposure to a toxic substance can cause serious health effects. Access to the regulated areas is restricted to "authorized persons"; that is, those persons required by their job duties to be present in the area; specifically, to those authorized entry by the employer, this proposal, or the OSH Act. By limiting access to these areas to authorized persons only, the additional obligation imposed by the proposal when PPE is used will be limited to as few persons as possible.

The reasons that regulated areas are to be established in all work areas where the PEL is exceeded, including maintenance operations, is that it is the Committee's view that the existence of a hazard, rather than the type of operation or work being performed, should be the basis for establishment of a regulated area. Areas where exposures are temporarily over the PELs while maintenance is being performed need to be demarcated to warn employees not performing the repairs and restrict access to these areas. Further, employees who enter the area are thereby warned to wear the appropriate protective equipment when entering.

Paragraph (g). Methods of Compliance

The Committee's recommended standard proposes that feasible engineering and work practice controls reduce employee exposures to or below the permissible limits. In situations where engineering controls that can be instituted immediately will not reduce exposures to the permissible exposure limits, these controls must nonetheless be used to reduce exposures to the lowest feasible level and be supplemented by the use of respirators. In addition, a compliance program to reduce exposures to within the permissible exposure limits solely by means of engineering and work practice controls must be developed and implemented. Written plans for this program must be developed and furnished upon request for examination and copying to representatives of the Assistant Secretary, representatives of the Director, and affected employees. These plans must be reviewed and updated annually to reflect the current status of the program.

The Committee recognized that there are certain activities, often involving certain maintenance and repair operations, as well as in emergency situations, in which the use of engineering controls to control exposures will not be feasible, regardless of the permissible exposure limits in the standard. Where the employer can show that engineering controls for such operations are not feasible, respirators shall be permitted as a primary means of control.

It has been OSHA policy to require that employers use feasible engineering and work practice controls to prevent excessive employee exposures and that respirators be used as an alternative only when other methods are not adequate, are not feasible, or have not yet been installed. The Committee's recommendation is based on this OSHA policy.

Paragraph (h). Respiratory Protection

The Committee recommendation provides that where respirators are necessary to limit employee exposures to below the permissible exposure limits, the employer must provide the respirators at no cost to the employee, and require that the employees use them.

A table of respirators for use with MDA is included in the standard provisions. The primary basis for the selection and evaluation of respirators is current OSHA policy and is generally used in standard development. The Committee agreed to accept the current OSHA policies found in the respirator selection section even though the Committee realized that OSHA is currently revising its respiratory protection standards. The Committee is making this recommendation with the understanding that, when OSHA amends its current respiratory protection standards, the respiratory section including the selection table will be recodified.

The Committee agreed that respirator use would also be restricted to the time necessary to install or implement feasible engineering and work practice controls. Further, respirators must be used in (1) operations in which engineering and work practice controls are not feasible (e.g., certain maintenance operations), (2) work operations for which the feasible engineering and work practice controls are not sufficient to reduce exposures to or below the PEL, and (3) emergency situations.

The Committee also recommended that each employee be properly trained to wear a respirator, to know why the respirator is needed, and to understand the limitations of the respirator. An understanding of the hazard involved is necessary to enable the employee to take steps for his or her own protection. The respiratory protection program implemented by the employer must conform to that set forth in 29 CFR 1910.134. This provision contains basic requirements for proper selection, fit, use, cleaning, and maintenance of respirators.

The Committee also believes emergencies are situations where respirators must be used to protect employees. Since it is unrealistic to predict the expected contaminant concentrations to which an employee may be exposed in all emergencies, the Committee recommends the use of respirators of the type approved for protection against unknown concentration. If an employee is working in an area and using an approved respirator of the type appropriate for the existing concentration, and an emergency occurs, the employee of course should continue using the respirator during his escape. Provisions to provide proper protection for emergency personnel assigned to enter vessels or workplaces containing an unknown concentration to rescue workers or to control the release of the contaminant or perform any necessary repairs will be required to be a part of the emergency plan. In addition, this paragraph will ensure that employers identify operations in which emergencies are apt to occur and make respirators available to employees in these operations.

The Committee also recommends the use of qualitative or quantitative fit tests. When negative pressure respirators are used, proper fit is especially critical to prevent leakage of contaminated air into the facepiece.

The employer must ensure that the employees' respirators fit properly and that leakage is minimal. A rapid qualitative fit test can be performed as either a positive-pressure test, in which the exhalation valve is closed and the wearer exhales into the facepiece to produce a positive pressure, or a negative pressure test, in which the inhalation valve is closed and the wearer inhales so that the facepiece collapses slightly. Employees should be trained to perform this test.

The Committee also recommends that OSHA make use of the fit testing appendix to ensure that the employer does the proper testing to achieve adequacy of fit testing.

Paragraph (i). Protective Work Clothing and Equipment

The Committee recommendation would require the employer to provide and the employee to wear the appropriate protective clothing to prevent eye and dermal contact with MDA. The Committee also agreed that the personal protective recommendations should be harmonious with the general provisions under §§ 1910.132 and 1910.133. The equipment is to be provided at no cost to the employee, and includes the use of these items as may be necessary to protect employees at each particular work situation from exposure to MDA, including, where appropriate, such items as face shields, gloves, aprons, coveralls, or footwear.

Contact with liquid MDA irritates the eyes and may result in corneal burns if the MDA is splashed in the eyes. When there is a realistic possibility of splashing the eyes, precautions are needed. Eye and face protection is currently required by 29 CFR 1910.133, and the types of safety goggles and face shields required by this section to prevent eye and face injury are readily available from safety products companies nationwide.

The requirement in this proposed MDA standard attempts to prevent skin contact with MDA. The risk assessment agreed upon by the Committee analyzes risk associated with dermal exposure and found that a 20 fold increase in risk could be prevented by not allowing dermal contact with MDA. MDA is easily absorbed through the skin at the rate of 2 μ/cm^2 per hour. In addition, recent studies by El Hawari (Ex. 1-260) indicate that the absorption of MDA peaks 5 hours after the end of the work shift and that 80% of the substance is cleared from the body within 24 hours of exposure. While MDA may induce yellow staining of the skin, a very precise indicator that exposure has occurred, it is difficult to correlate the amount deposited on the skin with a biological indicator, such as the amount found in the urine. There are many confounding factors which lead to these findings. Firstly, through absorption rates it is apparent that MDA easily enters the body. Secondly, once deposited on the skin absorption continues although the worker may have long since left the work place and the apparent exposure area. Thirdly, once absorbed into the body the chemical is rapidly eliminated so that using a biological indicator, such as urine measurement, may not detect the apparent exposure. All in all MDA can be considered a chemical with poor biological warning properties or biological indicators of exposure. The best protective measures which can be taken are to simply prevent skin contact and subsequent absorption. This will in turn reduce both the risk of cancer and the potential for hepatotoxicity.

The Committee-recommended proposal is performance-oriented and requires the employer to survey the work situation in determining the type of protective equipment needed. For example, when handling solid materials the employee may be required to wear full body coveralls, and gloves which must be removed at the end of the shift and laundered before being worn again. This employee would also be required to shower at the end of the work shift. Employees required to work only with liquids or MDA liquid mixtures may not be required to wear full body coveralls but instead may be required to wear an apron, and gloves. If the employee does become splashed with MDA or other substances containing MDA, the

employee must be directed to immediately remove the clothing, wash the affected area, and put on clean clothing if necessary. The employer may require employees to discard gloves when removed and use a new pair of gloves after breaks, lunch, etc. The employee's gloves must be sufficiently protective or changed often enough so that MDA-wetted material is not kept in contact with the skin.

The performance approach grants an employer flexibility to achieve the goal of minimizing MDA contact with the skin in a manner the employer finds most effective. However, being performance oriented, it is of necessity more general and requires the employer to consider the work process in order to achieve the desired goal in the manner that the employer believes is most efficient. This provision is designed to prevent the employee from coming in contact on a regular basis with MDA or MDA contaminated substances.

The employer must be aware that maintaining the effectiveness of the protective equipment and clothing used is also of keen importance. Exposure occurs by (1) bulk penetration through pinholes, rips, zippers, seams, etc.; (2) material failure through chemical degradation; or (3) permeation through the material.

While not specifically recommended, the Committee discussed the likelihood of requiring the employer to use permeation data to determine the effectiveness of protective clothing. Permeation depends on MDA concentration, thickness of protective material, temperature, and age of protective clothing. Liquid MDA that may be spilled on aprons, coveralls, or footwear or other protective clothing other than gloves can be wiped off within a few minutes time. Therefore, the materials used to make these types of protective clothes need to be impervious to MDA only for a few minutes. However, the liquid MDA permeability rate for materials used to make gloves needs to be less than that for other protective equipment since it is less likely that gloves will be wiped off when liquid contact occurs. Breakthrough times of MDA through various protective clothing materials differ widely, and the choice of material for protection against MDA breakthrough depends on the type of operation involved and length of time of contact, other solvents present, and other factors. Because of the uncertainty associated with requiring this sort of testing, the Committee chose to develop recommended regulations which give the employer the options of choosing the methodology relied upon to assure that the effectiveness of protective clothing is achieved.

Nonetheless, although there have been limited tests of protective clothing and devices conducted for various toxic materials. The Committee recognized that all clothing and equipment are not equally protective, and in some cases may realistically provide no effective protection. The data analysis done by the Committee indicated that polyvinyl chloride (PVC), natural latex, and polyethelene are currently the best candidates for protection against this methanolic solution containing MDA.

The Committee recognized that the potential for the employer to ignore factors which determine effectiveness of the protective equipment was great. The Committee recommended, however, that the employer be obligated to take the appropriate measures to ensure that workers are not dermally exposed to MDA, and allows the employer the option of choosing the protective clothing or equipment which will achieve this goal. How much clothing and the type of protective clothing needed will depend on the potential for exposure and the conditions of use. The employer in exercising his reasonable judgment in the workplace should be able to select the appropriate clothing or equipment in accordance with this paragraph which satisfies the legal obligation defined by this paragraph. The Committee allowed the employer this freedom because the Committee felt that there were checks and balances on the effectiveness of the clothing and equipment built into other standard provisions. For example, MDA-yellow staining of the skin could easily identify areas of the body where protective clothing or equipment was not effective. In addition, the medical surveillance provisions recommended by the Committee would detect workers who were adversely affected as a result of occupational exposure to MDA.

Many of the Committee members expressed concern with the requirement that the employee remove protective clothing only in change rooms. As examples, they indicated that workers usually remove gloves and discard contaminated protective clothing before entering lunch facilities. Clearly it appears that to require employees to return to the change rooms to discard protective equipment, in this instance, appears to be unwarranted. Of course, the employer who allows the employee to dispose of contaminated clothing in areas outside of the change rooms is still obligated to comply with the requirements for the proper disposal of MDA contaminated materials. In addition, the Committee recommended that clothing not routinely removed throughout the day must be removed at the end of the shift in change rooms.

Paragraph (j). Hygiene Facilities and Practices

The recommended proposed standard contains a variety of regulatory options for the use of shower and change room facilities and lunch rooms for employees exposed to MDA.

The purpose of this section is two-fold. First, it is designed to minimize the exposure to MDA of those workers directly exposed to MDA. Second, it is designed to prevent the inadvertent occupational exposure to MDA of other workers with no expected occupational exposure to MDA. The standard also recognizes that there are two routes of exposure, inhalation and dermal, and that they may occur in the same workplaces. Therefore, the provisions of this section are tiered.

For example, whenever food or beverages are consumed at the worksite and employees are exposed to MDA the employer shall provide readily accessible lunch areas. Lunch facilities in plants where only dermal exposures may occur may not require the same stringent controls as in those facilities where airborne exposures also occur. It is for this reason that only lunch facilities located in areas at or above the PEL must be equipped with a positive pressure filtered air supply, whereas lunch facilities located in areas where exposure to only liquid mixtures of MDA occurs need only be established in an area free of MDA accumulations.

Likewise, showers may be necessary for workers exposed to dusts or vapors; however, showers may not be necessary for workers only exposed to liquids. Workers exposed to liquids must be immediately instructed to wash exposed areas with soap and water or any media which does not increase the absorption properties of MDA. This particular recommendation was given much consideration by the Committee.

The Committee expressed concern with the appropriate manner inwhich MDA should be removed from the skin. However, the Committee did not want to recommend that only soap and water be used to remove MDA impregnated resin accumulations. In fact, the Committee felt that it was better, should exposure occur, to remove the hardened resin as soon as possible even if a solvent must be used. The Committee recommended that if the employer can demonstrate that a particular solvent does not increase the absorption properties of

MDA it should be used to remove MDA from the skin.

Furthermore, because the Committee recognized that accidents, ineffective personal protective equipment, and ineffective work practices might lead to employee exposure, the Committee recommended stringent provisions for selection, use, and maintenance of personal protective clothing and equipment. Because it is difficult to remove safely this acute toxin from the skin, it is simply better not to get the material on the skin.

The Committee recommended that all employers covered by this provision would be required to assure that employees wash hands and face with soap and water prior to eating, drinking, smoking or applying cosmetics, and taking breaks. This recommendation is intended to prevent the accidental ingestion of MDA.

Paragraph (k). Communication of Hazards to Employees

(1) *Signs and Labels.* The Committee recommended that the employer post and maintain legible signs demarcating regulated areas and entrances or access ways to regulated areas with the following legend:

DANGER

MDA

MAY CAUSE CANCER,

LIVER TOXIN

AUTHORIZED PERSONNEL ONLY

RESPIRATORS AND PROTECTIVE CLOTHING MAY BE REQUIRED TO BE WORN IN THIS AREA

The recommendation also requires labelling of containers of MDA. The labels must state.

(a) MDA

DANGER

CONTAINS MDA

MAY CAUSE CANCER, LIVER TOXIN

(b) Mixtures contain MDA

DANGER

CONTAINS MDA

CONTAINS MATERIAL WHICH MAY CAUSE CANCER,

LIVER TOXIN

The Committee's recommendations are consistent with section 6(b)(7) of the Act, which prescribes the use of labels or other appropriate forms of warning to apprise employees of the hazards to which they are exposed.

It is required that labels remain affixed to containers leaving the workplace. The purpose of this requirement is to assure that all affected employees, not only those of a particular employer, are apprised of the hazardous nature of MDA exposure.

It is the Committee's view that informing employees of the hazards to which they are exposed is an important element in reducing oocupational disease and injury and one of the significant purposes of the Act. Section 6(b)(7) of the Act does not limit an employer's obligation to inform employees of hazardous conditions, to the employer's own employees. When an employer manufactures, formulates, or sells a product, the employer may create exposures not only to his or her own employees, but also to the employees of other employers involved in handling, transporting, or using the product. The extent of the obligation to inform should be commensurate with the extent of the exposure. This is especially true where the manufacturer, formulator, or seller will, in many cases, be the only employer capable, through his knowledge of the product, of providing the information necessary for protection of employees. A narrower reading of the statutory authority would defeat the protective purposes of the Act by effectively preventing the downstream employee from obtaining adequate information about the hazard. Furthermore, the use of labels required by the standard will alert other employers who would not otherwise know of the presence of MDA in their workplace of their obligation to comply with the standard. The Committee therefore feels that this requirement would be necessary and appropriate.

The Committee's recommendation also requires the posting of warning signs to demarcate regulated areas. These signs are intended to supplement the training which employees are required to receive under the standard. Even trained employees will need t be reminded of the locations of regulated areas and the dangers of entering these areas. In addition, other personnel, such as employees of independent maintenance contractors authorized to enter regulated areas, need to be reminded of the locations of regulated areas, the dangers of entering these areas, and the need to use protective equipment. The Committee agreed that both signs and training are necessary to apprise employees adequately of the hazards associated with MDA exposure.

The Committee also recommended specific wording of the warning signs for regulated areas to assure that the proper warning is given to employees. The word "Danger" is used to attract the attention of workers, to alert them to the fact that they are in a hazardous area and to emphasize the importance of the message that follows. In addition, the use of the word "Danger" is consistent with recent OSHA health standards dealing with carcinogens. The proposed sign legend: "Respirators and Protective Clothing May be Required to Be Worn In This Area," recognizes that there may be a difference between the MDA concentration in air or the potential to be splashed with liquid mixtures (the bases which determine when a regulated area must be established), and a particular employee's likely exposure.

(2) *Material Safety Data Sheet.* The Committee also recommended statements to be incorporated into a material safety data sheet. This material can be found in Appendix B.

(3) *Employee information and training.* The Committee recommended that all employers provide a training program for all employees exposed to MDA initially at the time of assignment and at least annually there after.

The Committee recommended that an information and training program is essential to inform employees of the hazards to which they are exposed and to provide employees with the necessary understanding of the degree to which each employee can contribute toward minimizing health hazard potentials.

The content of the training program is intended to inform employees of: (1) The hazards to which they are exposed; (2) the necessary steps to protect themselves, including those to be taken during emergency situations; (3) limitations and the proper use of respirators and protective equipment; (4) a description of medical examinations and their purpose; (5) implementation of work practices and the use of available engineering controls; and (6) the contents of this standard. Section 6(b)(7) of the Act makes it clear that these are appropriate goals for an employee training program, and the proposed standard includes such provisions.

The Committee also agreed that the employer would be required to make a copy of the standard and its appendices available to affected employees and their representatives. This requirement, in combination with the review provided for as part of the training program, is intended to ensure that employees understand their rights and duties under this standard.

The employer is also required to provide, upon request, all materials relating to the training program to the Assistant Secretary and Director. This is intended to provide an objective check of compliance with the requirements under this paragraph.

The Committee realized that MDA may be only one of a number of substances to which an employee may

be exposed simultaneously in the workplace. The education and training requirements in this standard contain those elements OSHA has determined to be basic. The format and content of the required training and information program are neither rigid nor extensive.

Paragraph (l). Housekeeping

The Committee's recommendation requires that employers institute a program to detect leaks, spills and discharges of MDA which includes visual inspections. When leaks, spills, or discharges of MDA are detected, the proposed language requires the employer to repair promptly all leaks and clean up all spills. These work practices aid in minimizing the number of employees exposed, as well as the extent of any potential for MDA exposure.

Prevention and removal of accumulations of liquid MDA on all surfaces are critically important aspects of minimizing employee exposure. The liquid, if allowed to remain on the floor or work surfaces, will slowly evaporate and contribute to a possible airborne hazard, or it may become a dermal hazard through inadvertent skin contact. MDA's low vapor pressure which results in slow evaporation will contribute to and prolong the hazard. The requirement to clean up spills and drips refers to the prevention and removal of visible accumulations of liquid MDA on all surfaces.

In addition to the hazards of exposure to MDA in its liquid forms, hazards also result from exposure to the dusts of MDA. Thus, the recommended language contains provisions for maintaining surfaces as free as possible of accumulations of dusts and waste containing MDA. Surfaces contaminated with dusts may not be cleaned by the use of compressed air. The recommended standard requires HEPA-filtered vacuuming equipment for vacuuming. This equipment must be emptied in a manner which minimizes the reentry of MDA dusts into the workplace.

Paragraph (m). Medical Surveillance

The Committee's recommendation requires that each employer institute a medical surveillance program for all employees exposed to MDA accordingly:

(1) Employees exposed at or above the action level for more than 30 days per year;

(2) Employees who have the likelihood of dermal exposure for more than 15 days per year;

(3) Employees who have been exposed in an emergency situation; and

(4) Employees whom the employer has reason to believe are being dermally exposed as a result of monitoring in accordance with paragraph (e)(8) of this section.

The recommended language requires that the medical surveillance program provide each covered employee with an opportunity for a medical examination. Further, all examinations and procedures must be performed by or under the supervision of a licensed physician and be provided without cost to the employee. Clearly, a licensed physician is the appropriate person to supervise and evaluate medical examinations. However, certain parts of the required examination do not necessarily require the physician's expertise and may be conducted by another person under the supervision of the physician.

The Committee also recommends that examinations be given at a reasonable time and place. It is necessary that examinations be convenient and be provided without loss of pay to the employee to assure that they are taken.

The proposal allows the examining physician to prescribe the specific tests to be included in the medical surveillance program. Also included are some specific requirements, such as:

(i) Comprehensive medical and work histories with special emphasis directed to an evaluation of other carcinogens to which the employee is exposed, and smoking and alcohol use.

(ii) Comprehensive physical examination, with particular emphasis given to symptoms related to skin disease and liver dysfunction.

(iii) Urinalysis.

(iv) Screening for liver damage.

It is important to note that the employer is required to make any prescribed tests available more often than specified if recommended by the examining physician.

The Committee also recommended that the employer provide examinations advised by the physician to any employee exposed to MDA under emergency conditions. Due to the effects of high short-term exposures, it appears prudent to monitor such affected employees in light of existing health data. However, trivial exposure, for example, to a single drop of an MDA-containing mixture would not trigger the emergency examination requirement, particularly if the employee was able to remove the MDA immediately after exposure.

The employer will also be required to provide the physician with the following information: a copy of this standard and its appendices; a description of the affected employee's duties as they relate to the employee exposure level; and information from the employee's previous medical examinations which is not readily available to the examining physician. Making this information available to the physician will aid in the evaluation of the employee's health in relation to assigned duties and fitness to wear personal protective equipment.

The employer is required to obtain a written opinion from the examining physician that contains the results of the medical examination; the physician's opinion as to whether the employee has any detected medical conditions which would place the employee at increased risk of material health impairment from exposure to MDA; any recommended restrictions upon the employee's exposure to MDA or upon the use of protective clothing or equipment such as respirators; and a statement that the employee has been informed by the physician of the results of the medical examination and of any medical conditions which require further explanation or treatment. This written opinion must not reveal specific findings or diagnoses unrelated to occupational exposure to MDA, and a copy of the opinion must be provided to the affected employee.

The purpose in requiring the examining physician to supply the employer with a written opinion is to provide the employer with a medical basis to aid in the determination of initial placement of employees and to assess the employee's ability to use protective clothing and equipment. The requirement that a physician's opinion be in written form will ensure that employers have had the benefit of this information. The requirement that an employee be provided with a copy of the physician's written opinion will ensure that the employee is informed of the results of the medical examination. The purpose in requiring that specific findings or diagnoses unrelated to occupational exposure to MDA not be included in the written opinion is to encourage employees to take the medical examination by removing the concern that the employer will obtain information about their physical condition that has no relation to present occupational exposures.

The Committee's recommendation also includes a multiple physician review mechanism. This provision is triggered by the employee disagreeing with the opinion of the examining physician selected by the employer to conduct any medical examination as a result of signs and/or symptoms indicative of occupational exposure to MDA.

Finally, the recommended proposal contains provisions for removing an employee from exposure who has suffered reversible material impairment to health as a result of being exposed to MDA. The majority of the Committee members agreed that employees whose health has been adversely affected as a direct result of occupational exposure to MDA should be removed from exposure and should receive medical removal benefit protections.

Paragraph (n). Recordkeeping

The Committee's recommendations are consistent with section 8(c)(3) of the Act which provides for the promulgation of regulations requiring employers to maintain accurate records of employee exposures to potentially toxic or harmful physical agents which are required to be monitored or measured.

The Committee recommended that objective data be used for any exemptions from the standard. Records of objective data must be maintained to demonstrate that employees will not be exposed to airborne MDA concentrations and that the potential for dermal exposure does not exist.

The Committee also recommended that records be kept to identify the employee monitored and to reflect the employee's exposure accurately. Specifically, records must include the following information: (a) The names and social security numbers of the employees sampled; (b) the number, duration, and results of each of the samples taken, including a description of the representative sampling procedure and equipment used to determine employee exposure where applicable; (c) a description of the operation involving exposure to MDA which is being monitored and the date on which monitoring is performed; (d) the type of respiratory protective devices, if any, worn by the employee; and (e) a description of the sampling and analytical methods used, and evidence of their accuracy.

The Committee's recommendation also includes a provision for requiring the employer to keep an accurate medical record for each employee subject to medical surveillance. Section 8(c) of the Act authorizes the promulgation of regulations requiring any employer to keep such records regarding the employer's activities relating to the Act as are necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational illnesses. The Committee believes that medical records, like exposure monitoring records, are necessary and appropriate to both the enforcement of the standard and the development of information regarding the causes and prevention of illness.

The employer is also required to keep a record of any employee's medical removal and return to work status.

The recommended proposal requires that all records required to be kept shall be made available upon request to the Assistant Secretary and the Director of NIOSH for examination and copying. Access to these records is necessary for the agencies to monitor compliance with the standard. These records may also contain information needed by the agencies to carry out their other statutory responsibilities.

The recommended proposal would also provide for employees, former employees, and their designated representative to have access to mandated records upon request. Section 8(c)(3) of rhe Act explicitly provides "employees or their representatives" with an opportunity to observe monitoring and to have access to the records of monitoring and exposures to toxic substances; several other provisions of the Act contemplate that employees and their representatives are entitled to play an active role in the enforcement of the Act.

Access to exposure and medical records by employees, designated representatives, and OSHA shall be established in accordance with 29 CFR 1910.20. By its terms, it applies to records required by specific standards, such as this MDA standard, as well as records which are voluntarily created by employers. In general, it provides for unrestricted employee and designated representative access to exposure records. Access to medical records is also provided to employees and, if the employee has given specific written consent, to the employee's designated representatives. The Committee recommends that unrestricted access to both kinds of records be allowed, but access to personally identifiable records is made subject to rules of agency practice and procedure concerning OSHA access to employee medical records, which have been published at 29 CFR 1913.10. An extensive discussion of the provisions and rationale for § 1920.20 may be found at 45 FR 35312; the discussion of § 1913.10 may be found at 45 FR 35384.

It is necessary to keep records for extended periods because of the long latency periods commonly observed for carcinogens. Cancer often cannot be detected until 20 or more years after onset of exposure. The extended retention period is therefore needed for two purposes. Diagnosis of disease in employees is assisted by having present and past exposure data as well as the results of the medical exams. Retaining records for extended periods also makes it possible at some future date to review the adequacy of the standard.

The time periods recommended for retention of exposure records and medical records are thirty years, and period of employment plus thirty years, respectively. These retention periods are consistent with those found in other OSHA health standards.

The recommended proposal would also require certain employers to notify the Director in writing at least 3 months prior to the disposal of the records. Section 1910.20(h) also contains requirements regarding the transfer of records.

Paragraph (o). Observation of Monitoring

The Committee also recommends that OSHA include a provision for observation of exposure monitoring. This provision is in accordance with section 8(c) of the OSH Act which requires that employers provide employees and their representatives with the opportunity to observe monitoring of employee exposures to toxic substances or harmful physical agents. Any observer must be provided with the personal protective clothing and equipment that is required to be worn by the employees who are working in the area. The employer is required to assure the use of such clothing and equipment or respirators and is responsible for requiring that the observer complies with all other applicable safety and health procedures.

Paragraph (p). Effective Dates

The Committee did not establish a section for effective dates. However, the Committee did not indicate in any of its feasibility findings that any specific time would be needed to comply with the implementation of any of the recommendated standards. Thus OSHA has developed its effective date section based on the feasibility analysis recommended by the Committee.

Paragraph (q). Appendices

Five appendices have been included at the end of this proposed standard. Appendices A, B, C, and D have been included primarily for purposes of information. None of the statements contained in Appendices A, B, C, and D should be construed as establishing a mandatory requirement not otherwise imposed by the standard, or as detracting from an obligation which the standard does impose. However, the

protocols for respiratory fit testing in Appendix E are mandatory.

Appendix A contains information on the description and exposure levels of MDA. Also provided in Appendix A is information on the health hazards associated with exposure, descriptions of protective clothing and equipment, emergency and first aid procedures, medical requirements, provisions for the observation of monitoring, access to exposure and medical records, and precautions for the safe use, handling, and storage of MDA.

Appendix B contains "substance technical guidelines" for MDA, including physical and chemical data, spill and leak procedures, including waste disposal methods, and other miscellaneous precautions for the safe handling of MDA.

Appendix C contains the medical surveillance guidelines for MDA. Included in these guidelines are the description of the routes of entry, the toxicology and symptoms and signs associated with MDA exposure, information on the treatment of acute toxic effects, and surveillance and preventive considerations, including hematology guidelines which may be useful to physicians in conducting the medical surveillance program required by paragraph (m) of this recommended standard.

Appendix D gives details of the recommended sampling and analytical methods for use in monitoring employee exposures to MDA.

Appendix E gives detailed fit testing procedures that are to be followed for qualitative or quantitative fit testing of negative pressure respirators. Various protocols for qualitative and quantitative fit tests are outlined in detail.

All the Appendices are designed to aid the employer in complying with the requirements of the standard. Paragraph (k) of this proposed standard on the "communication of MDA hazards to employees" specifically requires that the contents of the standard and Appendices A and B be made available to affected employees. Information contained in Appendix C on medical surveillance is to be explained to affected employees. Appendix C also provides information needed by the physician to evaluate the results of the medical examination.

Paragraph (r). Start-Up Dates.

The Committee did not establish a section for start up dates. As was done for effective dates, OSHA based its selection of start-up dates on the feasibility analysis done by the Committee.

B. OSHA's Findings

1. General

After consideration of all of the Committee's recommendations, OSHA agrees that the Committee's recommended standard will significantly reduce the carcinogenic and toxicological risk to workers exposed from inhalation and dermal exposure to MDA. Furthermore, OSHA recognizes as did the Committee that all the recommended provisions complement each other by reducing exposure from both the dermal and inhalation routes. Protection of workers requires more than providing protective equipment to prevent dermal contact or implementing engineering controls to prevent inhalation. Therefore, the Committee's recommendations contain additional provisions that reduce worker exposure from the different exposure routes. These provisions recommended by the Committee and now proposed by OSHA are similar to those promulgated by OSHA for other toxic substances but have been tailored for the unique characteristics of MDA.

2. Specific

Paragraph (a). Scope and Application.

OSHA finds the Committee's recommendations regarding the intended coverage of their recommended standard acceptable and thus has included these provisions in this NPRM. OSHA also agrees with the Committee's decision to develop a separate standard for the construction industry and OSHA has developed a separate NPRM for construction.

Paragraph (b). Definitions

Except as mentioned below, OSHA finds the Committee's recommended definitions to be appropriate in that they are either found in other OSHA standards, e.g., "Director," "Assistant Secretary," and "Authorized person" or are used in accordance with their meanings in general industry. OSHA has included these definitions in its NPRM.

With regard to the Committee's definition of MDA, however, OSHA finds a narrower definition to be appropriate. At 52 FR 26875, the Committee's definition includes an exclusion which reads as follows: "The definition does not include unreacted MDA, physically bound, such that it is incapable of releasing MDA into the workplace at levels greater than the action level or posing a dermal absorption hazard". The Committee's intent, as explained at 52 FR 26858, however, makes no mention of the emphasized phrase in the definition. Furthermore, to propose such a broad exclusion would require additional rationale to what was recommended by the Committee. It would create an exemption not contemplated by the Committee when considering the Scope and Application section, the normal area in an OSHA health standard in which to consider exemptions. Looking to the recommended exemptions in (a) (2) and (3) it is clear that monitoring is required to rely on the former and a determination of incapability of release based on objective data is required in the latter. OSHA believes that the definition should be proposed without the qualifying phrase as indicated above in order for the proposal to be internally consistent and in order to afford greater worker protection.

Paragraph (c). Permissible exposure limits (PELs).

1. *Necessity of a TWA and a STEL.* The Committee recommended that the employer implement engineering and work practice controls to reduce airborne exposure of MDA to a 10 ppb TWA and a STEL of 100 ppb. OSHA examined the necessity of establishing these PELs since most of the exposure appeared to result from dermal contact by workers with MDA. OSHA finds that the Committee's recommendation in this instance, directly reduces the amount of MDA inhaled as well as the amount available for deposition and ultimately absorption.

OSHA believes, however, as did the Committee, that all of the provisions recommended by the Committee and now proposed by OSHA are necessary to protect workers. In particular, OSHA believes that the PELs are necessary components of the proposed standard for the following reasons: 1. The risk from inhalation, in itself is significant; 2. Compliance with the PELs results in a cleaner workplace by reducing the amount of MDA which is airborne and likely to settle on worksurfaces and thus, available for dermal deposition and ultimately absorption; 3. MDA absorption through the palms was overestimated by the Committee, but absorption through other parts of the body was underestimated; 4. The effectiveness of the personal protective equipment is not quantitatively defined with certainty; therefore, assumptions were made by the Committee regarding the extent to which the personal protective clothing would prevent dermal contact. Without an understanding of the assumptions, the risk estimates recommended by the Committee and now proposed by OSHA could give the incorrect appearance that

use of gloves provides total protection, and that equally effective provisions such as the use of other types of personal protective equipment, the PEL and training, provide minimal protection; 5. Assumptions made by the Committee regarding the effectiveness of personal protective equipment are that the personal protective equipment would be used in a clean workplace with engineering controls for mechanical handling of MDA. Therefore, the personal protective equipment would not be used in excessively contaminated environments which would tax the ability of the personal protective equipment to prevent dermal contact; 6. Since MDA is difficult to remove from the skin after contact takes place, the PEL provisions, which decrease the chance that personal protective equipment will fail and the other industrial provision of the proposed standard, are necessary. These reasons for requiring a PEL in addition to preventing dermal contact with MDA are explained in more detail below:

• The Committee employed mathematical models to estimate cancer risk using ambient sampling data furnished by NIOSH, EPA, and the CMA which indicated that worker exposures were in the range of 50–70 ppb. Based on these data, estimates for any primary manufacturing operation where only inhalation exposure was considered were expected to produce 1–2 cancers per 1000 exposed workers over a working lifetime. When both inhalation and dermal exposure were considered, the resultant risks were 6–7 per 1000 exposed workers. In secondary operations, inhalation exposures of approximately 50 ppb were used and the risks were estimated as 1 per 1000 workers exposed. When dermal exposure was considered the risks were escalated to 30 per 1000 exposed workers. Although the risks resulting only from dermal exposure are higher than those from inhalation exposure, the Committee determined that a considerable risk resulted solely from inhalation exposure.

• The Committee noted that since the initiation of regulatory activity worker exposure has been reduced from those levels reported early by NIOSH, EPA, and CMA. The reductions in exposure were the result of the implementation of engineering controls and work practices. As a result of this observation the Committee made a series of assumptions regarding ambient and dermal exposure. The Committee assumed that as additional engineering controls were implemented and the PELs instituted, the amount of MDA in the air and available for deposition and absorption on the upper body, face, hands, neck, head, and forearms would be proportionately reduced. Since the deposition rates are a function of the amount of MDA in the air, the Committee recommended that PELs be set to minimize dermal deposition resulting from fall out of MDA from the air. Although it may appear from observation of the risk tables recommended by the Committee and now proposed by OSHA that establishing PELs makes a small contribution to the reduction of risk and the quantifiable benefits, this is not the case. Reducing airborne concentrations of MDA also reduces deposition potential. Without establishing PELs, there would be no reason for the employer to maintain ambient concentrations even at the currently reported levels (which range from 1–41 ppb). Employers may relax the use of engineering controls and airborne exposures may return to past reported levels, and the risk expected from dermal deposition and absorption would be escalated. Thus, the Committee believed that PELs were necessary to ensure that an employee's cumulative exposure (dermal and inhalation) was reduced to a level which the Committee believed produced an acceptable risk.

• The Committee's finding that most of the dermal exposure came from absorption of MDA through the palm is due, in part, to the assumption that no dermal exposure occurs to the lower body. The Committee only estimated the risk expected from upper body exposure. If the total body surface area was used in making risk estimates, the contributions from dermal exposure from all body portions except for the palms would be approximately double that estimated by the Committee. The Committee, however, lacked lower body deposition and absorption data and preferred to be conservative and only estimated risk resulting from upper body dermal exposure. Thus, when making comparisons of the benefits expected from reducing dermal contact with the upper body, neck, face, head, and forearms and reducing dermal contact through the palms, it should be noted that the calculated risks resulting from body parts except for the palm have been underestimated.

The Committee made conservative assumptions regarding exposure through the palm which result in overestimates of the absorption by the palm. The Committee relied on the data generated by Boeninger (Ex. 1. 250) in estimating dermal dose through the palm. These data are considered "worst case" or high estimates for several reasons: There were no monitoring data describing present day dermal exposure in the eleven industry sectors reviewed. Consequently, baseline data for dermal exposure through the palm were assumed to be the same as that reported by Boeninger even though these were data which probably overestimate exposure. The Committee would have preferred to have recent dermal exposure consistent with recent inhalation data used in the benefit assessment; no consideration was given to the effect implementing engineering controls would have on controlling dermal exposure through the palm; and Estimates are based on using flake, powder, or granular forms of MDA and these estimates were considered applicable to the handling of liquid forms of MDA.

In addition, the Committee was unable to estimate current palm exposure for the eleven industry sectors. None of the respondents in the Heiden survey, nor in the ICF site visits had done dermal monitoring for the palms. Since there were no monitoring data, the Committee was unable to develop baseline exposure estimates for any of the eleven industry sectors. The Committee attempted to assess the actual "current" use of gloves in the eleven industry sectors analyzed. For example, the Committee examined the Heiden Associates' questionnaire regarding current use of gloves by the eleven industry sectors and found that in a few of the sectors, workers were now required to wear butyl gloves rather than cloth gloves. However, the Committee found that in many of the sectors cloth gloves were still being worn. Thus, the Committee felt it reasonable to assume that the palm exposures reported by Boeninger were adequate to justify its recommended standard. The Committee recognized that changes in the use of gloves to those that prevent skin contact with MDA would result in lower palm exposures than those reported by Boeninger. It is for these reasons that the Committee assumed these estimates to be "worst case" exposures which overestimate MDA exposure to the palm.

Furthermore, while the Committee was able to assess the effect which the implementation of engineering controls had made on reducing the ambient exposure levels in the eleven sectors surveyed, the Committee found it difficult to assess the effect which the implementation of engineering controls had made on reducing dermal exposure. The Committee however, was aware

that the implementation of certain engineering controls did have the potential to reduce dermal exposure. For example, many of the firms responding to the Heiden survey indicated that many of the engineering controls "currently in place" consisted of mechanical handling devices which replaced the manual handling of MDA by the workers. None of these firms, now using mechanical handling devices, however, had done any dermal monitoring thus the Committee had to rely on exposure data collected from establishments where manual handling rather than mechanical handling was done. It could reasonably be assumed that dermal exposure through the palm would be reduced if MDA were mechanically handled rather than manually handled. Yet, without the monitoring data from operations where mechanical handling systems had been installed, the Committee relied on data acquired through monitoring of manual handling operations. Thus, it is safe to say that the effectiveness that mechanical handling devices have on reducing dermal exposure through the palm has not been adequately assessed.

In continuing its analysis, the Committee attempted to determine what types of MDA were presently being used by the eleven industry sectors. Based on responses to the Heiden survey, the Committee noted that approximately 50% of the respondents were now using liquid forms of MDA rather than powder, flake, or granules. Once again, because data were lacking concerning exposures resulting from workers handling liquids, the Committee agreed to use the estimates provided by Boeninger, but recognized that these represent "worst case" or high estimates.

While OSHA agrees that these data may represent "worst case" estimates. OSHA recognizes that this is the "best available" evidence and as such has incorporated these data into the benefit analysis done by the Agency.

• The effectiveness of different types of personal protective equipment is not defined with certainty. The Committee needed to make simplifying assumptions. First, the Committee assumed that there was no personal protective equipment for the upper body, head, neck and forearms which would prevent totally dermal absorption. The Committee recognized that to achieve "no dermal exposure" through the upper body workers would be required to wear space suits. This, the Committee felt, would impede their ability to work safely and as such was considered not feasible. On the other hand, the Committee assumed that once engineering controls were implemented to achieve the PEL, many of which require mechanical rather than manual handling of MDA, it was feasible to prevent absorption through the palms by using gloves. The Committee made the assumption that gloves can provide 100% protection although it recognized that there are no standards which can assure 100% effectiveness. Qualitative aids, such as visual monitoring of areas covered by protective equipment to look for MDA-produced yellow staining of the skin were recommended by the Committee to provide some assurance of the effective use of this type of personal protective equipment. Nonetheless, since gloves do exist which are impervious to MDA and, if worn properly, can prevent dermal contact through the palms, the Committee assumed 100% effectiveness when gloves are worn. Based on these assumptions, the benefits were computed. Since exposure through the palms was assumed to be totally preventable through the use of personal protective equipment, and dermal absorption for upper body parts was not, the greatest benefit estimates appear to come from preventing palm exposure.

OSHA notes that these assumptions result in an underestimate of the benefits achievable through preventing upper body absorption. OSHA believes that the use of personal protective equipment required by this standard will prevent substantial upper body absorption. OSHA, however, recognizes that many of the assumptions which the Committee relied upon represent good judgements based on the available data. Thus, OSHA concurs with the assumption that upper body absorption will not be totally prevented by the use of personal protective equipment and that estimates of risk should include the contributions made by these exposures. Furthermore, OSHA agrees that establishing standards which reduce the total exposure of workers through the implementation of both a PEL and the industrial hygiene provisions will reduce the hazards associated with upper body dermal absorption to the extent feasible.

• In the estimates of the amount of MDA absorbed through the palm the Committee used the exposure estimates provided by Boeinger; contributions which "currently" in place engineering controls make to preventing palm exposure were not considered. However, when estimating the amount of MDA absorbed by the upper body, the Committee reduced the upper body deposition by a scaling factor to reflect the contribution which "currently" in place engineering controls make to aiding in the reduction of upper body deposition. In addition, the Committee did not try to quantify the effect that reducing the PEL to 10 ppb would have on palm exposure, although the Committee's feasibility recommendations for many of the eleven industry sectors include automated material handling.

• As previously stated, the most confounding factor associated with exposure to MDA is that it is not easily removed from the skin. The record evidence indicates that washing with soap and water only removes 50% of the material deposited on the skin. Considering that it takes approximately 48 hours for MDA deposited on the skin to be cleared from the body and that only 50% of the material deposited on the skin can be removed, it was the Committee's position that dermal absorption should be reduced to the extent feasible regardless of the source of such exposure. Thus, this finding further supported the Committee's recommendation that dermal exposure should be prevented to the extent feasible.

In summary, OSHA agrees with the Committee's recommendation that inhalation and dermal exposure must be reduced to the extent feasible. Further, OSHA recognizes the relationship which exists between dermal deposition and the PELs and agrees that a combination of engineering controls and work practices along with stringent standard provisions restricting dermal contact are needed to assure that employees are protected from the effects of occupational exposure to MDA. OSHA also agrees that the cumulative risk posed by both inhalation and dermal contact with MDA is significant and that a 10 ppb TWA, a 100 ppb STEL, and the stringent standard provisions being proposed will reduce the risk. Furthermore, OSHA believes as did the Committee that most of the provisions including the use of personal protective equipment, hygiene facilities, exposure monitoring, regulated areas, medical surveillance, employee training, and hazard communication all have been designed to reduce the carcinogenic and toxicological risk posed from inhalation and dermal exposure to MDA. OSHA also believes as did the Committee that the interrelationship between the provisions is so significant that it is really not possible to quantify the contributions to the reduction of risk expected from each provision separately. For example, the use of engineering controls and work practices

results in a clean workplace which minimizes the reentrainment of MDA into the air and aids in reducing the potential for skin contact by minimizing the accumulation of MDA on work surfaces. The recommended housekeeping provision requires, in part, that all surfaces be maintained as free as practicable of visible accumulations of MDA. This provision will directly result in reduced dermal contact contact and will also reduce the possibility of reentrainment into the air. In addition, OSHA recognizes that the true contribution which engineering controls and work practices make in reducing this risk have not been totally quantified. Yet, the cost associated with implementing the engineering and work practice portions of the standards recommended by the Committee and now proposed by OSHA reflect only 2% of the total compliance costs.

(2) *Determining a STEL.* The Committee relied primarily on the Kopelman *et al* data in determining the appropriate STEL. While these computations may provide some guidance in establishing a STEL, it should be remembered that the series of assumptions which were made to construct these hypothetical doses are fraught with problems. It is impossible to precisely determine from the available data what if any ambient level would ensure a worker occupationally exposed to MDA that exposure would not result in clinical or subclinical findings of disease resulting from exposure. Further, it is impossible at this point to determine how much MDA must be deposited on the skin to produce clinical signs or symptoms of exposure or to induce changes in liver function.

OSHA's decision to accept the 100 ppb STEL recommended by the Committee was based largely on the data collected through the survey done by Heiden Associates which indicated that workers who were exposed at the current ACGIH limit of 100 ppb had not reported any clinical evidence of hepatitis or lost work days resulting from MDA exposure at these levels. OSHA notes that the data provided by Heiden Associates did not address the additive effect dermal exposure had on this worker population nor did the survey find that all the reporting workers were equipped with personal protective equipment which would prevent dermal contact with MDA.

While OSHA may believe that a STEL of 100 ppb may prevent the clinical observation of disease, OSHA finds no evidence that occupational exposure to the STEL of 100 ppb may not result in changes in liver function in exposed workers. OSHA believes, however, that the medical surveillance provisions along with the hygiene and personal protective provisions will help to assure the effectiveness of this proposed STEL.

OSHA also finds convincing the Committee's argument that the implementation of a STEL will further reduce the carcinogenic risk posed by occupational exposure to MDA.

OSHA accepts the Committee's conclusion that this STEL is feasible and believes that the engineering controls needed to achieve a 10 ppb TWA will also achieve the 100 ppb STEL.

OSHA recognizes that while a STEL of 100 ppb is expected to keep the majority of exposed workers from developing the clinical signs and symptoms of acute exposure to MDA, acute exposure still might result in biological compromise or alteration of organ function. Moreover, OSHA is concerned with individuals who are more susceptible to exposure and subsequent disease. OSHA agrees with the Committee's recommendation and also proposes that a comprehensive medical surveillance program with sophisticated biological screening tools such as liver function testing be used to detect the early development of disease in exposed workers before the more advanced clinical manifestation of disease become apparent.

Paragraph (d). Emergency Situation

OSHA based its NPRM on the Committee's recommendation. OSHA finds the Committee's recommendation to be appropriate for exposure to MDA. OSHA, like the Committee, recognizes that employees exposed to MDA in an emergency situation are at potential risk of death from acute liver intoxication. Thus, OSHA agrees that requiring written plans and methods to alert employees is needed.

Paragraph (e). Exposure Monitoring

OSHA agrees with the Committee's recommendations for exposure monitoring. OSHA also finds significant the Committee's recommendations that visual monitoring be included. OSHA recognizes that visual monitoring can provide the employer with an instant determination that personal protective clothing has lost its effectiveness. OSHA also recognizes that visual monitoring of all potentially exposed body parts may not be feasible. OSHA believes that the employer will be able to implement this provision to the extent feasible and that this provision will greatly aid the employer in assuring that employers are not being exposed, dermally, to MDA.

OSHA has clarified the regulatory language recommended by the Committee with respect to monitoring for the STEL. In the Committee's rationale, it is clear that monitoring for the PELs was intended and that this monitoring would occur accordingly: (1) Where exposure measurements are determined to be above the permissible exposure limits (includes both the TWA and the STEL), the employer is required to monitor every 3 months; (2) where exposure measurements are above the action level but at or below the PELs (includes both the TWA and the STEL), monitoring is required only at 6 month intervals; (3) where exposure measurements are below the action level, monitoring is not required unless there is some change that suggests that work place conditions might have changed. The language in the regulatory text has been changed to reflect the rationale offered by the Committee. OSHA agrees that if a STEL is being recommended that some monitoring scenario to determine compliance must also be recommended and has been proposed accordingly.

Paragraph (f). Regulated Areas

OSHA has reviewed the Committee's recommendations for establishing regulated areas and finds that the tiering of this standard provision is acceptable. In fact, OSHA recognizes that the Committee took considerable effort in developing this provision. It was difficult to develop the concept of establishing regulated areas which would restrict inadvertent exposure to unaffected workers to liquid mixtures of MDA. Traditionally, OSHA establishes regulated areas primarily where the PELs are exceeded. Establishing reasonable barriers for areas where only liquid mixtures are found poses somewhat of a problem, however, OSHA believes that the regulatory text recommended by the Committee and now proposed by OSHA will allow the employer to reasonably make the necessary determinations. OSHA did notice that there was some redundancy in the drafting of the Committee's regulatory text and this has been corrected.

Paragraph (g). Methods of Compliance.

OSHA has adopted and included the Committee's recommendations regarding methods of compliance in its NPRM. OSHA finds that the Committee relied heavily on OSHA's policy to require feasible engineering and work practice controls to prevent excessive employees exposures and to rely on respirators only as an alternative when these other methods are not adequate,

not feasible, or have not yet been installed.

Paragraph (h). Respiratory Protection

OSHA has adopted the Committee's recommendations regarding respiratory protection and has included these recommendations in its NPRM. OSHA also agrees with the Committee recommendation that if OSHA does modify § 1910.134 that the respiratory section of this MDA regulation should reflect these modifications. When § 1910.134 is modified, OSHA will amend the respiratory section found in this proposed regulation accordingly.

Paragraph (i). Protective Work Clothing and Equipment

OSHA has proposed the Committee's recommendation for this paragraph with only minor changes to eliminate redundancy in the text.

Paragraph (j). Hygiene Facilities and Practices

OSHA accepts the Committee's recommendations for this paragraph and has included them in its NPRM. OSHA did correct an inconsistency in this section. The Committee recommended that employees be required to take showers at or above the action level. The language requiring change rooms was somewhat inconsistent with the Committee's intent for showering provisions, thus OSHA changed the change room provision to correct this inconsistency. The change room provision proposed by OSHA requires "the employer to provide clean change rooms for employees, who must wear protective clothing, or must use protective equipment because of their exposure to MDA."

Paragraph (k). Communication of Hazards to Employees

OSHA accepts the Committee's recommendations for this paragraph except that OSHA has removed what is perceived as a redundancy. The Committee recommended the use of "suspect cancer hazard" and "may cause cancer" both in the signs and labelling requirements. OSHA believes that only one of these terms is necessary and will include the term "may cause cancer" in its signs and labelling requirements.

Paragraph (l). Housekeeping

OSHA reviewed the Committee's recommendations for this paragraph and has based its housekeeping provisions on the Committee's recommendations.

Paragraph (m). Medical Surveillance

OSHA reviewed the recommendations made by the Committee regarding medical surveillance and has, for the most part, used these recommendations in paragraph (m) of its NPRM. Clearly, there is a need for medical surveillance. First, while the recommended standard now proposed by OSHA is anticipated to be adequate to prevent employees being adversely affected as a result of occupational exposure to MDA, OSHA finds it impossible to precisely determine from the available data what if any ambient level would ensure a worker occupationally exposed to MDA that exposure would not result in clinical or subclinical findings of disease. Further, it is impossible at this time to determine how much MDA must be deposited on the skin to produce clinical signs or symptoms of exposure or to induce changes in liver function. Thus, while OSHA may believe that a STEL of 100 ppb and a TWA of 10 ppb may prevent the clinical observation of disease, OSHA finds no evidence that occupational exposure to these PELs may not result in changes in liver function, a subtle indicator of disease, in exposed workers and it is for these reasons that OSHA has proposed a comprehensive medical surveillance program. OSHA also believes that the medical surveillance provisions along with the hygiene and personal protective provisions will help to assure the effectiveness of these proposed PELs.

Second, even if the PELs were sufficiently protective, OSHA believes that the medical surveillance program is also part of this standard's comprehensive approach to prevention of MDA related diseases. Its purpose is to supplement the standard's primary mechanisms of disease prevention, the elimination or reduction of airborne concentrations of MDA and sources of dermal exposure, by facilitating the early detection of medical effects associated with exposure to MDA. Control of MDA exposure below the TWA and STEL and the prevention of dermal contact will protect most workers from the adverse effects of MDA exposure, but may not be satisfactory to protect individual workers (1) from the carcinogenic potential posed by MDA, (2) from the hepatotoxic effects of exposure to MDA, (3) who have additional uncontrolled sources of MDA exposure or exposure to liver toxins (e.g., non-occupational), (4) who exhibit abnormal variation in MDA absorption rates, or (5) who have specific medical conditions which could be aggravated by MDA exposure (liver disease). In addition, control systems may fail or hygiene and respirator programs may be inadequate, and periodic medical surveillance of individual workers may help detect those failures.

Third, while human data indicate that clinical signs and symptoms of disease appear to be reversible, there are no data which describe the effect that chronic low dosing or acute dosing will have on target organs. The only screening tool which is capable of detecting changes in biological processes prior to the manifestation of the disease (evidenced by clinical signs and symptoms) is the liver function test. Liver function testing, while a screening tool for detecting abnormalities, is also a sensitive indicator of the biological decay of the liver. The question of what effect continued exposure will have on the cell repair or cell reproductive capabilities is not known with certainity. Given the severity of the disease and the fact that changes in liver function are often times indications of disease rather than of the incipiation of disease, the implementation of a medical surveillance program is warranted.

OSHA believes that the use of the liver function test is an indicator of these subtle changes in liver function and that these tests can be used to indicate that adverse effects from MDA exposure have occurred. It was the Committee's opinion that a qualified physician equipped with the baseline data on a particular worker would be able to determine what is normal or abnormal. Local laboratories provide statistical variations for baseline liver function testing and a physician armed with the employee specific data could make the proper diagnosis. OSHA finds that the liver function test is presently the best indicator of MDA induced hepatotoxicity.

Fourth, OSHA is concerned with the Committee's seeming failure to recommend sensitive detection testing for bladder cancer, since the Committee clearly felt that a reduction of the carcinogenic risk posed by MDA was essential. In fact, originally OSHA's considerations for medical surveillance included cytology testing to detect bladder cancer. The Committee was reluctant to recommend cytology testing because of the negative reports on the sensitivity of the testing procedures. Also this testing was extremely costly and very worker invasive. More recently, however, a bladder cancer test requiring only the examination of the cells found in the urine for genetic change in order to determine if bladder

cancer has developed has been utilitzed. This testing is less invasive than older technologies and if at all accurate could effectively be used.

OSHA is unable to make findings regarding the applicability of using bladder cancer testing. OSHA does not propose bladder cancer testing in its NPRM but would ask for public comment concerning the appropriateness of requiring such testing. OSHA also agrees with the Committee's rationale that a properly functioning medical surveillance program, even without requiring specific cancer testing, will nonetheless provide some early cancer detection as a result of the routine examinations requirements. In addition, these routine examinations will also provide for detection of other conditions which might be aggravated as a result of MDA exposure.

Finally, the Secretary's authority to require medical surveillance in this proposed standard is supported by section 6(b)(7) of the Act, which reads in pertinent part:

> In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure.

Addition statutory support is found in the general rulemaking authority granted in section 8(g)(2) of the Act. This section empowers the secretary "to prescribe such rules and regulations as he may deem necessary to carry out (his) responsibilities under the Act"—in this case as part of, or ancillary to, a section 6(b) standard. The Secretary's responsibilities under the Act are defined largely by its enumerated purposes, which include, among other things, exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions * * *. (29 U.S.C. 651(b)(6)). The Committee recommended, at 52 FR 26864, that all medical examinations of employees be given at a reasonable time and place. It is necessary, the Committee reasoned, that the examinations be convenient and be provided without loss of pay to the employee to ensure employee participation. While this recommendation appeared in the Summary and Explanation section of the Committee document, the recommended language of the standard, probably as an oversight, does not reflect this requirement. OSHA finds, based on this discussion of the Committee's standard that the Committee unintentionally omitted this requirement from its standard and therefore, seeing obvious merit, adopts this requirement in this NPRM at paragraph (m)(1)(ii).

On September 27, 1988, OSHA published an Advance Notice of Proposed Rulemaking, "Medical Surveillance Programs for Employees" (53 FR 37595). This ANPR raised for public comment several issues related to the need for and content of a generic medical surveillance standard. OSHA announced in the ANPR that it "has initiated an evaluation of the effectiveness of medical monitoring and surveillance requirements in existing OSHA standards, in order to determine what has worked and what has not worked in practice, and if these requirements could be improved."

In this proposal, OSHA requests comment on the appropriateness of and need for such an evaluation for the medical surveillance provisions of the MDA standard, and on the methodology by which an evaluation could be conducted. Following is a discussion of the reasons why an evaluation would be beneficial, but difficult to conduct.

The primary objectives of such an evaluation would be to determine if workers who have been protected according to the requirements of this standard have exhibited adverse health effects that may be related to MDA exposure and to determine whether or not workers may develop diseases that may be exacerbated by MDA exposures that may not otherwise adversely affect them. Thus, it may be possible to determine if the information obtained through the medical surveillance program is useful to employers for detecting deficiencies in workplace protection and for identifying individuals who may be at greater risk of developing MDA related disease. Such an evaluation may be particularly appropriate for substances such as MDA. Although studies show that MDA causes liver damage, the incidence of liver damage that may occur from MDA exposure at or below the PEL is not certain. Liver function tests, which would be required by the proposed standard, are capable of detecting liver impairment. OSHA believes, however, that an evaluation of the medical surveillance program will be definitive only if extensive data are gathered for many years and after evaluation through epidemiological methods. Such an effort may impose extensive resource burdens on the employers and OSHA.

If an adequate evaluation could be conducted, and the results indicate that forms of liver toxicity were identified, OSHA could use the results to reconsider the standard to determine if further protection is warranted. On the other hand, if an evaluation shows that the information collected through the medical surveillance program has not been useful in identifying workers with adverse health effects related to MDA exposure, then OSHA could reconsider the program to determine whether it should be modified or deleted. Such an evaluation may show that the medical surveillance provisions are working and that there is no need to change an acceptable practice, or may show that worker protection could be improved through the promulgation of a more stringent standard.

In addition to an evaluation of the overall medical surveillance program, a specific evaluation could be conducted for one or more individual provisions of the standard. For example, an evaluation could assess the requirement for multiple physician review or the adequacy of the removal period required by the medical removal provision. An evaluation such as this would not allow the agency to determine if MDA-exposed employees were at higher risk of adverse health effects due to MDA exposures, but would allow the agency to determine if specific provisions are giving the employers the information needed to make the right decisions about employee protection.

As a general matter, OSHA believes that evaluations of OSHA's programs are necessary functions to ensure that OSHA is effectively accomplishing its mandate. Therefore, OSHA requests comments on whether an evaluation should be performed on the medical surveillance provisions of the MDA standard. If an evaluation is recommended, OSHA requests that the commenter stipulate a hypothesis for the evaluation and provide protocols for its conduct and analysis.

Paragraph (n) Recordkeeping

OSHA has reviewed the Committee's recommendations and has used their recommendations as the basis for its NPRM.

Paragraph (o) Observation of Monitoring

OSHA has reviewed the Committee's recommendations and has used their recommendations as the basis for its NPRM.

Paragraph (p) Effective Dates

The Committee did not establish a section for effective dates. However, the Committee did not indicate in any of its feasibility findings that any specific time would be needed to comply with the implementation of any of the

recommended standards. Thus OSHA has developed its effective date section based on the feasibility analysis recommended by the Committee.

Paragraph (q) Appendices

Five appendices have been included at the end of this proposed standard. Appendices A, B, C, and D have been included primarily for purposes of information. None of the statements contained in Appendices A, B, C, and D should be construed as establishing a mandatory requirement not otherwise imposed by the standard, or as detracting from an obligation which the standard does impose. However, the protocols for respiratory fit testing in Appendix E are mandatory.

Appendix A contains information on the description and exposure levels of MDA. Also provided in Appendix A is information on the health hazards associated with exposure, descriptions of protective clothing and equipment, emergency and first aid procedures, medical requirements, provisions for the observation of monitoring, access to exposure and medical records, and precautions for the safe use, handling, and storage of MDA.

Appendix B contains "substance technical guidelines" for MDA, including physical and chemical data, spill and leak procedures, including waste disposal methods, and other miscellaneous precautions for the safe handling of MDA.

Appendix C contains the medical surveillance guidelines for MDA. Included in these guidelines are the description of the routes of entry, the toxicology and symptoms and signs associated with MDA exposure, information on the treatment of acute toxic effects, and surveillance and preventive considerations, including hematology guidelines which may be useful to physicians in conducting the medical surveillance program required by paragraph (m) of this recommended standard.

Appendix D gives details of the recommended sampling and analytical methods for use in monitoring employee exposures to MDA.

Appendix E gives detailed fit testing procedures that are to be followed for qualitative or quantitative fit testing of negative pressure respirators. Various protocols for qualitative and quantitative fit tests are outlined in detail.

All the Appendices are designed to aid the employer in complying with the requirements of the standard. Paragraph (k) of this proposed standard on the "communication of MDA hazards to employees" specifically requires that the contents of the standard and Appendices A and B be made available to affected employees. Information contained in Appendix C on medical surveillance is to be explained to affected employees. Appendix C also provides information needed by the physician to evaluate the results of the medical examination.

Paragraph (r) Start-Up Dates

The Committee did not establish a section for start-up dates. As was done for effective dates, OSHA based its selection of start-up dates on the feasibility analysis done by the Committee.

VIII. Summary and Explanation of the Standard for the Construction Industry

(a) Committee's Recommendations

Paragraph (a) Scope and Application

The Committee unanimously recommended a separate standard for occupational exposure to MDA in the construction industry. The Committee also agreed to use § 1910.12(b) to define "construction work" as work for construction, alteration, and/or repair, including painting and decorating.

The Committee recommended that their proposed standard apply to all construction work as defined in 29 CFR 1910.12(a), which states:

> The standards prescribed in Part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work.

Accordingly, the recommended standard applies to all occupational exposures to MDA in the construction industry. Depending on the nature and extent of exposure, certain provisions of the recommended standard rule may not be applicable in certain situations or may have limited applicability. The applicability of many provisions of the standard is based on the results of initial employee monitoring conducted by the employer or on the availability of other objective data concerning employee exposures or product characteristics. The construction operations listed in paragraph (a) include construction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof that contain MDA; the installation or finishing of surfaces with MDA containing products; the removal of MDA spills or emergency clean-up on site; and transportation, disposal, or storage of contaminated products.

MDA spill and emergency situations are included within the scope of the standard, because these events clearly have the potential for serious employee and bystander exposures. MDA spills might occur during the handling of bags or containers of MDA-containing materials to be used at the construction site. The final group of activities listed in the scope and application paragraph includes the transportation, disposal, storage, or containment of MDA or MDA-containing products on the worksites at which construction operations occur. These operations are included because they have considerable potential for excessive employee exposure to MDA, and, if not closely supervised and properly conducted, may lead to serious bystander exposure as well. The Environmental Protection Agency (EPA) has specific requirements for the disposal of hazardous waste, and the MDA standard contemplates compliance with EPA provisions for the safe disposal and handling of MDA-containing wastes and of MDA-contaminated clothing.

The Committee notes that the recommended standard has been carefully structured to relate the stringency of the requirements to the extent and duration of employee exposures. The Committee therefore believes that a compliance burden will not be placed on construction employers who either do not use, handle, or remove MDA-containing products or who maintain MDA exposures in their workplaces at levels below the action level or where the likelihood of dermal exposure does not exist.

Paragraph (b). Definitions

Paragraph (b) of the recommended MDA standard for the construction industry defines a number of terms used in the standard. In some instances, the definitions used are consistent with those of other OSHA standards and those recommended by the Committee to be used in the general industry standard, e.g., "Director," "Assistant Secretary," and "Authorized person." However, certain other terms require definition because they are used in accordance with their meanings in the construction industry.

Action level is defined as one half of the PEL. If employers are engaged in MDA work causing worksite levels of MDA above the action level for 30 or more days per year, they must also institute a medical surveillance program for all employees. In addition, on sites where food and beverages are consumed and the airborne MDA level exceeds the PEL, the standard requires employers to provide lunch areas that

have airborne MDA levels below the action level.

Employee exposure is defined as that exposure to airborne MDA that would occur if the employee were not using respiratory protective equipment. The Committee believes it is essential to determine employee exposure levels without the use of respiratory protection in order to gauge the efficacy of mandated work practice and engineering controls.

Regulated areas are defined as areas where airborne concentrations of MDA exceed or can reasonably be expected to exceed the permissible exposure limit or where the potential for dermal exposure exists. The fact that the recommended standard contains requirements for two types of regulated areas reflects both the wide differences in construction worksites and the Committee's approach in dealing with this wide range in exposure conditions. These two types of regulated areas thus reflect the recommended standard's use of the "tiering" concept: increasing regulatory stringency with increasing hazard.

Competent person is a term and concept widely used and recognized in the construction field. The recommended proposal definition of a competent person as one who is capable of identifyinq existing MDA hazards in the workplace and who has the authority to take prompt corrective measures to eliminate them is consistent with the definition in 29 CFR 1926.32(f), OSHA's safety and health standards for the construction industry.

The terms "clean room," "equipment room," and "high-efficiency particulate air (HEPA) filter" are self-explanatory and refer to hygiene areas and equipment storage areas used in the construction industry.

Paragraph (c) Permissible Exposure Limit

The Committee recommends that the PEL for the construction industry be set at 10 parts of MDA per billion parts of air as an 8-hour time-weighted average (TWA) limit and at 100 ppb as a STEL. This is consistent with the recommended standard for general industry.

The recommendations contained in the Committee's proposed standard are supported by the Committee's findings that occupationa1 exposure to MDA under current occupational conditions poses a risk to the health of employees and that the proposed standard, if adopted, can achieve a reduction in that risk. The Committee determined in its quantitative risk assessment (Ex. 9, Section IV) that lifetime exposure to an 8-hour TWA of 250 ppb in spray operations would result in 9.25 excess deaths due to cancer per thousand workers. For roll-on operations, the lifetime risk at an exposure level of 20 ppb would be 2.25 cancers per thousand workers.

As with the recommended standard for general industry, the recommended standard for construction establishes a ceiling or short-term exposure limit of 100 ppb (sampled over a 15-minute period) for MDA.

Paragraph (d) Communication Among Employers

Paragraph (d) of the recommended rule requires that, on multi-employer construction worksites, employers performing MDA work requiring the establishment of a regulated area inform other employers on the site of the nature of their work with MDA and of the existence of and requirements pertaining to regulated areas. The Committee recognizes that several different operations involving workers from numerous trades may simultaneously take place on the same construction site and that the exposures of these workers to MDA should be minimized to the extent possible. The Committee believes that requiring employers who are directly involved in MDA-related activities to inform other employers working nearby on a multi-employer worksite of the existence of hazardous levels of MDA, regulated areas, and the rules pertaining to such areas will contribute substantially to the protection of these nearby employees.

Paragraph (e) Emergency Situations

The Committee agreed that available health data suggest that elevated short-term exposure to MDA should be viewed with concern. The Committee believed that an unexpected high exposure must be viewed as an emergency situation. A written plan would be required where there is a possibility of an emergency and procedures for alerting employees in the event that an emergency occurs.

The recommended provisions also include a requirement to alert employees other than those who have the potential to be directly exposed in an emergency situation. Such employees may be employees from neighboring work sites who may inadvertently approach the emergency site. They may also include employees from other work shifts or employees who may be later exposed to work surfaces or equipment contaminated as a result of the emergency.

The Committee also recommended the development of a written plan for each workplace where there is a possibility of an emergency. The plan shall include the elements prescribed in 29 CFR 1910.38, "Employee emergency plans and fire prevention plans."

The Committee believes that the performance language of the emergency situation paragraph will give employers the flexibility to choose any effective method of alerting employees, including communications systems, voice communication, or a bell or other alarm.

Paragraph (f). Exposure Monitoring

The recommended standard also requires that the employers conduct monitoring to determine employee exposures to MDA. The recommended standard requires initial determinations of employee exposures using frequencies and patterns of monitoring sufficient to represent with reasonable accuracy the exposures of employees. The standard would also require that monitoring be conducted no less frequently than once every 3 months if MDA exposure exceeds the PELs and once every 6 months if exposure is between the action level and the PELs. Moreover, section 6(b)(7) of the Act mandates that standards promulgated shall, where appropriate, "provide for monitoring or measuring employee exposures at such locations and intervals. and in such a manner as may be necessary for the protection of employees" (29 U.S.C. 655(b)(7)). Based on the recommendations made by CACOSH in the Asbestos rulemaking, and the requirements of the Act, the Committee recommends that the construction trades be required to do the same sort of monitoring required to be done by the general industry sectors.

Accordingly, the recommended standard for construction includes several monitoring requirements, i.e., employers must perform monitoring of their employees' breathing zones that will accurately reflect and be representative of their exposures to MDA. In paragraph (f)(2). construction employers are required to conduct initial monitoring of employee exposures, unless: (1) The employer can demonstrate, on the basis of objective data, that the MDA-containing product or material being handled cannot cause exposures above the standard's action level, even under worst-case release conditions; or (2) the employer has historical or other data demonstrating that exposures on a particular job will be below the action level. Periodic monitoring is addressed in paragraph (f)(3), which stipulates that employers whose MDA operations are being conducted within a regulated area

forego periodic monitoring if the employees are all wearing supplied-air respirators while working in the regulated area. Monitoring may be terminated when, in accordance with paragraph (f)(4), employers obtain confirmation by means of periodic monitoring that their employees' exposures are below the action level. Paragraph (f)(5) sets forth the accuracy and precision requirements for the sampling methodology selected by the employer. The requirements in paragraphs (f)(6) and (f)(7) pertain to requirements for employee notification of monitoring results and to observation of monitoring, respectively.

Although employers are required to determine the exposure of each employee exposed to MDA, this determination is not required to be based on separate measurements taken for each employee. Instead, the recommended standard permits employers to use a "representative" measurement to characterize the exposures of more than one employee when these employees perform essentially the same job under the same conditions. For these types of situations, it may be sufficient for the employer to monitor one or a few of these employees to obtain data that are "representative" of the exposure of the remaining employees in the group. As permitted in paragraph (f)(l)(iii), representative personal sampling for employees engaged in similar work and exposed to similar concentrations of MDA can be achieved by measuring the exposure of that member of the exposed group who can reasonably be expected to have the highest exposure and then attributing this exposure level to the remaining employees in the group.

In many work situations, this representative monitoring approach may be more cost-effective than individual monitoring of all employees to determine the exposures of affected employees. However, employers are free to use any monitoring approach that will correctly identify the breathing-zone exposures of their employees to airborne MDA.

Paragraph (f)(2)(i) of the recommended rule contains requirements for initial monitoring for construction employees exposed to MDA. In this paragraph OSHA requires employers to conduct initial monitoring at the srart of each new MDA job in order to assess the effectiveness of existing engineering controls and to provide intormation necessary for the proper selection of appropriate respirators.

The Committee believes that initial monitoring is essential for protecting employee health because it provides the employer with information for determining the necessity for using engineering controls, instituting or modifying work practices, and selecting appropriate respiratory protection. Recognizing the varied nature of construction projects, the Committee has required that initial monitoring for employee exposures be conducted at the start of each new construction project that involves the handling of MDA-containing materials.

Paragraph (f)(2) allows employers to dispense with initial monitoring if they can demonstrate by means of objective data that MDA-containing products or material cannot release airborne MDA in concentrations exceeding the action level. The Committee believes that employers may be able to obtain data from the manufacturers of MDA-containing products that demonstrate that these materials will not release MDA at levels that exceed the action level, even under worst case conditions. This exemption would relieve employers from monitoring when employees are handling MDA containing products that are not capable of releasing a significant amount of MDA.

The Committee also has included in paragraph (f)(2) an exemption from initial monitoring for employers who have historical monitoring data. The Committee included this exemption in recognition of the fact that many employers are currently conducting exposure monitoring on construction sites; this exemption would prevent these employers from having to repeat monitoring activity for construction jobs that are substantially similar to previous jobs for which monitoring was conducted.

However, such monitoring data must have been obtained from projects conducted by the employer that meet the following conditions:

(1) The data upon which judgments are based are scientifically sound and collected using methods that are sufficiently accurate and precise.

(2) The processes and work practices in use when the historical data were obtained are essentially the same as those to be used during the job for which initial monitoring will not be performed.

(3) The characteristics of the MDA-containing material being handled when the historical data were obtained are the same as those on the job for which initial monitoring will not be performed.

(4) Environmental conditions prevailing when the historical data were obtained are the same as for the job for which initial monitoring will not be performed.

Thus, the Committee agrees that employers should be encouraged to compile and use any information that will aid in the protection of workers' health. Furthermore, the Committee would recommend the use of such data in lieu of initial monitoring if information from the data base is available and sufficiently detailed to meet the requirements of paragraph (f)(2)(ii) for historical data.

Like the recommended general industry standard, the recommended construction standard requires employers to notify employees of their exposure levels and to provide employees exposed to MDA an opportunity to observe any air sampling being performed in accordance with the standard; designated employee representatives must also be given this opportunity. The recommended standard further specifies that such observers be provided with and required to wear any protective clothing and equipment required by the standard.

These provisions are consistent with section 8(c) of the Act, which requires employers to permit employees or their representatives to observe any required monitoring and to notify employees of their monitoring results.

Paragraph (g). Regulated Areas

The recommended standard requires that signs be posted to alert employees to the existence of areas where the PELs are exceeded or where the likelihood of dermal exposure exists. Paragraphs (g)(2) and (g)(3) require that the regulated area be demarcated in a manner that restricts entry to the area to authorized persons only. Respirators must be supplied to persons entering regulated areas as specified in paragraphs (g)(1)(iv) and (g)(2)(iv), and eating, drinking, smoking, and applying cosmetics are prohibited in such areas by paragraphs (g)(1)(v) and (g)(2)(v). These requirements are consistent with similar provisions in previous OSHA standards (Acrylonitrile, 29 CFR 1910.1045; Inorganic Arsenic, 29 CFR 1910.1018; Ethylene Oxide, 29 CFR 1910.1047; and Vinyl Chloride, 29 CFR 1910.1047) and with the Committee's recommendations for a general industry standard regulating occupational exposure to MDA.

Paragraph (h). Methods of Compliance

The recommended standard governing occupational exposure to MDA requires that a combination of engineering controls, work practices be used to meet the exposure limits contained in the standard. The engineering control methods outlined in the standard

include isolation, enclosure, exhaust ventilation, and dust collection. Work practices were also recognized as necessary for maintaining exposures at or below the PELs.

The effectiveness of local exhaust ventilation systems that are equipped with HEPA-filtered dust collection systems was recommended for use in the general industry standards and are likewise being recommended for use in the construction industry.

The Committee believes that general exhaust ventilation systems may also be effective in reducing employee exposure to MDA in construction. Such systems are useful for reducing the concentration of MDA-containing materials and removing potentially harmful MDA particulates from the air through a HEPA filtration system. OSHA cautions employers, however, that the use of general exhaust ventilation will tend to spread MDA airborne contaminants unless the return air is passed through a HEPA filter.

Vacuum cleaners that are equipped with HEPA filters are effective controls for cleaning MDA spills and performing clean-up, since the HEPA-filtered vacuum systems collect MDA containing material and prevent it from becoming airborne.

Isolation of operations where MDA-containing materials are being applied to surfaces during construction activities is an effective means of containing exposures.

The prompt disposal of MDA-containing materials in leak-tight containers can be an effective work practice because MDA-containing materials sealed in disposal containers while they are still wet are less likely to pose a dermal exposure problem.

The Committee, in the feasibility recommendations, also noted the significance which respiratory use had in controlling worker exposure to MDA resulting from spray application. In fact, the Committee found that in this instance for the most part a properly selected and functioning respirator served as the only feasible control for separating the worker from his environment. The Committee provided considerable discussion concerning this recommendation, however, the results of their findings are not reflected in the Committee's recommended regulatory text.

The Committee also recommended that spray application of MDA be prohibited. As recognized application of MDA through spray techniques would result in the potential for very high worker exposures. However, the Committee later changed this recommendation to allow the application of MDA through spray application. OSHA has also proposed the use of MDA through spray application.

Further, the Committee recommended that compressed air not be used to remove MDA-containing materials. Using compressed air to clean MDA dust from surfaces results in the formation of large dust clouds that lead to excessive exposures of the worker and bystanders unless local exhaust ventilation is used. There was no indication, however, that using compressed air to blow MDA-containing dust from surfaces was a current practice.

Paragraph (i). Respiratory Protection

The recommended standard for the construction industry requires that employers provide respirators at no cost to employees

(1) During the interval necessary to install or implement feasible engineering and work practice controls;

(2) In operations such as maintenance and repair activities for which engineering and work practice controls are not feasible;

(3) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the PELs; and

(4) In emergencies.

Employers are required under paragraph (i)(2) of the revised rule to select appropriate respirators based on employee exposure levels that exist in the workplace. The required respirators range from half-mask air-purifying respirators equipped with high-efficiency filters for concentrations that do not exceed 10 times the PEL, to full-facepiece supplied-air respirators or SCBA when the concentration of MDA exceeds 1000 times the PEL. Employers are required to select respirators from those that are approved jointly by the National Institute for Occupational Safety and Health and the Mine Safety and Health Administration under the provisions of 30 CFR Part 11. In addition, employers are required to provide powered air-purifying respirators at the request of employees whenever such a respirator will provide adequate protection for the concentration existing in the workplace.

Under paragraph (i)(3), employers are required to institute a Respiratory Protection program as required under 29 CFR 1910.134. The required program is to include (1) Criteria for changing filter elements for air-purifying respirators, (2) a policy permitting employees time to leave work areas to wash their faces and respirator facepieces to prevent skin irritation, and (3) a policy for reassigning employees to other jobs if a physician determines that the employee cannot function normally while wearing a respirator. Under paragraph (i)(5), the recommended standard requires that employers conduct qualitative or quantitative fit testing for all employees required to wear a negative-pressure respirator. The requirements for the use, selection, program elements, and fit testing of respirators are the same as those contained in the general industry standard.

The Committee agreed that this respirator section, like the respiratory section recommended in the general industry standard would be revised when OSHA revised its respiratory protection standard found in § 1910.134.

Paragraph (j). Protective Clothing

The recommended construction standard, like the general industry standard, requires that all workers exposed to MDA be provided with personal protective clothing and equipment: i.e., coveralls, aprons, gloves, boot covers, and goggles. The Committee has recommended stringent provisions for the use of personal protective clothing because of the hazards associated with dermal absorption of MDA or MDA–containing materials. When nondisposable protective clothing is used, the employer is required by paragraph (j)(2) to launder the clothing in a manner that prevents the release of airborne MDA in excess of the PEL and to notify the person responsible for laundering. Paragraph (j)(3) requires employers to transport contaminated clothing in sealed impermeable bags or other impermeable containers. The requirements of paragraphs (j)(2) and (j)(3) are identical to the requirements of the general industry standard.

In addition, a requirement has been included that the personal protective equipment worn by employees be examined periodically to detect rips or tears, and that when rips or tears are detected in clothing they must be immediately mended, or the worksuit must be immediately replaced.

In addition, the Committee would recommend that disposable work suits be used by construction workers handling MDA or MDA–containing products. The Committee believes that this type of clothing provides sufficient protection to the worker but eliminates the problems that may be involved in laundering and storing MDA–contaminated clothing on non-fixed work sites. The Committee recognizes that while disposable overalls may not be as durable and comfortable as cotton

work clothes, they do not require laundering which would expose another workforce or the worker's family to MDA. The Committee, however, believes that non-disposable work clothes similar ro those required in the revised general industry standard will provide sufficient protection for employees engaged in construction activities, provided that such clothing is properly cleaned after work and then laundered. The Committee, however, chose to propose performance language in its regulatory text which would allow the employer to chose the clothing which is appropriate.

The Committee also recognizes that heat stress is a concern when disposable protective clothing is used in hot environments. However, the use of protective clothing is necessary to protect employees from MDA exposure that may result from contaminated clothing. In situations in which heat stress is a concern, the Committee believes that employers should use appropriate work-rest regimens and provide heat stress monitoring that includes measuring employees' heart rates, body temperatures, and weight loss. If such measures are used to conrrol heat stress, disposable protective clothing can be safely worn to provide the needed protection against MDA exposure.

Paragraph (k). Hygiene Facilities and Practices

The hygiene facilities requirements of the recommended construction standard are similar to those recommended in the general industry standard. For example, exposure to MDA at levels above the action level acts as the trigger for the shower provisions. All workers required to wear personal protective equipment must have a place to change their street clothes and to store them separately from their work clothes.

Paragraph (k)(1)(i) of the recommended construction standard modifies the language of the recommended general industry standard to allow change "areas," in recognition of the fact that the place where employees change from street clothing to work clothing and back again to street clothing is not always a separate room but may be merely a separate area of a larger space. This difference recognizes that it may not be feasible at some construction sites to provide a separate room with physical barriers. In these instances, employers may provide change areas that are distant from the immediate location where MDA-related work is being conducted, such as on a separate floor of a building.

The Committee also recommends that the term "separate storage facilities" be used in recognition of the fact the employers must use portable storage facilities that can be transported from job to job. The Committee's intent in this provision is to ensure that street clothes are sufficiently separated from work and protective clothing and equipment in order to prevent contamination of employees' street clothing, and this can be accomplished by separate lockers, baskets, or other containers.

New language has been added in the recommended standard to require the provision of clean areas: *i.e.*, areas that have airborne concentrations of MDA below the action level, where employees may consume food or beverages on site. This addition was recommended by CACOSH in its 1980 report (Ex. 84-233). CACOSH recognized that permanent lunch rooms, such as exist on fixed worksites, were probably not feasible for the construction industry, due to the nonfixed nature of construction project worksites. The term "lunch area" was adopted by OSHA to indicate that a temporary facility, such as a separate trailer, would serve the purpose of protecting employee health. The Committee agrees with both OSHA's and CACOSH's findings that the transient work conditions in nonfixed workplaces would make the installation of fixed lunchrooms difficult, and accordingly included a requirement for clean lunch areas in its recommended standard.

Paragraph (l). Communication of MDA Hazards to Employees

In paragraph (l) of the recommended standard, the Committee has included requirements to ensure that the dangers of MDA-containing materials are communicated to employees by means of signs, labels, and employee information and training. The requirements for the signs and labels mandated in this section parallel those in OSHA's Hazard Communication standard (29 CFR 1910.1200).

(1) *Signs and Labels.* The Committee recommends that the construction standard include specifications for signs to be posted at all locations where regulated areas have been established to indicate that concentrations of airborne MDA exceed the PEL or where the likelihood of dermal exposure exists; such signs are to bear the same legend as that recommended in the general industry standard.

The purpose of such signs is to minimize the number of employees in a regulated area by alerting them to the fact that they must have authorization from their employer and take the appropriate protective measures before entering. Furthermore, as discussed in the Summary and Explanation for the recommended standard for general industry signs serve to apprise employees of the hazards to which they are exposed in the course of their employment, and foster cooperation between the employee and employer in controlling workplace hazards.

The standard also requires that all MDA products and containers of MDA products, including waste containers, be labeled with appropriate information and with a warning statement against inhalation or dermal contact with MDA. These labelling requirements are consistent with those found in 1910.1200.

(2) *Employee Information and Training.* The recommended training requirements are consistent with those found in 1910.1200, except that annual training is recommended in both the general industry and construction standards. The recommended standard requires that training be provided to all employees prior to or at the time of initial assignment and at least yearly thereafter. Component areas to be covered in the training program include: (1) Methods for recognizing MDA; (2) the health effects associated with MDA exposure; (3) the importance of necessary protective measures to minimize exposure including, as applicable, engineering controls, work practices, respirators, housekeeping and protective clothing, and any necessary instruction in the use of these controls; (4) the purpose, proper use, fitting instructions, and limitations of respirators, as described in 29 CFR 1910.134; (5) the appropriate work practices for performing the MDA related job; and (6) the medical surveillance program requirements. The employer may design and implement his own training program that contains these elements, or rely on third-party training programs.

The Committee strongly believed that informing and training employees can reduce the incidence of work-related diseases caused by exposure to hazardous workplace conditions.

Paragraph (m). Housekeeping

The recommended standard for the construction industry includes a housekeeping provision stipulating that (1) when vacuuming is used for cleanup, only HEPA-filtered equipment may be used; and (2) all waste, scrap, debris, bags, containers, equipment, and contaminated clothing must be collected and disposed of in sealed impermeable bags or in other closed impermeable containers. The Committee believes that these housekeeping practices reflect

advances in vacuum filter technology and good hygiene practices, and are essential parts of any effective MDA control program. The Committee believes that the use of HEPA-filtered vacuums and proper disposal practices will considerably diminish the risk of generating airborne MDA during cleanup—a potentially high-exposure activity—and minimize the potential for dermal absorption of MDA. The required use of high-efficiency particulate air filters on vacuums employed for cleanup is not intended to preclude the use of other complementary cleanup methods, such as wet methods (where applicable). The Committee believes that the recommended housekeeping requirements will aid in minimizing worker contact with MDA.

Paragraph (n). Medical Surveillance

Where appropriate, the recommended construction standard requires that medical surveillance programs required by section 6(b)(7) of the OSH Act be included in OSHA health standards to aid in determining whether the health of workers is adversely affected by exposure to toxic substances. The medical surveillance requirements contained in this recommended MDA construction standard are designed to detect changes in liver function and signs or symptoms of acute liver disease.

The Committee agreed that each employer must institute a medical surveillance program for all employees exposed to MDA as follows:

Employees exposed at or above the action level for more than 30 days per year or who show signs or symptoms of exposure;

Employees who have the likelihood of dermal exposure for more than 15 days per year, exhibit MDA dermal staining, or show signs or symptoms of exposure; and

Employees who have been exposed in an emergency situation.

The recommended language requires that the medical surveillance program provide each covered employee with an opportunity for a medical examination. Further, all examinations and procedures must be performed by or under the supervision of a licensed physician and be provided without cost to the employee. Clearly, a licensed physician is the appropriate person to supervise and evaluate a medical examination. However, certain parts of the required examination do not necessarily require the physician's expertise and may be conducted by another person under the supervision of the physician.

The Committee also recommends that exams be given at a reasonable time and place. It is necessary that exams be convenient and be provided without loss of pay to the employee to assure that they are taken.

The proposal allows the examining physician to prescribe the specific tests to be included in the medical surveillance program. Included are some specific requirements, such as:

(i) Comprehensive medical and work histories with special emphasis directed to an evaluation of other carcinogens to which the employee is exposed, and smoking and alcohol use;

(ii) Comprehensive physical examination. with particular emphasis given to symptoms related to eye and skin irritation, and liver dysfunction;

(iii) Complete urinalysis; and

(iv) Screening for liver damage.

It is important to note that the employer is required to make any prescribed tests available more often than specified if recommended by the examining physician.

The Committee also recommends that the employer provide examinations recommended by the physician to any employee exposed to MDA under emergency conditions. Due to the effects of high short-term exposures, it appears prudent to monitor medically such affected employees. However, trivial exposures which are peripherally related to an emergency do not trigger the requirement.

The employer will also be required to provide the physician with the following information: A copy of this standard and its appendices; a description of the affected employee's duties as they relate to the employee exposure level; and information from the employee's previous medical examinations which is not readily available to the examining physician. Making this information available to the physician will aid in the evaluation of the employee's health in relation to assigned duties and fitness to wear personal protective equipment.

The employer is required to obtain a written opinion from the examining physician that contains the results of the medical examinations; the physician's opinion as to whether the employee has any detected medical conditions which would place the employee at increased risk of material health impairment from exposure to MDA; any recommended restrictions upon the employee's exposure to MDA or upon the use of protective clothing or equipment, such as respirators; and a statement that the employee has been informed by the physician of the results of the medical examination and of any MDA-related medical conditions which require further explanation or treatment. This written opinion must not reveal specific findings or diagnoses unrelated to occupational exposure to MDA, and a copy of the opinion must be provided to the affected employee.

The purpose of requiring the examining physician to supply the employer with a written opinion is to provide the employer with a medical basis to aid in the determination of initial placement of employees and to assess the employee's ability to use protective clothing and equipment. The requirement that a physician's opinion be in written form will ensure that employers have had the benefit of this information. The requirement that an employee be provided with a copy of the physician's written opinion will ensure that the employee is informed of the results of the medical examination. The purpose of requiring that specific findings or diagnoses, unrelated to occupational exposure to MDA, not be included in the written opinion is to encourage employees to take the medical examination by removing the concern that the employer will obtain information about their physical condition that has no relation to present occupational exposures.

Like the general industry standard this standard would also include a multiple physician review mechanism. This mechanism was recommended because it was the Committee's belief that this would aid in ensuring that employees take physical examinations. Finally, the draft language would contain provisions for removing an employee from exposure who has suffered reversible material impairment to health as a result of being exposed to MDA. The Committee agreed that employees whose health has been adversely affected as a direct result of occupational exposure to MDA should be removed from exposure and should receive medical removal benefit protections.

Paragraph (o) Recordkeeping

The Committee's recommendations are consistent with section 8(c)(3) of the OSH Act which provides for the promulgation of regulations requiring employers to maintain accurate records of employee exposures to potentially toxic substances or harmful physical agents which are required to be monitored or measured.

The Committee allows for the use of objective data in order to be exempted from the standard. Records of objective data must be maintained to demonstrate that employees are not exposed to airborne MDA concentrations and that the likelihood for dermal exposure does not exist.

The Committee also recommends that records be kept to identify the employee monitored and to reflect the employee's exposure accurately. Specifically, records must include the following information: (a) The names and social security numbers of the employees sampled; (b) the number, duration, and results of each of the samples taken, including a description of the representative sampling procedure and equipment used to determine employee exposure where applicable; (c) a description of the operation involving exposure to MDA which is being monitored and the date on which monitoring is performed; (d) the type of respiratory protective devices, if any, worn by the employee; and (e) a description of the sampling and analytical methods used, and evidence of their accuracy.

The Committee's recommendation also includes a provision for requiring the employer to keep an accurate medical record for each employee subject to medical surveillance. Section 8(c) of the Act authorizes the promulgation of regulations requiring any employer to keep such records regarding the employer's activities relating to the Act as are necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational illnesses. The Committee believes that medical records, like exposure monitoring records, are necessary and appropriate to both the enforcement of the standard and the development of information regarding the causes and prevention of illness.

As explained above, it is necessary to relate employees' medical conditions to their exposures to develop information regarding cause and prevention. Medical records are necessary and appropriate for this purpose. In addition, medical records are necessary for the proper evaluation of the employee's health.

The employer is also required to keep a record of any employee's medical removal and return to work status.

The recommended draft requires that all records required to be kept shall be made available upon request to the Assistant Secretary and the Director of NIOSH for examination and copying. Access to these records is necessary for the agencies to monitor compliance with the standard. These records may also contain essential information which is necessary for the agencies to carry out their other statutory responsibilities.

The recommended proposal would also provide for employees, former employees, and their designated representatives to have access to mandated records upon request. Section 8(c)(3) of the Act explicitly provides "employees or their representatives" with an opportunity to observe monitoring and to have access to the records of monitoring and exposures to toxic substances; and several other provisions of the Act contemplate that employees and their representatives are entitled to play an active role in the enforcement of the Act. Employees and their representatives need to know relevant information concerning employee exposure to toxic substances and their health consequences if they are to benefit fully from these statutory rights.

In addition, access to exposure and medical records by employees, designated representatives, and OSHA is to be provided in accordance with 29 CFR 1910.20. Section 1910.20 is OSHA's generic standard for access to employee exposure and medical records (45 FR 35212). By its terms, it applies as to records required by specific standards, such as this MDA standard, as well as records which are voluntarily created by employers. In general, it provides for unrestricted employee and designated representative access to exposure records. The Committee recommends that unrestricted access to both kinds of records be allowed, but also recommends that Agency access to personally identifiable records is made subject to rules of agency practice and procedure concerning OSHA access to employee medical records, which have been published at 29 CFR 1913.10. An extensive discussion of the provisions and rationale for § 1920.20 may be found at 45 FR 35312; the discussion of § 1913.10 may be found at 45 FR 35384.

It is necessary to keep records for extended periods because of the long latency periods commonly observed for carcinogens. Cancer often cannot be detected until 20 or more years after onset of exposure. The extended retention period is therefore needed for two purposes. Diagnosis of disease in employees is assisted by having present and past exposure data as well as the results of the medical exams. Retaining records for extended periods also makes it possible at some future date to review the adequacy of the standard.

The time periods suggested for retention of exposure records and medical records are thirty years, and period of employment plus thirty years, respectively. These retention periods are consistent with those in the OSHA records access standard.

The recommended proposal would also require certain employers to notify the Director in writing at least 3 months prior to the disposal of the records. Section 1910.20(h) contains further requirements regarding the transfer of records.

To increase the effectiveness of training goals the draft requires that the training material be made available, without cost, to all affected employees or their representatives.

The Committee recognizes the transient nature of the Construction industry and the difficulties which this industry may have with recordkeeping requirements; it is for this reason that the Committee would not mandate the specific methods of recordkeeping. Employers are free to use the services of competent organizations such as industry trade associations and employee associations to maintain the required records. To reduce the costs and facilitate the recordkeeping some groups currently use centralized medical recordkeeping financed through employer contributions. Centralized recordkeeping could be instrumental in alleviating the problem of lost records associated with the transient nature of the construction workforce and the frequency of business closures in this sector.

Paragraph (p) Observation of Monitoring

The Committee also recommends that OSHA include a provision for observation of exposure monitoring. This provision is in accordance with section 8(c) of the OSH Act which requires that employers provide employees and their representatives with the opportunity to observe monitoring of employee exposures to toxic substances or harmful physical agents. Observation procedures are set forth which require the observer, whether it be an employee or a designated representative, to be provided with the personal protective clothing and equipment that is required to be worn by the employees who are working in the area. The employer is required to assure the use of such clothing and equipment or respirators and is responsible for requiring that the observer complies with all other applicable safety and health procedures.

Paragraph (q) Effective Dates

The Committee did not establish a section for effective dates. However, the Committee did not indicate in any of its feasibility findings that any specific time would be needed to comply with the implementation of any of the recommendated standards. Thus OSHA has developed its effective date section based on the feasibility analysis recommended by the Committee.

Paragraph (r) Start-Up Dates

The Committee did not establish a section for start-up dates. As was done for effective dates, OSHA based its selection of start-up dates on the feasibility analysis done by the Committee.

Paragraph (s) Appendices

Five appendices have been included at the end ot this proposed standard. Appendices A, B, C, and D have been included primarily for purposes of information. None of the statements contained in Appendices A, B, C, and D should be construed as establishing a mandatory requirement not otherwise imposed by the standard, or as detracting from an obligation which the standard does impose. However, the protocols for respiratory fit testing in Appendix E are mandatory.

Appendix A contains information on the description and exposure levels of MDA. Also provided in Appendix A is information on the health hazards associated with exposure, descriptions of protective clothing and equipment, emergency and first aid procedures, medical requirements, provisions for the observation of monitoring, access to exposure and medical records, and precautions for the safe use, handling, and storage of MDA.

Appendix B contains "substance technical guidelines" for MDA, including physical and chemical data, spill and leak procedures, including waste disposal methods, and other miscellaneous precautions for the safe handling of MDA.

Appendix C contains the medical surveillance guidelines for MDA. Included in these guidelines are the description of the routes of entry, the toxicology and symptoms and signs associated with MDA exposure, information on the treatment of acute toxic effects, and surveillance and preventive considerations. including hematology guidelines which may be useful to physicians in conducting the medical surveillance program required by paragraph (i) of this recommended standard.

Appendix D gives details of the recommended sampling and analytical methods for use in monitoring employee exposures to MDA.

Appendix E gives detailed fit testing procedures that are to be followed for qualitative and quantitative fit testing of negative pressure respirators. Various protocols for qualitative and quantitative fit tests are outlined in detail.

All the Appendices are designed to aid the employer in complying with the requirements of the standard. Paragraph (j) of this proposed standard on the "communication of MDA hazards to employees" specifically requires that the contents of the standard and Appendices A and B be made available to affected employees. Information contained in Appendix C on medical surveillance is to be explained to affected employees. The information in Appendix C also provides information to evaluate the results of the information needed by the physician to evaluate the results of the medical examination.

(b) OSHA's Findings

1. General

OSHA has relied heavily on the recommendations made by the Committee in developing its own NPRM for construction. There were however. several instances in which OSHA made changes to the Committee's recommended construction standard. OSHA has made these corrections in the regulatory text of its NPRM. OSHA believes that these changes do not alter or amend the Committee's actual recommendations, instead, these changes clarify what OSHA believes the Committee intended.

2. Specific

Paragraphs (a) Scope and Application. OSHA reviewed the Committee's recommendations for this paragraph and has used these recommendations as the basis for its NPRM. OSHA agrees that construction should have its own standard and believes that the Committee has sufficiently defined the scope and application for this standard. OSHA recognizes that the Committee had difficulty identifying affected employers in this sector. OSHA believes that the examples of MDA uses are adequate and that the scope and application are adequately defined.

Paragraph (b) Definitions. The Committee provided OSHA with a number of definitions to be used in the recommended standard. OSHA finds that the Committee's recommendations are appropriate and, for the most part has adopted the Committee's recommendations in its definition paragraph in the NPRM. OSHA has expanded upon or clarified some of the Committee's recommended definitions. For example, for action level and STEL OSHA has inserted numeric values into the definitions. OSHA has also amended the definition of regulated areas to reflect only the definition and not the intended duties. OSHA has also deleted the term "competent person" and has replaced this term with "employer".

Paragraph (c) Permissible Exposure Limits. OSHA accepts the Committee's recommendations for permissible exposure limits for the construction industry and has made the Committee's recommendations part of its NPRM. As with the general industry standard, OSHA was concerned with the relationship between ambient and dermal exposure and the effectiveness of establishing these PELs. OSHA finds, as it did in the general industry standard that the PELs and the other standard provisions are necessary to adequately control worker exposure to MDA (See discussion in PEL section in general industry standard). In addition, OSHA believes that for construction as is the case for general industry that the STEL selected is appropriate and will aid in preventing acute toxicity and carcinogenicity in workers exposed to MDA in the construction industry (See discussion in PEL section in general industry standard).

Paragraph (d) Employee Rotation. While included in OSHA's NPRM, it does not appear as a separate paragraph. Instead OSHA has moved it to the methods of compliance section. OSHA did use the Committee's recommended regulatory text in its own NPRM for this provision (See (h)(5)).

Paragraph (e) Is Now Paragraph (d) Communication Among Employers. OSHA relied on the Committee's recommended regulatory text in developing its own NPRM. OSHA believes that including a communication among employers provision will aid in preventing inadvertant MDA exposure to workers on multi-employer sites.

Paragraph (f) Is Now Paragraph (e) Emergency Situations. OSHA also relied on the Committee's recommendations in developing its emergency provision in its NPRM. OSHA agrees that providing a written plan for emergency situations and an employee alerting mechanism will warn employees of an impending hazard and the correct procedures for abating such. Given the potential for acute toxicity and possibly death posed by exposure to infrequent, high doses of MDA emergency provision are clearly needed.

Paragraph (g) Is Now Paragraph (f) Exposure Monitoring. OSHA made use of the Committee's recommendations in drafting its own monitoring provisions. Like the general industry standard, OSHA attempted to clarify the Committee's intent with respect to monitoring and has made it clear that monitoring for the STEL must also be done. OSHA has also included the visual monitoring provisions in its NPRM. OSHA believes that these

provisions will aid the employer in early detection of ineffective personal protective clothing.

Paragraph (h) Is Now Paragraph (g) Regulated Areas. OSHA recognizes the significance which regulated areas has in providing worker protection on multi-work sites. OSHA agrees that restricting employee access and requiring the use of personal protection equipment is necessary.

While OSHA has relied on the Committee's recommended regulatory text, OSHA has made a number of changes. First, OSHA has removed some of the repetition by including the establishment provisions under one sub heading instead of two. Secondly, OSHA has attempted to clarify the establishment requirements for employees dermally exposed. OSHA recognizes as did the Committee that dermal exposure can occur from ambient "fall out". In this instance, where liquid mixtures have been allowed to become airborne and now pose both an inhalation and a dermal exposure hazard, regulated areas must be established in areas in excess of the PEL. On the other hand, if exposure is to non-ambient liquid mixtures then these areas must be demarcated as regulated areas. OSHA agrees with the feasibility findings of the Committee in this respect and believes that caution tape may be used to mark off these areas. Because dermal exposure makes a significant contribution to employee exposure, neither the Committee nor OSHA looks favorably on inadventent or excessive employee exposure to liquid mixtures.

Paragraph (i) Is Now Paragraph (h) Methods of Compliance. OSHA has relied on the Committee's recommendations in developing this paragraph in its NPRM. OSHA, however, found it necessary to amend the regulatory text proposed by the Committee in order to make it conform to the rationale proposed by the Committee. OSHA recognizes the difficulty associated wirh drafting regulatory text and believes that the text proposed by OSHA reflects the Committee's position.

Firstly, the Committee recommended the traditional hierarchy of control for MDA exposure in the construction sector. However, for workers engaged in spray application, the Committee recommended that a respirator be used in conjunction with feasible engineering controls. The Committee also acknowledged that for spray painters engaged in application in non-barriered areas, that feasible engineering controls and work practices do not exist and that worker protection is achieved exclusively through the use of a respirator. OSHA accepts the Committee's findings in this limited instance and has included special provisions in the regulatory text of its NPRM to acknowledge these findings. Furthermore, OSHA also believes as did the Committee that this control hierachy would result in exposures much less than the 10 ppb PEL proposed.

In addition, the regulatory text of the Committee's recommendations propose to exclude the spray application of MDA. Yet, in the Committee' s discussions and even in the Committee s feasibility determinations, the significance and wides-spread use of this technique in construction is apparent. During the final committee meeting the Committee agreed to delete this provision from the regulatory text of the construction standard but the amendment was not made to the text. OSHA has made this modification to its NPRM and believes that this modification reflects the Committee recommendations.

Paragraph (j) Is Now Paragraph (i) Respiratory Protection. OSHA reviewed the Committee's recommendations regarding the use of respiratory protection and has relied on these recommendations to make findings in its NPRM. OSHA has modified the Committee's recommendations slightly to reflect that spray painters are required to wear respirators. This change results from the clarifications which OSHA made to paragraph (h), methods of compliance.

Paragraph (k) Is Now Paragraph (j) Protective Work Clothing and Equipment. OSHA agrees that the Committee's recommendations for the use of personal protective equipment and clothing are appropriate, however, OSHA has modified the format recommended by the Committee. OSHA has redesigned the format of this paragraph to be compatible with this same paragraph in the general industry standard. OSHA believes that this format assists in producing ease of regulatory interpretation. OSHA acknowledges that many of the clarifications and format corrections which have been made oould have been corrected by publication of a correction document to the Committee's July 16, 1987 **Federal Register** document. Traditionally, OSHA publishes a correction document following publication of a lengthy rulemaking. A correction document was not done for the Committee's recommendations, moreso because, OSHA believed that these corrections could be made through its NPRM. OSHA believes this to be a cost-effective alternative.

Paragraph (l) Is Now Paragraph (k) Hygiene Facilities and Practices. OSHA accepts the Committee's recommendations and generally has used the regulatory text proposed by the Committee in its NPRM. OSHA, as in the general industry standard, has deleted the phrase. "Shower facilities for employees exposed only in this manner may not be necessary" found in (k)(2)(ii) of this paragraph, to include only the obligatory portions of the provision.

Paragraph (m) Is Now Paragraph (l) Communication of Hazards to Employees. OSHA generally has accepted the Committee's recommended paragraph in this instance, except that some unnecessary terminology has been removed.

Paragraph (n) Is Now Paragraph (m) Housekeeping. OSHA has used the Committee's recommendations to develop this paragraph in its NPRM.

Paragraph (o) Is Now Paragraph (n) Medical Surveillance. OSHA has relied on the Committee's recommendations in developing its NPRM for this paragraph. As discussed in the general industry medical surveillance paragraph, OSHA considered the appropriateness of medical surveillance and the possibility of "sunsetting" this provision. OSHA believes that medical surveillance for workers exposed to MDA in the construction industry is necessary. Furthermore, the maintenance of this provision is crucial to the continued health and safety of workers exposed to MDA in construction (See medical surveillance discussion for the general industry standard).

Paragraph (n) Is Now Paragraph (o) Recordkeeping. OSHA has reviewed the Committee's recommendations and has used their recommendaticns as the basis for its NPRM.

Paragraph (o) Is Now Paragraph (p) Observation of Monitoring. OSHA has reviewed the Committee's recommendations and has used their recommendations as the basis for its NPRM.

Paragraph (p) Is Now Paragraph (q) Effective Dates. The Committee did not establish a section for effective dates. However, the Committee did not indicate in any of its feasibility findings that any specific time would be needed to comply with the implementation of any of the recommendated standards. Thus OSHA has developed its effective date section based on the feasibility analysis recommended by the Committee.

Paragraph (q) Is Now Paragraph (r) Appendices. Five appendices have been included at the end of this proposed

standard. Appendices A, B, C, and D have been included primarily for purposes of information. None of the statements contained in Appendices A, B, C, and D should be construed as establishing a mandatory requirement not otherwise imposed by the standard, or as detracting from an obligation which the standard does impose. However, the protocols for respiratory fit testing in Appendix E are mandatory.

Appendix A contains information on the description and exposure levels of MDA. Also provided in Appendix A is information on the health hazards associated with exposure, descriptions of protective clothing and equipment, emergency and first aid procedures, medical requirements, provisions for the observation of monitoring, access to exposure and medical records, and precautions for the safe use, handling, and storage of MDA.

Appendix B contains "substance technical guidelines" for MDA, including physical and chemical data, spill and leak procedures. including waste disposal methods, and other miscellaneous precautions for the safe handling of MDA.

Appendix C contains the medical surveillance guidelines for MDA. Included in these guidelines are the description of the routes of entry, the toxicology and symptoms and signs associated with MDA exposure, information on the treatment of acute toxic effects, and surveillance and preventive considerations, including hematology guidelines which may be useful to physicians in conducting the medical surveillance program required by paragraph (m) of this recommended standard.

Appendix D gives details of the recommended sampling and analytical methods for use in monitoring employee exposures to MDA.

Appendix E gives detailed fit testing procedures that are to be followed for qualitative or quantitative fit testing of negative pressure respirators. Various protocols for qualitiative and quantitative fit tests are outlined in detail.

All the Appendices are designed to aid the employer in complying with the requirements of the standard. Paragraph (k) of this proposed standard on the "communication of MDA hazards to employees" specifically requires that the contents of the standard and Appendices A and B be made available to affected employees. Information contained in Appendix C on medical surveillance is to be explained to affected employees. Appendix C also provides information needed by the physician to evaluate the results of the medical examination.

Paragraph (r) Is Now Paragraph (s) Start-up Dates. The Committee did not establish a section for start-up dates. As was done for effective dates, OSHA based its selection of start-up dates on the feasibility analysis done by the Committee.

IX. Environmental Assessment Findings of No Significant Impact

A. Summary of the Committee's Recommendations

The Committee has reviewed the environmental impact in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) NEPA regulations (40 CFR Part 1500), and OSHA's DOL NEPA Compliance procedures (29 CFR Part 11).

As a result of this review, the Committee has determined that the proposed rule will not have a significant impact on the external environment. Impacts on the workplace environment are discussed in other portions of this preamble.

B. OSHA's Findings

OSHA has reviewed the Committee's recommendations with respect to environmental impact and finds that the recommendation is appropriate and adopts this recommendation as its own.

X. Public Participation

Interested persons are invited to submit written data, views, and arguments with respect to this proposal. The comments must be postmarked by June 26, 1989, and submitted in quadruplicate to the Docket Officer, Docket No. H040, U.S. Department of Labor, Occupational Safety and Health Administration, Room N3637, 200 Constitution Avenue NW., Washington DC 20210.

The data, views, and arguments that are submitted will be available for public inspection and copying at the above address. All timely submissions received will be made a part of the record of this proceeding.

Additionally, under section 6(b)(3) of the OSH Act (29 U.S.C. 655), section 107 of the Construction Safety Act (41 U.S.C. 333), and 29 CFR 1911.11, interested persons may file objections to the proposal and request an informal hearing. The objections and hearing requests should be submitted in quadruplicate to the Docket Officer at the address above and must comply with the following conditions:

1. The objections must include the name and address of the objector;
2. The objections must be postmarked by June 12, 1989;
3. The objections must specify with particularity the provisions of the proposed rule to which each objection is taken and must state the grounds therefor;
4. Each objection must be separately stated and numbered; and
5. The objections must be accompanied by a detailed summary of the evidence proposed to be adduced at the requested hearing.

XI. State Plan Requirements

The 25 States and territories with their own OSHA-approved occupational safety and health plans must revise their existing standards within six months of the publication date of the final standard or show OSAA why there is no need for action, e.g., because an existing already "at least as effective" as the revised Federal standard. These States California, Connecticut, (State and local government workers only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, (State and local government workers only), North Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington and Wyoming.

XII. Federalism

The proposed standard has been reviewed in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987) regarding Federalism. This Order requires that agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The Order provides for preemption of State law only if there is a clear constitutional authority and the presence of a problem of national scope. The Order provides for preemption of State law only if there is a clear Congressional intent for the agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the Occupational Safety and Health Act (OSH Act), expresses Congress' clear intent to preempt State laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards. Under the OSH Act a State can avoid preemption only if it submits, and obtains Federal approval of, a plan for the development of such standards and

their enforcement. Occupational safety and health standards developed by such Plan-States must, among other things, be at least as effective in providing safe and healthful employment and places of employment as the Federal standards.

The federally proposed MDA standard is drafted so that workers in every State would be protected by general, performance-oriented standards. To the extent that there are State or regional peculiarities that could alter work practices, States with occupational safety and health plans approved under section 18 of the OSH Act would be able to develop their own State standards to deal with any special problems. Moreover, the performance nature of this proposed standard, of and by itself, allows for flexibility by States and contractors to provide as much safety as possible using varying methods consonant with conditions in each State.

In short, there is clear national problem related to occupational safety and health of workers. While the individual States, if all acted, might be able collectively to deal with the safety problems involved, most have not elected to do so in the seventeen years since the enactment of the OSH Act. Those States which have elected to particpate under section 18 of the OSH Act would not be preempted by this proposed regulation and would be able to deal with special, local conditions within the framework provided by this performance-oriented standard while ensuring that their standards are at least as effective as the Federal standard. State comments are invited on this proposal and will be fully considered prior to promulgation of a final rule.

XIII. Authority and Signature

This document was prepared under the direction of Alan C. McMillan, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, pursuant to sections 6(b), 8(c), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 657); sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); and 29 CFR Part 1911: 29 CFR Parts 1910 and 1926 are proposed to be amended as set forth below.

List of Subjects in 29 CFR Parts 1910 and 1926

Health, Occupational safety and health, Protective equipment, Respiratory protection, Carcinogen.

Signed at Washington, DC this 26th day of April, 1989.

Alan C. McMillan,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

XIV. Proposed Standard and Appendices

General Industry

Parts 1910 and 1926 of Title 29 of the Code of Federal Regulations are proposed to be amended as follows:

PART 1910—[AMENDED]

Subpart B—[Amended]

1. The authority citation for Subpart B of Part 1910 continues to read as follows:

Authority: Secs. 4, 6 and 8 of the Occupational Safety and Health Act, 29 U.S.C. 653, 655, 657; Walsh-Healey Act, 29 U.S.C. 35 *et seq*: Service Contract Act of 1965, 41 U.S.C. 351 *et seq:* Pub. L. 91–54, 40 U.S.C. 333; Pub. L. 85–742, 33 U.S.C. 941; National Foundation on Arts and Humanities Act, 20 U.S.C. 951 *et seq:* Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 2505), or 9–83 (48 FR 35736); and 29 CFR Part 1911.

2. By adding a new paragraph (k) to § 1910.19 to read as follows:

§ 1910.19 Special provisions for air contaminants.

* * * * *

(k) *4,4'-Methylenedianiline (MDA).* Section 1910.1050 shall apply to the exposure of every employee to MDA in every employment and place of employment covered by §§ 1910.13, 1910.14, 1910.15, or 1910.16, in lieu of any different standard on exposure to MDA which would otherwise be applicable by virtue of those sections.

Subpart Z—[Amended]

3. The authority citation for Subpart Z of 29 CFR Part 1910 continues to read as follows:

Authority: Secs. 6 and 8, Occupational Safety and Health Act, 29 U.S.C. 655, 657, Secretary of Labor's Orders Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable; and 29 CFR Part 1911.

4. By adding a new § 1910.1050 to read as follows:

§ 1910.1050 Methylenedianiline.

(a) *Scope and application.* (1) This section applies to all occupational exposures to MDA, Chemical Abstracts Service Registry No. 101–77–9, except as provided in paragraphs (a)(2) through (a)(5) of this section.

(2) This section does not apply to the processing, use, and handling of products containing MDA where initial monitoring indicates that the product is not capable of releasing MDA in excess of the action level under the expected conditions of processing, use, and handling which will cause the greatest possible release; and where the likelihood of dermal exposure does not exist.

(3) This section does not apply to the processing, use, and handling of products containing MDA where objective data are reasonably relied upon which demonstrate the product is not capable of releasing MDA under the expected conditions of processing, use, and handling which will cause the greatest possible release; and where the likelihood of dermal exposure does not exist.

(4) This section does not apply to the storage, transportation, distribution or sale of MDA in intact containers sealed in such a manner as to contain the MDA dusts, vapors, or liquids, except for the provisions of 29 CFR 1910.1200 and the emergency provisions under paragraph (d) of this section.

(5) This section does not apply to the construction industry as defined in 29 CFR 1910.12(b). (Exposure to MDA in the construction industry is covered by 29 CFR 1926.59).

(6) Where products containing MDA are exempted under paragraph (a)(2) through (a)(5) of this section, the employer shall maintain records of the initial monitoring results or objective data supporting that exemption and the basis for the employer's reliance on the data, as provided in the recordkeeping provision of paragraph (n) of this section.

(b) *Definitions.* For the purpose of this section, the following definitions shall apply:

"*Action level*" means a concentration of airborne MDA of 5 ppb as an eight (8)-hour time-weighted average.

"*Assistant Secretary*" means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee.

"*Authorized person*" means any person specifically authorized by the employer whose duties require the person to enter a regulated area, or any person entering such an area as a designated representative of employees, for the purpose of exercising the right to observe monitoring and measuring procedures under paragraph (m) of this section, or any other person authorized by the Act or regulations issued under the Act.

"*Container*" means any barrel, bottle, can, cylinder, drum, reaction vessel, storage tank, commercial packaging or the like, but does not include piping systems.

"*Director*" means the Director of the National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

"*Emergency*" means any occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which results in an unexpected and potentially hazardous release of MDA.

"Employee exposure" means exposure to MDA which would occur if the employee were not using personal protective equipment and clothing.

"4,4' Methylenedianiline" or "MDA" means the chemical, 4,4'-diaminodiphenylmethane, Chemical Abstract Service Registry number 101-77-9, in the form of a vapor, liquid, or solid. The definition also includes the salts of MDA. The definition includes MDA contained in liquid mixtures and the MDA vapors released by these liquids. The definition does not include unreacted MDA, physically bound, such that it is incapable of releasing MDA into the workplace.

"Regulated Areas" means areas where airborne concentrations of MDA exceed or can reasonably be expected to exceed, the permissible exposure limit, or areas where the likelihood for dermal exposure exists.

"STEL" means short term exposure limit of 100 ppb as determined by any 15 minute sample period.

(c) *Permissible exposure limits (PEL).* The employer shall assure that no employee is exposed to an airborne concentration of MDA in excess of ten parts per billion (10 ppb) as an 8-hour time-weighted average or a STEL of 100 ppb.

(d) *Emergency situations*—(1) *Written plan.* (i) A written plan for emergency situations shall be developed for each workplace where there is a possibility of an emergency. Appropriate portions of the plan shall be implemented in the event of an emergency.

(ii) The plan shall specifically provide that employees engaged in correcting emergency conditions shall be equipped with the appropriate personal protective equipment and clothing as required in paragraphs (h) and (i) of this section until the emergency is abated.

(iii) The plan shall specifically include provisions for alerting and evacuating affected employees as well as the elements prescribed in 29 CFR 1910.38, "Employee emergency plans and fire prevention plans."

(2) *Alerting employees.* Where there is the possibility of employee exposure to MDA due to an emergency, means shall be developed to alert promptly those employees who have the potential to be directly exposed. Affected employees not engaged in correcting emergency conditions shall be evacuated immediately in the event that an emergency occurs. Means shall also be developed for alerting other employees who may be exposed as a result of the emergency.

(e) *Exposure monitoring*—(1) *General.* (i) Determinations of employee exposure shall be made from breathing zone air samples that are representative of each employee's exposure to airborne MDA over an eight (8) hour period. Monitoring for the STEL shall also consist of breathing zone samples except that each employees' exposure shall be monitored over a 15 minute sampling period.

(ii) Representative employee exposure shall be determined on the basis of one or more samples representing full shift exposure for each shift for each job classification in each work area where exposure to MDA may occur.

(iii) Where the employer can document that exposure levels are equivalent for similar operations in different work shifts, the employer shall only be required to determine representative employee exposure for that operation during one shift.

(2) *Initial monitoring.* Each employer who has a workplace or work operation covered by this standard shall perform initial monitoring to determine accurately the airborne concentrations of MDA to which employees may be exposed.

(3) *Periodic monitoring and monitoring frequency.* (i) If the monitoring required by paragraph (e)(2) of this section reveals employee exposure at or above the action level, but at or below the PELs, the employer shall repeat such representative monitoring for each such employee at least every six months.

(ii) If the monitoring required by paragraph (e)(2) of this section reveals employee exposure above the PELs, the employer shall repeat such monitoring for each such employee at least every three (3) months.

(iii) The employer may alter the monitoring schedule from every three months to every six months for any employee for whom two consecutive measurements taken at least 7 days apart indicate that the employee exposure has decreased to below the TWA but above the action level.

(4) *Termination of monitoring.* (i) If the initial monitoring required by paragraph (e)(2) of this section reveals employee exposure to be below the action level, the employer may discontinue the monitoring for that employee, except as otherwise required by paragraph (e)(5) of this section.

(ii) If the periodic monitoring required by paragraph (e)(3) of this section reveals that employee exposures, as indicated by at least two consecutive measurements taken at least 7 days apart, are below the action level the employer may discontinue the monitoring for that employee, except as otherwise required by paragraph (e)(5).

(5) *Additional monitoring.* The employer shall institute the exposure monitoring required under paragraphs (e)(2) and (e)(3) of this section when there has been a change in production process, chemicals present, control equipment, personnel, or work practices which may result in new or additional exposures to MDA, or when the employer has any reason to suspect a change which may result in new or additional exposures.

(6) *Accuracy of monitoring.* Monitoring shall be accurate, to a confidence level of 95 percent, to within plus or minus 25 percent for airborne concentrations of MDA.

(7) *Employee notification of monitoring results.* (i) The employer shall, within 15 working days after the receipt of the results of any monitoring performed under this standard, notify each employee of these results, in writing, either individually or by posting of results in an appropriate location that is accessible to affected employees.

(ii) The written notification required by paragraph (e)(7)(i) of this section shall contain the corrective action being taken by the employer to reduce the employee exposure to or below the PELs, wherever the PELs are exceeded.

(8) *Visual monitoring.* The employer shall make routine inspections of employee dermal areas potentially exposed to MDA. If the employer determines that the employee has been exposed to MDA the employer shall:

(i) Determine the source of exposure;

(ii) Implement protective measures to correct the hazard; and

(iii) Maintain records of the corrective actions in accordance with paragraph (n) of this section.

(f) *Regulated areas*—(1) *Establishment*—(i) *Airborne exposures.* The employer shall establish regulated areas where the potential exists for exposure to airborne concentrations of MDA in excess of the permissible exposure limits.

(ii) *Dermal exposures.* Where employees are engaged in the handling, application, or use of non-airborne MDA liquids or mixtures the employer shall establish those work areas as regulated areas.

(2) *Demarcation.* Regulated areas shall be demarcated from the rest of the

workplace in a manner that minimizes the number of persons potentially exposed.

(3) *Access.* Access to regulated areas shall be limited to authorized persons.

(4) *Personal protective equipment and clothing.* Each person entering a regulated area shall be supplied with, and required to use, the appropriate personal protective clothing and equipment in accordance with paragraphs (h) and (i) of this section.

(5) *Prohibited activities.* The employer shall ensure that employees do not eat, drink, smoke, chew tobacco or gum, or apply cosmetics in regulated areas.

(g) *Methods of compliance*—(1) *Engineering controls and work practices.* (i) The employer shall institute engineering controls and work practices to reduce and maintain employee exposure to MDA at or below the PELs except to the extent that the employer can establish that these controls are not feasible or where the provisions of paragraphs (g)(1)(ii) or (h)(1) (i) through (iv) of this section apply.

(ii) Wherever the feasible engineering controls and work practices which can be instituted are not sufficient to reduce employee exposure to or below the PELs, the employer shall use them to reduce employee exposure to the lowest levels achievable by these controls and shall supplement them by the use of respiratory protective devices which comply with the requirements of paragraph (h) of this section.

(2) *Compliance program.* (i) The employer shall establish and implement a written program to reduce employee exposure to or below the PELs by means of engineering and work practice controls, as required by paragraph (g)(1) of this section, and by use of respiratory protection where permitted under this section. The program shall include a schedule for periodic maintenance (e.g., leak detection) and shall include the written plan for emergency situations as specified in paragraph (d) of this section.

(ii) Upon request this written program shall be furnished for examination and copying to the Assistant Secretary, the Director, affected employees, and designated employee representatives. The employer shall review such plans at least once every 12 months to make certain they reflect the current status of the program.

(3) *Employee rotation.* Employee rotation shall not be permitted as a means of reducing exposure.

(h) *Respiratory protection*—(1) *General.* The employer shall provide respirators, and ensure that they are used, where required by this section. Respirators shall be used in the following circumstances:

(i) During the time period necessary to install or implement feasible engineering and work practice controls;

(ii) In work operations for which the employer establishes that engineering and work practice controls are not feasible;

(iii) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the PEL; and

(iv) In emergencies.

(2) *Respirator selection.* (i) Where respirators are required or allowed under this section, the employer shall select and provide, at no cost to the employee, the appropriate respirator as specified in Table 1, and shall assure that the employee uses the respirator provided.

(ii) The employer shall select respirators from among those approved by the Mine Safety and Health Administration and the National Institute for Occupational Safety and Health under the provisions of 30 CFR Part 11.

(iii) Any employee who cannot wear a negative pressure respirator shall be given the option of wearing a positive pressure respirator or any supplied-air respirator operated in the continuous flow or pressure demand mode.

(3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with 29 CFR 1910.134 (b), (d), (e), and (f).

(4) *Respirator use.* (i) Where air-purifying respirators (cartridge or canister) are used, the employer shall replace the air purifying element as needed to maintain the effectiveness of the respirator. The employer shall ensure that each cartridge is dated at the beginning of use.

(ii) Employees who wear respirators shall be allowed to leave the regulated area to readjust the facepiece or to wash their faces and to wipe clean the facepieces on their respirators in order to minimize potential skin irritation associated with respirator use.

TABLE 1.—RESPIRATORY PROTECTION FOR MDA

Airborne concentration of MDA or condition of use	Respirator type
(a) Less than or equal to 10×PEL.	(1) Half-mask respirator with HEPA [1] Cartridge.[2]
(b) Less than or equal to 50×PEL.	(1) Full facepiece respirator with HEPA [1] Cartridge or Canister.[2]
(c) Less than or equal to 1,000×PEL.	(1) Full facepiece powered air-purifying respirator with HEPA [1] cartridges.[2]
(d) Greater than 1,000×PEL or unknown concentrations.	(1) Self-contained breathing apparatus with full facepiece in positive pressure mode. (2) Full facepiece positive pressure demand supplied-air respirator with auxiliary self-contained air supply.
(e) Escape	(1) Any full facepiece air-purifying respirator with HEPA [1] cartridges.[2] (2) Any positive pressure or continuous flow self-contained breathing apparatus with full facepiece or hood.
(f) Firefighting	(1) Full facepiece self-contained breathing apparatus in positive pressure demand mode.

Note: Respirators assigned for higher environmental concentrations may be used at lower concentrations.

[1] High Efficiency Particulate in Air filter (HEPA) means a filter that is at least 99.97 percent efficient against mono-dispersed particles of 0.3 micrometers or larger.

[2] Combination HEPA/Organic Vapor Cartridges shall be used whenever MDA in liquid form or a process requiring heat is used.

(5) *Respirator fit testing.* (i) The employer shall perform and record the results of either quantitative or qualitative fit tests at the time of initial fitting and at least annually thereafter for each employee wearing a negative pressure respirator. The test shall be used to select a respirator facepiece which provides the required protection as prescribed in Table 1.

(ii) The employer shall follow the test protocols outlined in Appendix E of this standard for whichever type of fit testing the employer chooses.

(i) *Protective work clothing and equipment.*—(1) *Provision and use.* Where the likelihood for dermal contact or eye irritation resulting from MDA exposure exists, the employer shall provide, at no cost to the employee, and ensure that the employee uses, appropriate protective work clothing and equipment which prevent contact with MDA such as, but not limited to:

(i) Aprons, coveralls or other full-body work clothing;

(ii) Gloves, head coverings, and foot coverings; and

(iii) Face shields, chemical goggles, or

(iv) Other appropriate protective equipment which comply with § 1910.133 of this part.

(2) *Removal and storage.* (i) The employer shall ensure that employees remove MDA-contaminated protective work clothing and equipment at the end of the work shift only in change rooms provided in accordance with the provisions established for change rooms,

(ii) The employer shall ensure that employees remove MDA-contaminated protective work clothing or equipment before eating, drinking, smoking, chewing gum or tobacco, taking breaks or applying cosmetics.

(iii) The employer shall ensure that no employee takes MDA-contaminated work clothing or equipment out of the change room, except those employees authorized to do so for the purpose of laundering, maintenance, or disposal.

(iv) MDA-contaminated work clothing or equipment shall be placed and stored in closed containers which prevent dispersion of the MDA outside the container.

(v) Containers of MDA-contaminated protective work clothing or equipment which are to be taken out of change rooms or the workplace for cleaning, maintenance, or disposal, shall bear labels in accordance with § 1910.1200 of this part.

(3) *Cleaning and replacement.* (i) The employer shall provide the employee with clean protective clothing and equipment. The employer shall ensure that protective work clothing or equipment required by this paragraph is cleaned, laundered, repaired, or replaced at intervals appropriate to maintain its effectiveness.

(ii) The employer shall prohibit the removal of MDA from protective work clothing or equipment by blowing, shaking, or any methods which allow MDA to re-enter the workplace.

(iii) The employer shall ensure that laundering of MDA-contaminated clothing shall be done so as to prevent the release of MDA in the workplace.

(iv) Any employer who gives MDA-contaminated clothing to another person for laundering shall inform such person of the requirement to prevent the release of MDA.

(v) The employer shall inform any person who launders or cleans protective clothing or equipment contaminated with MDA of the potentially harmful effects of exposure.

(vi) MDA-contaminated clothing shall be transported in properly labeled, sealed, impermeable bags or containers.

(j) *Hygiene facilities and practices.*—(1) *Change rooms.*

(i) The employer shall provide clean change rooms for employees, who must wear protective clothing, or who must use protective equipment because of their exposure to MDA.

(ii) Change rooms must be equipped with separate storage for protective clothing and equipment and for street clothes which prevents MDA contamination of street clothes.

(2) *Showers.* (i) The employer shall ensure that employees, who work in areas where there is the potential for exposure resulting from airborne MDA (e.g., particulates or vapors) above the action level, shower at the end of the work shift.

(A) Shower facilities required by this paragraph shall comply with § 1910.141(d)(3) of this part.

(B) The employer shall ensure that employees who are required to shower pursuant to the provisions contained herein do not leave the workplace wearing any protective clothing or equipment worn during the work shift.

(ii) Where the employee is only exposed to non-airborne liquid mixtures containing MDA, the employer shall ensure that materials spilled on the skin are removed as soon as possible by methods which do not facilitate the dermal absorption of MDA.

(3) *Lunch facilities.*—(i) *Availability and construction.* (A) Whenever food or beverages are consumed at the worksite and employees are exposed to MDA, the employer shall provide readily accessible lunch areas.

(B) Lunch areas located within the workplace and in areas where there is the potential for airborne exposure to MDA at or above the PEL shall have a positive pressure, temperature controlled, filtered air supply.

(C) Lunch areas located within the workplace and in areas where only the potential for dermal exposure to MDA exists shall be free of MDA.

(ii) The employer shall ensure that employees exposed to MDA wash their hands and faces with soap and water prior to eating, drinking, smoking, or applying cosmetics.

(iii) The employer shall ensure that employees exposed to MDA do not enter lunch facilities with MDA-contaminated protective work clothing or equipment.

(k) *Communication of hazards to employees*—(1) *Signs and labels.* (i) The employer shall post and maintain legible signs demarcating regulated areas and entrances or accessways to regulated areas that bear the following legend:

DANGER
MDA
MAY CAUSE CANCER
LIVER TOXIN
AUTHORIZED PERSONNEL ONLY
RESPIRATORS AND PROTECTIVE CLOTHING
MAY BE REQUIRED TO BE WORN IN THIS AREA

(ii) The employer shall ensure that labels or other appropriate forms of warning are provided for containers of MDA within the workplace. The labels shall comply with the requirements of 29 CFR 1910.1200(f) and shall include the following legend:

(A) MDA

DANGER
CONTAINS MDA
MAY CAUSE CANCER
LIVER TOXIN

(B) Mixtures containing MDA

DANGER
CONTAINS MDA
CONTAINS MATERIALS WHICH MAY CAUSE CANCER
LIVER TOXIN

(2) *Material safety data sheets* (MSDS). (i) Employers shall obtain or develop, and shall provide access to their employees, to a material safety data sheet (MSDS) for MDA.

(ii) Employers who are manufacturers or importers shall:

(A) Comply with paragraph (k)(1)(ii) (A) or (B) of this section as appropriate, and

(B) Comply with the requirement in OSHA's Hazard Communication Standard, 29 CFR 1910.1200, that they deliver to downstream employers an MSDS for MDA.

(3) *Information and training.* (i) The employer shall provide employees with information and training on MDA, in accordance with 29 CFR 1910.1200(h), at the time of initial assignment and at least annually thereafter.

(ii) In addition to the information required under 29 CFR 1910.1200, the employer shall:

(A) Provide an explanation of the contents of this section, including Appendices A and B, and indicate to employees where a copy of the standard is available;

(B) Describe the medical surveillance program required under paragraph (m) of this section, and explain the information contained in Appendix C; and

(C) Describe the medical removal provision required under paragraph (m) of this section.

(l) *Housekeeping.* (1) All surfaces shall be maintained as free as practicable of visible accumulations of MDA.

(2) The employer shall institute a program for detecting MDA leaks, spills, and discharges, including regular visual

inspections of operations involving liquid or solid MDA.

(3) All leaks shall be repaired and liquid or dust spills cleaned up promptly.

(4) Surfaces contaminated with MDA may not be cleaned by the use of compressed air.

(5) Shoveling, dry sweeping, and other methods of dry clean-up of MDA may be used where HEPA-filtered vacuuming and/or wet cleaning are not feasible or practical.

(6) Waste, scrap, debris, bags, containers, equipment, and clothing contaminated with MDA shall be collected and disposed of in a manner to prevent the re-entry of MDA into the workplace.

(m) *Medical surveillance*—(1) *General.* (i) The employer shall make available a medical surveillance program for employees exposed to MDA accordingly:

(A) Employees exposed at or above the action level for 30 or more days per year;

(B) Employees who have the likelihood of dermal exposure for more than 15 days per year;

(C) Employees who have been exposed in an emergency situation; and

(D) Employees whom the employer, based on results from compliance with paragraph (e)(8) of this section, has reason to believe are being dermally exposed in accordance with paragraph (e)(8) of this section.

(ii) The employer shall ensure that all medical examinations and procedures are performed by, or under the supervision of, a licensed physician, and provided without cost to the employee. The examination shall be given at a reasonable time and place.

(2) *Initial examinations.* (i) Within 60 days of the effective date of this standard, or before the time of initial assignment, the employer shall provide each employee covered by paragraph (m)(1)(i) of this section with a medical examination including the following elements:

(A) A detailed history which includes: (*1*) Past work exposure to MDA or any other toxic substances; (*2*) a history of drugs, alcohol, tobacco, and medication routinely taken (duration and quantity); and (*3*) a history of dermatitis. chemical skin sensitization, or previous hepatic disease.

(B) A physical examination which includes all routine physical examination parameters, skin examination, and signs of liver disease.

(C) Laboratory tests including liver function tests and urinalysis.

(D) Additional tests as necessary in the opinion of the physician.

(ii) No initial medical examination is required if adequate records show that the employee has been examined in accordance with the requirements of this section within the previous six months prior to the effective date of this standard or prior to the date of initial assignment.

(3) *Periodic examinations.* (i) The employer shall provide each employee covered by this section with a medical examination at least annually following the initial examination. These periodic examinations shall include at least the following elements:

(A) A brief history regarding any new exposure to potential liver toxins, changes in drug, tobacco, and alcohol intake, and the appearance of physical signs relating to the liver, and the skin;

(B) The appropriate tests and examinations including liver function tests and skin examinations;

(C) Appropriate additional tests or examinations as deemed necessary by the physician.

(ii) If in the physician's opinion the results of liver function tests indicate an abnormality, the employee shall be removed from further MDA exposure in accordance with paragraph (m)(9) of this section. Repeat liver function tests shall be conducted on advice of the physician.

(4) *Emergency examinations.* If the employer determines that the employee has been exposed to a potentially hazardous amount of MDA in an emergency situation as addressed in paragraph (d) of this section, the employer shall provide medical examinations in accordance with paragraph (m)(3) (i) and (ii) of this section. If the results of liver function testing indicate an abnormality, the employee shall be removed in accordance with paragraph (m)(9) of this section. Repeat liver function tests shall be conducted on the advice of the physician. If the results of the tests are normal, tests must be repeated two to three weeks from the initial testing. If the results of the second set of tests are normal and on the advice of the physician, no additional testing is required.

(5) *Additional examinations.* Where the employee develops signs and symptoms associated with exposure to MDA, the employer shall provide the employee with an additional medical examination including a liver function test. If the results of liver function tests indicate an abnormality, the employee shall be removed in accordance with paragraph (m)(9) of this section. Repeat liver function tests shall be conducted on the advice of the physician. If the results of the tests are normal, tests must be repeated two to three weeks from the initial testing. If the results of the second set of tests are normal and, on the advice of the physician, no additional testing is required.

(6) *Multiple physician review mechanism.* (i) If the employer selects the initial physician who conducts any medical examination or consultation provided to an employee under this section, and the employee has signs or symptoms which could include an abnormal liver function test, and the employee disagrees with the opinion of the examining physician, and this opinion could affect the employee's job status, he may designate a mutually acceptable internist as a second physician, accordingly:

(A) To review any findings, determinations, or recommendations of the initial physician; and

(B) To conduct such examinations, consultations, and laboratory tests as the second physician deems necessary to facilitate this review.

(ii) The employer shall promptly notify an employee of the right to seek a second medical opinion after each occasion that an initial physician conducts a medical examination or consultation pursuant to this section. The employer may condition its participation in, and payment for, the multiple physician review mechanism upon the employee doing the following within fifteen (15) days after receipt of the foregoing notification, or receipt of the initial physician's written opinion, whichever is later:

(A) The employee informing the employer that he or she intends to seek a second medical opinion, and

(B) The employee initiating steps to make an appointment with a second physician.

(iii) If the findings, determinations, or recommendations of the second physician differ from those of the initial physician, then the employer and the employee shall assure that efforts are made for the two physicians to resolve any disagreement.

(iv) If the two physicians have been unable to resolve quickly their disagreement, then the employer and the employee through their respective physicians shall designate a third physician:

(A) To review any findings, determinations, or recommendations of the prior physicians; and

(B) To conduct such examinations, consultations, laboratory tests, and discussions with the prior physicians as the third physician deems necessary to resolve the disagreement of the prior physicians.

(v) The employer shall act consistent with the findings, determinations, and recommendations of the third physician, unless the employer and the employee reach an agreement which is otherwise consistent with the recommendations of at least one of the three physicians.

(7) *Information provided to the examining and consulting physicians.* (i) The employer shall provide the following information to the examining physician:

(A) A copy of this regulation and its appendices;

(B) A description of the affected employee's duties as they relate to the employee's potential exposure to MDA;

(C) The employee's current actual or representative MDA exposure level;

(D) A description of any personal protective equipment used or to be used: and

(E) Information from previous employment-related medical examinations of the affected employee.

(ii) The employer shall provide the foregoing information to a second physician under this section upon request either by the second physician, or by the employee.

(8) *Physician's written opinion.* (i) For each examination under this section, the employer shall obtain, and provide the employee with a copy of, the examining physician's written opinion within 15 days of its receipt. The written opinion shall include the following:

(A) The occupationally-pertinent results of the medical examination and tests;

(B) The physician's opinion concerning whether the employee has any detected medical conditions which would place the employee at increased risk of material impairment of health from exposure to MDA;

(C) The physician's recommended limitations upon the employee's exposure to MDA or upon the employee's use of protective clothing or equipment and respirators.

(D) A statement that the employee has been informed by the physician of the results of the medical examination and any medical conditions resulting from MDA exposure which require further explanation or treatment.

(ii) The written opinion obtained by the employer shall not reveal specific findings or diagnoses unrelated to occupational exposures.

(9) *Medical removal*—(i) *Temporary medical removal of an employee*—(A) *Temporary removal resulting from occupational exposure.* The employee shall be removed from exposure to MDA following an initial examination (paragraph (m)(2)), periodic examinations (paragraph (m)(3)), an additional examination (paragraph (m)(4)), or an emergency situation (paragraph (d)) accordingly:

(1) When the employee exhibits signs and/or symptoms indicative of acute exposure to MDA, the employer shall remove the employee from exposure to MDA and provide the employee with medical surveillance in accordance with paragraph (m)(5) of this section. Liver function tests and physical examinations shall be provided in accordance with the provisions set forth in the medical surveillance paragraph (m) (2) through (5) of this section.

(2) When the examining physician determines that an employee's abnormal liver function tests are not associated with MDA exposure but that the abnormalities may be exacerbated as a result of occupational exposure to MDA.

(B) *Temporary removal due to a final medical determination.* (*1*) The employer shall remove an employee from work having an exposure to MDA at or above the action level, or where the potential for dermal exposure exists, on each occasion that a final medical determination results in a medical finding, determination, or opinion that the employee has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to MDA.

(*2*) For the purposes of this section, the phrase "final medical determination" shall mean the outcome of the physician review mechanism or alternate medical determination mechanism used pursuant to the medical surveillance provisions of this section.

(*3*) Where a final medical determination results in any recommended special protective measures for an employee, or limitations on an employee's exposure to MDA, the employer shall implement and act consistent with the recommendation.

(ii) *Return of the employee to former job status.* (A) The employer shall return an employee to his or her former job status:

(*1*) When the employee no longer shows signs or symptoms of exposure to MDA, or upon the advice of the physician.

(*2*) When a subsequent final medical determination results in a medical finding, determination, or opinion that the employee no longer has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to MDA.

(B) For the purposes of this section, the requirement that an employer return an employee to his or her former job status is not intended to expand upon or restrict any rights an employee has or would have had, absent temporary medical removal, to a specific job classification or position under the terms of a collective bargaining agreement.

(iii) *Removal of other employee special protective measures or limitations.* The employer shall remove any limitations placed on an employee, or end any special protective measures provided to an employee, pursuant to a final medical determination when a subsequent final medical determination indicates that the limitations or special protective measures are no longer necessary.

(iv) *Employer options pending a final medical determination.* Where the physician review mechanism, or alternate medical determination mechanism used pursuant to the medical surveillance provisions of this section, has not yet resulted in a final medical determination with respect to an employee, the employer shall act as follows:

(A) *Removal.* The employer may remove the employee from exposure to MDA, provide special protective measures to the employee, or place limitations upon the employee, consistent with the medical findings, determinations, or recommendations of any of the physicians who have reviewed the employee's health status.

(B) *Return.* The employer may return the employee to his or her former job status, and end any special protective measures provided to the employee, consistent with the medical findings, determinations, or recommendations of any of the physicians who have reviewed the employees health status, with two exceptions.

(*1*) If the initial removal, special protection, or limitation of the employee resulted from a final medical determination which differed from the findings, determinations, or recommendations of the initial physician; or

(*2*) If the employee has been on removal status for the preceding six months as a result of exposure to MDA, then the employer shall await a final medical determination.

(v) *Medical removal protection benefits*—(A) *Provisions of medical removal protection benefits.* The employer shall provide to an employee up to six (6) months of medical removal protection benefits on each occasion that an employee is removed from exposure to MDA or otherwise limited pursuant to this section.

(B) *Definition of medical removal protection benefits.* For the purposes of this section, the requirement that an

employer provide medical removal protection benefits means that the employer shall maintain the earnings, seniority, and other employment rights and benefits of an employee as though the employee had not been removed from normal exposure to MDA or otherwise limited.

(C) *Follow-up medical surveillance during the period of employee removal or limitations.* During the period of time that an employee is removed from normal exposure to MDA or otherwise limited, the employer may condition the provision of medical removal protection benefits upon the employee's participation in follow-up medical surveillance made available pursuant to this section.

(D) *Workers' compensation claims.* If a removed employee files a claim for workers' compensation payments for a MDA-related disability, then the employer shall continue to provide medical removal protection benefits pending disposition of the claim. To the extent that an award is made to the employee for earnings lost during the period of removal, the employer's medical removal protection obligation shall be reduced by such amount. The employer shall receive no credit for workers' compensation payments received by the employee for treatment-related expenses.

(E) *Other credits.* The employer's obligation to provide medical removal protection benefits to a removed employee shall be reduced to the extent that the employee receives compensation for earnings lost during the period of removal either from a publicly or employer-funded compensation program, or receives income from non-MDA-related employment with any employer made possible by virtue of the employee's removal.

(F) *Employees who do not recover within the 6 months of removal.* The employer shall take the following measures with respect to any employee removed from exposure to MDA:

(*1*) The employer shall make available to the employee a medical examination pursuant to this section to obtain a final medical determination with respect to the employee;

(*2*) The employer shall assure that the final medical determination obtained indicates whether or not the employee may be returned to his or her former job status, and, if not, what steps should be taken to protect the employee's health;

(*3*) Where the final medical determination has not yet been obtained, or, once obtained indicates that the employee may not be returned to his or her former job status, the employer shall continue to provide medical removal protection benefits to the employee until either the employee is returned to former job status, or a final medical determination is made that the employee is incapable of ever safely returning to his or her former job status.

(4) Where the employer acts pursuant to a final medical determination which permits the return of the employee to his or her former job status, despite what would otherwise be an abnormal liver function test, later questions concerning removing the employee again shall be decided by a final medical determination. The employer need not automatically remove such an employee pursuant to the MDA removal criteria provided by this section.

(vi) *Voluntary removal or restriction of an employee.* Where an employer. although not required by this section to do so, removes an employee from exposure to MDA or otherwise places limitations on an employee due to the effects of MDA exposure on the employee's medical condition, the employer shall provide medical removal protection benefits to the employee equal to that required by paragraph (m)(9)(v) of this section.

(n) *Recordkeeping*—(1) *Monitoring data for exempted employers.* (i) Where as a result of the initial monitoring the processing, use, or handling of products made from or containing MDA are exempted from other requirements of this section under paragraph (a) (2) of this section, the employer shall establish and maintain an accurate record of monitoring relied on in support of the exemption.

(ii) This record shall include at least the following information:

(A) The product qualifying for exemption;

(B) The source of the monitoring data (e.g., was monitoring performed by the employer or a private contractor);

(C) The testing protocol, results of testing, and/or analysis of the material for the release of MDA;

(D) A description of the operation exempted and how the data support the exemption (e.g., is the monitoring data representative of the conditions at the affected facility); and

(E) Other data relevant to the operations, materials, processing, or employee exposures covered by the exemption.

(iii) The employer shall maintain this record for the duration of the employer's reliance upon such objective data.

(2) *Objective data for exempted employers.* (i) Where the processing, use, or handling of products made from or containing MDA are exempted from other requirements of this section under paragraph (a) of this section, or where objective data have been relied on in lieu of initial monitoring under paragraph (a) of this section, the employer shall establish and maintain an accurate record of objective data relied upon in support of the exemption.

(ii) This record shall include at least the following information:

(A) The product qualifying for exemption;

(B) The source of the objective data;

(C) The testing protocol, results of testing, and/or analysis of the material for the release of MDA;

(D) A description of the operation exempted and how the data support the exemption; and

(E) Other data relevant to the operations, materials, processing, or employee exposures covered by the exemption.

(iii) The employer shall maintain this record for the duration of the employer's reliance upon such objective data.

(3) *Exposure measurements.* (i) The employer shall establish and maintain an accurate record of all measurements required by paragraph (e) of this section, in accordance with 29 CFR 1910.20.

(ii) This record shall include:

(A) The dates, number, duration, and results of each of the samples taken. including a description of the procedure used to derermine representative employee exposures;

(B) Identification of the sampling and analytical methods used;

(C) A description of the type of respiratory protective devices worn, if any; and

(D) The name, social security number, job classification and exposure levels of the employee monitored and all other employees whose exposure the measurement is intended to represent.

(iii) The employer shall maintain this record for at least 30 years, in accordance with 29 CFR 1910.20.

(4) Medical surveillance. (i) The employer shall establish and maintain an accurate record for each employee subject to medical surveillance required by paragraph (m) of this section, in accordance with 29 CFR 1910.20.

(ii) This record shall include: (A) The name, social security number and description of the duties of the employee;

(B) The employer's copy of the physician's written opinion on the initial, periodic, and any special examinations, including results of medical examination and all tests, opinions, and recommendations;

(C) Results of any airborne exposure monitoring done for that employee and

the representative exposure levels supplied to the physician; and

(D) Any employee medical complaints related to exposure to MDA;

(iii) The employer shall keep, or assure that the examining physician keeps, the following medical records:

(A) A copy of this standard and its appendices, except that the employer may keep one copy of the standard and its appendices for all employees provided the employer references the standard and its appendices in the medical surveillance record of each employee;

(B) A copy of the information provided to the physician as required by any paragraphs in the regulatory text;

(C) A description of the laboratory procedures and a copy of any standards or guidelines used to interpret the test results or references to the information;

(D) A copy of the employee's medical and work history related to exposure to MDA; and

(iv) The employer shall maintain this record for at least the duration of employment plus 30 years, in accordance with 29 CFR 1910.20.

(5) *Medical removals.* (i) The employer shall establish and maintain an accurate record for each employee removed from current exposure to MDA pursuant to paragraph (m) of this section.

(ii) Each record shall include:

(A) The name and social security number of the employee;

(B) The date of each occasion that the employee was removed from current exposure to MDA as well as the corresponding date on which the employee was returned to his or her former job status;

(C) A brief explanation of how each removal was or is being accomplished; and

(D) A statement with respect to each removal indicating the reason for the removal.

(iii) The employer shall maintain each medical removal record for at least the duration of an employee's employment plus 30 years.

(6) *Availability.* (i) The employer shall assure that all records required to be maintained by this section shall be made available, upon request, to the Assistant Secretary and the Director for examination and copying.

(ii) Employee exposure monitoring records required by this paragraph shall be provided upon request for examination and copying to employees, employee representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(i).

(iii) Employee medical records required by this paragraph shall be provided upon request for examination and copying, to the subject employee, to anyone having the specific written consent of the subject employee, and to the Assistant Secretary in accordance with 29 CFR 1910.20.

(7) *Transfer of records.* (i) The employer shall comply with the requirements involving transfer of records set forth in 29 CFR 1910.20(h).

(ii) If the employer ceases to do business and there is no successor employer to receive and retain the records for the prescribed period, the employer shall notify the Director, at least 90 days prior to disposal, and transmit the records to the Director if so requested by the Director within that period.

(o) *Observation of monitoring*—(1) *Employee observation.* The employer shall provide affected employees, or their designated representatives, an opportunity to observe the measuring or monitoring of employee exposure to MDA conducted pursuant to paragraph (e) of this section.

(2) *Observation procedures.* When observation of the measuring or monitoring of employee exposure to MDA requires entry into areas where the use of protective clothing and equipment or respirators is required, the employer shall provide the observer with personal protective clothing and equipment or respirators required to be worn by employees working in the area, assure the use of such clothing and equipment or respirators, and require the observer to comply with all other applicable safety and health procedures.

(p) *Effective date.* This standard shall become effect [insert date 30 days after publication of the final rule].

(q) *Appendices.* The information contained in the appendices to this section is not intended by itself, to create any additional obligations not otherwise imposed by this standard nor detract from any existing obligation.

(r) *Startup dates.* All obligations of this standard commence on the effective date except as follows:

(1) Initial monitoring under paragraph (e) (2) of this section shall be completed as soon as possible but no later than 90 days from the effective date.

(2) Medical examinations under paragraph (m) of this section shall be completed as soon as possible but no later than 60 days from the effective date.

(3) Emergency plans required by paragraph (d) of this section shall be provided and available for inspection and copying as soon as possible but no later than 30 days from the effective date.

(4) Initial training and education shall be completed as soon as possible but no later than 30 days from the effective date.

(5) Hygiene and lunchroom facilities under paragraph (j) of this section shall be in operation as soon as possible but no later than 1 year from the effective date.

(6) Respiratory protection required by paragraph (h) of this section shall be provided as soon as possible but no later than 30 days from the effective date.

(7) Written compliance plans required by paragraph (g)(2) of this section shall be completed and available for inspection and copying as soon as possible but no later than 30 days from the effective date.

(8) The permissible exposure limits in paragraph (c) of this section shall become effective 90 days from the effective date.

(9) Engineering controls needed to achieve the PELs must be in place one year from the effective date.

(10) Personal protective clothing required by paragraph (i) of this section shall be available 30 days from the effective date.

Appendix A to § 1910.1050—Substance Data Sheet, for 4-4'-Methylenedianiline

I. Substance Identification

A. Substance: Methylenedianiline (MDA)

B. Permissible Exposure:

1. *Airborne:* Ten parts per billion parts of air (10 ppb), time-weighted average (TWA) for an 8-hour workday and an action level of five parts per billion parts of air (5 ppb).

2. *Dermal:* Eye contact and skin contact with MDA are not permitted.

C. Appearance and odor: White to tan solid; amine odor

II. Health Hazard Data

A. Ways in Which MDA Affects Your Health

MDA can affect your health if you inhale it, or if it comes in contact with your skin or eyes. MDA is also harmful if you happen to swallow it. Do not get MDA in eyes, on skin, or on clothing.

B. Effects of Overexposure

1. *Short-term (acute) overexposure:* Overexposure to MDA may produce fever, chills, loss of appetite, vomiting, jaundice. Contact may irritate skin, eyes and mucous membranes. Sensitization may occur.

2. *Long-term (chronic) exposure.* Repeated or prolonged exposure to MDA, even at relatively low concentrations, may cause cancer. In addition, damage to the liver, kidneys, blood, and spleen may occur with long term exposure.

3. *Reporting signs and symptoms:* You should inform your employer if you develop any signs or symptoms which you suspect are caused by exposure to MDA including yellow staining of the skin.

III. Protective Clothing and Equipment

A. Respirators

Respirators are required for those operations in which engineering controls or work practice controls are not adequate or feasible to reduce exposure to the permissible limit. If respirators are worn, they must have the joint Mine Safety and Health Administration and National Institute for Occupational Safety and Health (NIOSH) seal of approval, and cartridges or canisters must be replaced as necessary to maintain the effectiveness of the respirator. If you experience difficulty breathing while wearing a respirator, you may request a positive pressure respirator from your employer. You must be thoroughly trained to use the assigned respirator, and the training will be provided by your employer.

MDA does not have a detectable odor except at levels well above the permissible exposure limits. Do not depend on odor to warn you when a respirator canister is exhausted. If you can smell MDA while wearing a respirator, proceed immediately to fresh air. If you experience difficulty breathing while wearing a respirator, tell your employer.

B. Protective Clothing

You may be required to wear coveralls, aprons, gloves, face shields, or other appropriate protective clothing to prevent skin contact with MDA. Where protective clothing is required, your employer is required to provide clean garments to you, as necessary, to assure that the clothing protects you adequately. Replace or repair impervious clothing that has developed leaks.

MDA should never be allowed to remain on the skin. Clothing and shoes which are not impervious to MDA should not be allowed to become contaminated with MDA, and if they do, the clothing and shoes should be promptly removed and decontaminated. The clothing should be laundered to remove MDA or discarded. Once MDA penetrates shoes or other leather articles, they should not be worn again.

C. Eye Protection

You must wear splashproof safety goggles in areas where liquid MDA may contact your eyes. Contact lenses should not be worn in areas where eye contact with MDA can occur. In addition, you must wear a face shield if your face could be splashed with MDA liquid.

IV. Emergency and First Aid Procedures

A. Eye and Face Exposure

If MDA is splashed into the eyes, wash the eyes for at least 15 minutes. See a doctor as soon as possible.

B. Skin Exposure

If MDA is spilled on your clothing or skin, remove the contaminated clothing and wash the exposed skin with large amounts of soap and water immediately. Wash contaminated clothing before you wear it again.

C. Breathing

If you or any other person breathes in large amounts of MDA, get the exposed person to fresh air at once. Apply artificial respiration if breathing has stopped. Call for medical assistance or a doctor as soon as possible. Never enter any vessel or confined space where the MDA concentration might be high without proper safety equipment and at least one other person present who will stay outside. A life line should be used.

D. Swallowing

If MDA has been swallowed and the patient is conscious, do not induce vomiting. Call for medical assistance or a doctor immediately.

V. Medical Requirements

If you are exposed to MDA at a concentration at or above the action level for more than 30 days per year, or exposed to liquid mixtures more than 15 days per year, your employer is required to provide a medical examination, including a medical history and laboratory tests, within 60 days of the effective date of this standard and annually thereafter. These tests shall be provided without cost to you. In addition, if you are accidentally exposed to MDA (either by ingestion, inhalation, or skin/eye contact) under conditions known or suspected to constitute toxic exposure to MDA, your employer is required to make special examinations and tests available to you.

VI. Observation of Monitoring

Your employer is required to perform measurements that are representative of your exposure to MDA and you or your designated representative are entitled to observe the monitoring procedure. You are entitled to observe the steps taken in the measurement procedure and to record the results obtained. When the monitoring procedure is taking place in an area where respirators or personal protective clothing and equipment are required to be worn, you and your representative must also be provided with, and must wear, the protective clothing and equipment.

VII. Access to Records

You or your representative are entitled to see the records of measurements of your exposure to MDA upon written request to your employer. Your medical examination records can be furnished to your physician or designated representative upon request by you to your employer.

VIII. Precautions for Safe Use, Handling and Storage

A. Material Is Combustible

Avoid strong acids and their anhydrides. Avoid strong oxidants. Consult supervisor for disposal requirements.

B. Emergency Clean-up

Wear self-contained breathing apparatus and fully clothe the body in the appropriate personal protective clothing and equipment.

Appendix B to § 1910.1050—Substance Technical Guidelines, MDA

I. Identification

A. Substance Identification

1. *Synonyms:* CAS No. 101-77-9. 4,4'-methylenedianiline; 4,4'-methylenebisaniline; methylenedianiline; dianilinomethane.

2. *Formula:* $C_{13}H_{14}N_2$.

II. Physical Data

1. *Appearance and Odor:* White to tan solid; amine odor.

2. *Molecular Weight:* 198.26.

3. *Boiling Point:* 398–399 degrees C at 760 mmHg.

4. *Melting Point:* 88–93 degrees C (190–100 degrees F).

5. *Vapor Pressure:* 9 mmHg at 232 degrees C.

6. *Evaporation Rate (n-butyl acetate=1):* Negligible.

7. *Vapor Density (Air=1):* Not Applicable.

8. *Volatile Fraction by Weight:* Negligible.

9. *Specific Gravity (Water=1):* Slight.

10. *Heat of Combustion:* –8.40 kcal/g.

11. *Solubility in Water:* Slightly soluble in cold water, very soluble in alcohol, benzene, ether, and many organic solvents.

III. Fire, Explosion, and Reactivity Hazard Data

1. *Flash Point:* 190 degrees C (374 degrees F) Setaflash closed cup.

2. *Flash Point:* 226 degrees C (439 degrees F) Cleveland open cup.

3. *Extinguishing Media:* Water spray; Dry Chemical; Carbon dioxide.

4. *Special Fire Fighting Procedures:* Wear self-contained breathing apparatus and protective clothing to prevent contact with skin and eyes.

5. *Unusual Fire and Explosion Hazards:* Fire or excessive heat may cause production of hazardous decomposition products.

IV. Reactivity Data

1. *Stability:* Stable.

2. *Incompatibility:* Strong oxidizers.

3. *Hazardous Decomposition Products:* As with any other organic material, combustion may produce carbon monoxide. Oxides of nitrogen may also be present.

4. *Hazardous Polymerization:* Will not occur.

V. Spill and Leak Procedures

1. Sweep material onto paper and place in fiber carton.

2. Package appropriately for safe feed to an incinerator or dissolve in compatible waste solvents prior to incineration.

3. Dispose of in an approved incinerator equipped with afterburner and scrubber or contract with licensed chemical waste disposal service.

4. Discharge treatment or disposal may be subject to federal, state, or local laws.

5. Wear appropriate personal protective equipment.

VI. Special Storage and Handling Precautions

A. High exposure to MDA can occur when transferring the substance from one container to another. Such operations should be well ventilated and good work practices must be established to avoid spills.

B. Pure MDA is a solid with a low vapor pressure. Grinding or heating operations increase the potential for exposure.

C. Store away from oxidizing materials.

D. Employers shall advise employees of all areas and operations where exposure to MDA could occur.

VII. Housekeeping and Hygiene Facilities

A. The workplace should be kept clean, orderly, and in a sanitary condition.

The employer should institute a leak and spill detection program for operations involving MDA in order to detect sources of fugitive MDA emissions.

B. Adequate washing facilities with hot and cold water are to be provided and maintained in a sanitary condition. Suitable cleansing agents should also be provided to assure the effective removal of MDA from the skin.

VIII. Common Operations

Common operations in which exposure to MDA is likely to occur include the following: Manufacture of MDA; Manufacture of Methylene diisocyanate; Curing agent for epoxy resin structures; Wire coating operations; and filament winding.

Appendix C to § 1910.1050—Medical Surveillance Guidelines for MDA

I. Route of Entry

Inhalation; skin absorption; ingestion. MDA can be inhaled, absorbed through the skin, or ingested.

II. Toxicology

MDA is a suspect carcinogen in humans. There are several reports of liver disease in humans and animals resulting from acute exposure to MDA. A well documented case of an acute cardiomyopathy secondary to exposure to MDA is on record. Numerous human cases of hepatitis secondary to MDA are known. Upon direct contact MDA may also cause damage to the eyes. Dermatitis and skin sensitization have been observed.

Almost all forms of acute environmental hepatic injury in humans involve the hepatic parenchyma and produce hepatocellular jaundice. This agent produces intrahepatic cholestasis. The clinical picture consists of cholestatic jaundice, preceded or accompanied by abdominal pain, fever, and chills. Onset in about 60% of all observed cases is abrupt with severe abdominal pain. In about 30% of observed cases, the illness presented and evolved more slowly and less dramatically, with only slight abdominal pain. In about 10% of the cases only jaundice was evident. The cholastatic nature of the jaundice is evident in the prominence of itching, the histologic predominence of bile stasis, and portal inflammatory infiltration, accompanied by only slight parenchymal injury in most cases, and by the moderately elevated transaminase values. Acute, high doses, however, have been known to cause hepatocellular damage resulting in elevated SGPT, SGOT, alkaline phosphatase and bilirubin.

Absorption through the skin is rapid. MDA is metabolized and excreted over a 48-hour period. Direct contact may be irritating to the skin, causing dermatitis. Also MDA which is deposited on the skin is not thoroughly removed through washing.

MDA may cause bladder cancer in humans. Animal data supporting this assumption is not available nor is conclusive human data. However, human data collected on workers at a helicopter manufacturing facility where MDA is used suggests a higher incidence of bladder cancer among exposed workers.

III. Signs and Symptoms

Skin may become yellow from contact with MDA.

Repeated or prolonged contact with MDA may result in recurring dermatitis (red-itchy, cracked skin) and eye irritation. Inhalation, ingestion or absorption through the skin at high concentrations may result in hepatitis, causing symptoms such as fever and chills, nausea and vomiting, dark urine, anorexia, rash, right upper quadrant pain and jaundice. Corneal burns may occur when MDA is splashed in the eyes.

IV. Treatment of Acute Toxic Effects/ Emergency Situation

If MDA gets into the eyes, immediately wash eyes with large amounts of water. If MDA is splashed on the skin, immediately wash contaminated skin with mild soap or detergent. Employee should be removed from exposure and given proper medical treatment. Medical tests required under the emergency section of the medical surveillance section (m)(4) must be conducted.

If the chemical is swallowed do not induce vomiting but remove by gastric lavage.

Appendix D to § 1910.1050—Sampling and Analytical Methods for MDA Monitoring and Measurement Procedures

Measurements taken for the purpose of determining employee exposure to MDA are best taken so that the representative average 8-hour exposure may be determined from a single 8-hour sample or two (2) 4-hour samples. Short-time interval samples (or grab samples) may also be used to determine average exposure level if a minimum of five measurements are taken in a random manner over the 8-hour work shift. Random sampling means that any portion of the work shift has the same chance of being sampled as any other. The arithmetic average of all such random samples taken on one work shift is an estimate of an employee's average level of exposure for that work shift. Air samples should be taken in the employee's breathing zone (air that would most nearly represent that inhaled by the employee).

There are a number of methods available for monitoring employee exposures to MDA. The method OSHA currently uses is included below.

The employer, however, has the obligation of selecting any monitoring method which meets the accuracy and precision requirements of the standard under his unique field conditions. The standard requires that the method of monitoring must have an accuracy, to a 95 percent confidence level, of not less than plus or minus 25 percent for the select PEL.

OSHA Methodology

Sampling Procedure

Apparatus

Samples are collected by use of a personal sampling pump that can be calibrated within ± 5% of the recommended flow rate with the sampling filter in line.

Samples are collected on 37 mm Gelman type A/E glass fiber filters treated with sulfuric acid. The filters are prepared by soaking each filter with 0.5 mL of 0.26N H_2SO_4. (0.26 N H_2SO_4 can be prepared by diluting 1.5 mL of 36N H_2SO_4 to 200 mL with deionized water.) The filters are dried in an oven at 100 degrees C for one hour and then assembled into two-piece 37 mm polystyrene cassettes with backup pads. The cassettes are sealed with shrink bands and the ends are plugged with plastic plugs.

After sampling, the filters are carefully removed from the cassettes and individually transferred to small vials containing approximately 2 mL deionized water. The vials must be tightly sealed. The water can be added before or after the filters are transferred. The vials must be sealable and capable of holding at least 7 mL of liquid. Small glass scintillation vials with caps containing Teflon liners are recommended.

Reagents

Deionized water is needed for addition to the vials.

Sampling Technique

Immediately before sampling, remove the plastic plugs from the filter cassettes.

Attach the cassette to the sampling pump with flexible tubing and place the cassette in the employee's breathing zone.

After sampling, seal the cassettes with plastic plugs until the filters are transferred to the vials containing deionized water.

At some convenient time within 10 hours of sampling, transfer the sample filters to vials.

Seal the small vials lengthwise.

Submit at least one blank filter with each sample set. Blanks should be handled in the same manner as samples, but no air is drawn through them.

Record sample volumes (in L of air) for each sample, along with any potential interferences.

Retention Efficiency

A retention efficiency study was performed by drawing 100 L of air (80% relative humidity) at 1 L/min through sample filters that had been spiked with 0.814 μg MDA. Instead of using backup pads, blank acid-treated filters were used as backups in each cassette. Upon analysis, the top filters were found to have an average of 91.8% of the spiked amount. There was no MDA found on the bottom filters, so the amount lost was probably due to the slight instability of the MDA salt.

Extraction Efficiency

The average extraction efficiency for six filters spiked at the target concentration is 99.6%.

The stability of extracted and derivatized samples was verified by reanalyzing the above six samples the next day using fresh standards. The average extraction efficiency for the reanalyzed samples is 98.7%.

Recommended Air Volume and Sampling Rate

The recommended air volume is 100 L.

The recommended sampling rate i 1 L/min.

Interferences (Sampling)

MDI appears to be a positive interference. It was found that when MDI was spiked onto

an acid-treated filter, the MDI converted to MDA after air was drawn through it.

Suspected interferences should be reported to the laboratory with submitted samples.

Safety Precautions (Sampling)

Attach the sampling equipment to the employees so that it will not interfere with work performance or safety.

Follow all safety procedures that apply to the work area being sampled.

Analytical Procedure

Apparatus: The following are required for analysis.

A GC equipped with an electron capture detector. For this evaluation a Tracor 222 Gas Chromatograph equipped with a Nickel 63 High Temperature Electron Capture Detector and a Linearizer was used.

A GC column capable of separating the MDA derivative from the solvent and interferences. A 6 ft × 2 mm ID glass column packed with 3% OV-101 coated on 100/120 Gas Chrom Q was used in this evaluation.

An electronic integrator or some other suitable means of measuring peak areas or heights.

Small resealable vials with Teflon-lined caps capable of holding 4 mL.

A dispenser or pipet for toluene capable of delivering 2.0 mL.

Pipets (or repipets with plastic or Teflon tips) capable of delivering 1 mL for the sodium hydroxide and buffer solutions.

A repipet capable of delivering 25 μL HFAA.

Syringes for preparation of standards and injection of standards and samples into a GC.

Volumetric flasks and pipets to dilute the pure MDA in preparation of standards.

Disposable pipets to transfer the toluene layers after the samples are extracted.

Reagents

0.5 NaOH prepared from reagent grade NaOH.

Toluene, pesticide grade. Burdick and Jackson distilled in glass toluene was used.

Heptafluorobutyric acid anhydride (HFAA). HFAA from Pierce Chemical Company was used.

pH 7.0 phosphate buffer, prepared from 136 g potassium dihydrogen phosphate and 1 L deionized water. The pH is adjusted to 7.0 with saturated sodium hydroxide solution.

4,4'-Methylenedianiline (MDA), reagent grade.

Standard Preparation

Concentrated stock standards are prepared by diluting pure MDA with toluene. Analytical standards are prepared by injecting μL amounts of diluted stock standards into vials that contain 2.0 mL toluene.

25 μL HFAA are added to each vial and the vials are capped and shaken for 10 seconds.

After 10 min, 1 mL of buffer is added to each vial.

The vials are recapped and shaken for 10 seconds.

After allowing the layers to separate, aliquots of the toluene (upper) layers are removed with a syringe and analyzed by GC.

Analytical standard concentrations should bracket sample concentrations. Thus, if samples fall out of the range of prepared standards, additional standards must be prepared to ascertain detector response.

Sample Preparation

The sample filters are received in vials containing deionized water.

1 mL of 0.5N NaOH and 2.0 mL toluene are added to each vial.

The vials are recapped and shaken for 10 min.

After allowing the layers to separate, approximately 1 mL aliquots of the toluene (upper) layers are transferred to separate vials with clean disposable pipets.

The toluene layers are treated and analyzed.

Analysis

GC Conditions

Zone temperatures:
- Column—220 degrees C
- Injector—235 degrees C
- Detector—335 degrees C

Gas flows, Ar/CH_4 (95/5):
- Column—28 mL/min
- Purge—40 mL/min

Injection volume: 5.0 μL

Column:
- 6 ft × ⅛ in ID glass, 3% OV-101 on 100/120 Gas Chrom Q

Retention time of MDA derivative:
- 3.5 min

Chromatogram:

Peak areas or heights are measured by an integrator or other suitable means.

A calibration curve is constructed by plotting response (peak areas or heights) of standard injections versus μg of MDA per sample. Sample concentrations must be bracketed by standards.

Interferences (Analytical)

Any compound that gives an electron capture detector response and has the same general retention time as the HFAA derivative of MDA is a potential interference. Suspected interferences reported to the laboratory with submitted samples by the industrial hygienist must be considered before samples are derivatized.

GC parameters may be changed to possibly circumvent interferences.

Retention time on a single column is not considered proof of chemical identity. Analyte identity should be confirmed by GC/MS if possible.

Calculations

The analyte concentration for samples is obtained from the calibration curve in terms of ug MDA per sample. The extraction efficiency is 100%. If any MDA is found on the blank, that amount is subtracted from the sample amounts. The air concentrations are calculated using the following formulae.

$\mu g/m^3$=(μg MDA per sample) (1000)/(L of air sampled)

ppb=($\mu g/m^3$)(24.46)/(198.3)=($\mu g/m^3$)(0.1233)

where 24.46 is the molar volume at 25 degrees C and 760 mm Hg

Safety Precautions (Analytical)

Avoid skin contact and inhalation of all chemicals.

Restrict the use of all chemicals to a fume hood if possible.

Wear safety glasses and a lab coat at all times while in the lab area.

Appendix E to § 1910.1050—Qualitative and Quantitative Fit Testing Procedures

Qualitative Fit Test Protocols

I. Isoamyl Acetate (banana oil) Protocol

A. *Odor threshold screening.*

1. Three 1-liter glass jars with metal lids (e.g. Mason or Bell jars) are required.

2. Odor-free water (e.g. distilled or spring water) at approximately 25° C shall be used for the solutions.

3. The isoamyl acetate (IAA) (also known as isopentyl acetate) stock solution is prepared by adding 1 cc of pure IAA to 800 cc of odor free water in a 1-liter jar and shaking for 30 seconds. This solution shall be prepared new at least weekly.

4. The screening test shall be conducted in a room separate from the room used for actual fit testing. The two rooms shall be well ventilated so that circulation of the test solution does not occur and cross contaminate the testing different sites.

5. The odor test solution is prepared in a second jar by placing 0.4 cc of the stock solution into 500 cc of odor free water using a clean dropper or pipette. Shake for 30 seconds and allow to stand for two to three minutes so that the IAA concentration above the liquid may reach equilibrium. This solution may be used for only one day.

6. A test blank is prepared in a third jar by adding 500 cc of odor free water.

7. The odor test and test blank jars shall be labelled 1 and 2 for jar identification.

8. The following instructions shall be typed on a card and placed on the table in front of the two test jars (i.e. 1 and 2): "The purpose of this test is to determine if you can smell banana oil at a low concentration. The two bottles in front of you contain water. One of these bottles also contains a small amount of banana oil. Be sure the covers are on tight, then shake each bottle for two seconds. Unscrew the lid of each bottle, one at a time, and sniff at the mouth of the bottle. Indicate to the test conductor which bottle contains banana oil."

9. The mixtures used in the IAA odor detection test shall be prepared in an area separate from where the test is performed, in order to prevent olfactory fatigue in the subject.

10. If the test subject is unable to correctly identify the jar containing the odor test solution, the IAA qualitative fit test may not be used.

11. If the test subject correctly identifies the jar containing the odor test solution, the test subject may proceed to respirator selection and fit testing.

B. *Respirator Selection*

1. The test subject shall be allowed to pick the most comfortable respirator from a selection including respirators of various sizes from different manufacturers. The selection shall include at least three sizes of elastomeric half facepieces, from at least two manufacturers.

2. The selection process shall be conducted in a room separate from the fit-test chamber

to prevent odor fatigue. Prior to the selection process, the test subject shall be shown how to put on a respirator, how it should be positioned on the face, how to set strap tension and how to determine a "comfortable" respirator. A mirror shall be available to assist the subject in evaluating the fit and positioning of the respirator. This instruction may not constitute the subject's formal training on respirator use, as it is only a review.

3. The test subject should understand that the employee is being asked to select the respirator which provides the most comfortable fit.

4. The test subject holds each facepiece up to the face and eliminates those which obviously do not give a comfortable fit. Normally, selection will begin with a half-mask and if a comfortable fit cannot be found, the subject will be asked to test the full facepiece respirators. (A small percentage of users will not be able to wear any half-mask.)

5. The more comfortable facepieces are noted; the most comfortable mask is donned and worn at least five minutes to assess comfort. All donning and adjustments of the facepiece shall be performed by the test subject without assistance from the test conductor or other person. Assistance in assessing comfort can be given by discussing the points in #6 below. If the test subject is not familiar with using a particular respirator, the test subject shall be directed to don the mask several times and to adjust the straps each time to become adept at setting proper tension on the straps.

6. Assessment of comfort shall include reviewing the following points with the test subject and allowing the test subject adequate time to determine the comfort of the respirator after donning:

- Positioning of mask on nose.
- Room for eye protection.
- Room to talk.
- Positioning mask on face and cheeks.

7. The following criteria shall be used to help determine the adequacy of the respirator fit:

- Chin properly placed.
- Strap tension.
- Fit across nose bridge.
- Distance from nose to chin.
- Tendency to slip.
- Self-observation in mirror.

8. The test subject shall perform the conventional negative- or positive-pressure fit checks (e.g., see ANSI Z88.2-1980A7). Before beginning the negative- or positive-pressure test, the subject shall be told to "seat" the mask by rapidly moving the head from side-to-side and up and down, while taking a few deep breaths.

9. The test subject is now ready for fit testing.

10. After passing the fit test, the test subject shall be questioned again regarding the comfort of the respirator. If the respirator has become uncomfortable, another model of respirator shall be tried.

11. The employee shall be given the opportunity to select a different facepiece and to be retested if the chosen facepiece becomes increasingly uncomfortable at any time.

C. *Fit Test*

1. The fit test chamber shall be similar to a clear 55 gallon drum liner suspended inverted over a 2-foot diameter frame, so that the top of chamber is about 6 inches above the test subject's head. The inside top center of the chamber shall have a small hook attached.

2. Each respirator used for the fitting and fit testing shall be equipped with organic vapor cartridges or offer protection against organic vapors. The cartridges or canisters shall be replaced as necessary to maintain the effectiveness of the respirator.

3. After selecting, donning, and properly adjusting a respirator, the test subject shall wear it to the fit testing room. This room shall be separate from the room used for odor threshold screening and respirator selection, and shall be well ventilated, as by an exhaust fan or lab hood, to prevent general room contamination.

4. A copy of the following test exercises and Rainbow Passage shall be taped to the inside of the test chamber:

Test Exercises

i. Breathe normally.

ii. Breathe deeply. Be certain breaths are *deep* and *regular*.

iii. Turn head all the way from one side to the other. Inhale on each side. Be certain movement is complete. Do not bump the respirator against the shoulders.

iv. Nod head up-and-down. Inhale when head is in the full up position (looking toward ceiling). Be certain motions are complete and made about every second. Do not bump the respirator on the chest.

v. Talking. Talk aloud and slowly for several minutes. The following paragraph is called the Rainbow Passage. Reading it aloud will result in a wide range of facial movements, and thus be useful to satisfy this requirement. Alternative passages which serve the same purpose may also be used.

vi. Jog in place.

vii. Breathe normally.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond reach, his friends say he is looking for the pot of gold at the end of the rainbow.

5. Each test subject shall wear the respirator for at a least 10 minutes before starting the fit test.

6. Upon entering the test chamber, the test subject shall be given a 6 inch by 5 inch piece of paper towel or other porous absorbent single ply material, folded in half and wetted with three-quarters of one cc of pure IAA. The test subject shall hang the wet towel on the hook at the top of the chamber.

7. Allow two minutes for the IAA test concentration to be reached before starting the fit-test exercises.

8. Each exercise described in #4 above shall be performed for at least one minute.

9. If at any time during the test, the subject detects the banana-like odor of IAA, the test has failed. The subject shall quickly exit from the test chamber and leave the test area to avoid olfactory fatigue.

10. If the test is failed, the subject shall return to the selection room and remove the respirator, repeat the odor sensitivity test, select and put on another respirator, return to the test chamber, and again begin the procedure described in the c(4) through c(8) above. The process continues until a respirator that fits well has been found. Should the odor sensitivity test be failed, the subject shall wait about 5 minutes before retesting. Odor sensitivity will usually have returned by this time.

11. If a person cannot pass the fit test described above wearing a half-mask respirator from the available selection, full facepiece models must be used.

12. When a respirator is found that passes the test, the subject must break the faceseal and take a breath before exiting the chamber. This is to assure that the reason the test subject is not smelling the IAA is the good fit of the respirator facepiece seal and not olfactory fatigue.

13. When the test subject leaves the chamber, the subject shall remove the saturated towel and return it to the person conducting the test. To keep the area from becoming contaminated, the used towels shall be kept in a self-sealing bag so there is no significant IAA concentration buildup in the test chamber during subsequent tests.

14. Persons who have successfully passed this fit test with a half-mask respirator may be assigned the use of the test respirator in atmospheres with up to 10 times the PEL. In atmospheres greater than 10 times, and less than 50 times the PEL (up to 50 ppm), the subject must pass the IAA test using a full face negative pressure respirator. (The concentration of the IAA inside the test chamber must be increased by five times for QLFT of the full facepiece.)

15. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface.

16. If hair growth or apparel interfere with a satisfactory fit, then they shall be altered or removed so as to eliminate interference and allow a satisfactory fit. If a satisfactory fit is still not attained, the test subject must use a positive-pressure respirator such as a powered air-purifying respirator, supplied air respirator, or self-contained breathing apparatus.

17. If a test subject exhibits difficulty in breathing during the tests, she or he shall be referred to a physician trained in respiratory diseases or pulmonary medicine to determine whether the test subject can wear a respirator while performing her or his duties.

18. Qualitative fit testing shall be repeated at least every 12 months.

19. In addition, because the sealing of the respirator may be affected, qualitative fit testing shall be repeated immediately when the test subject has a:

(1) Weight change of 20 pounds or more,

(2) Significant facial scarring in the area of the facepiece seal.

(3) Significant dental changes; i.e.; multiple extractions without prothesis, or acquiring dentures,

(4) Reconstructive or cosmetic surgery, or

(5) Any other condition that may interfere with facepiece sealing.

D. Recordkeeping

A summary of all test results shall be maintained by the employer for 3 years. The summary shall include:

(1) Name of test subject.

(2) Date of testing.

(3) Name of the test conductor.

(4) Respirators selected (indicate manufacturer, model, size and approval, and number).

(5) Testing agent.

II. Saccharin Solution Aerosol Protocol

A. Respirator Selection

Respirators shall be selected as described in section IB (respirator selection) above, except that each respirator shall be equipped with a particulate filter.

B. Taste Threshold Screening

1. An enclosure placed over the head and shoulders shall be used for threshold screening (to determine if the individual can taste saccharin) and for fit testing. The enclosure shall be approximately 12 inches in diameter by 14 inches tall with at least the front clear to allow free movement of the head when a respirator is worn.

2. The test enclosure shall have a three-quarter inch hole in front of the test subject's nose and mouth area to accommodate the nebulizer nozzle.

3. The entire screening and testing procedure shall be explained to the test subject prior to conducting the screening test.

4. During the threshold screening test, the test subject shall don the test enclosure and breathe with open mouth with tongue extended.

5. Using a DeVilbiss Model 40 Inhalation Medication Nebulizer or equivalent, the test conductor shall spray the threshold check solution into the enclosure. This nebulizer shall be clearly marked to distinguish it from the fit test solution nebulizer.

6. The threshold check solution consists of 0.83 grams of sodium saccharin, USP in water. It can be prepared by putting 1 cc of the test solution (see C 7 below) in 100 cc of water.

7. To produce the aerosol, the nebulizer bulb is firmly squeezed so that it collapses completely, then is released and allowed to fully expand.

8. Ten squeezes of the nebulizer bulb are repeated rapidly and then the test subject is asked whether the saccharin can be tasted.

9. If the first response is negative, ten more squeezes of the nebulizer bulb are repeated rapidly and the test subject is again asked whether the saccharin can be tasted.

10. If the second response is negative ten more squeezes are repeated rapidly and the test subject is again asked whether the saccharin can be tasted.

11. The test conductor will take note of the number of squeezes required to elicit a taste response.

12. If the saccharin is not tasted after 30 squeezes (Step 10). the saccharin fit test cannot be performed on the test subject.

13. If a taste response is elicited, the test subject shall be asked to take note of the taste for reference in the fit test.

14. Correct use of the nebulizer means that approximately 1 cc of liquid is used at a time in the nebulizer body.

15. The nebulizer shall be thoroughly rinsed in water, shaken dry, and refilled at least every four hours.

C. Fit Test

1. The test subject may not eat, drink (except plain water), or chew gum for 15 minutes before the test.

2. The test subject shall don and adjust the respirator without assistance from any person.

3. The fit test uses the same enclosure described in IIB above.

4. Each test subject shall wear the respirator for a least 10 minutes before starting the fit test. (a) This would be an appropriate time to talk with the test subject; to explain the fit test, the importance of cooperation and, the purpose for the head exercises; or, to demonstrate some of the exercises. (b) The test subject shall perform the conventional negative or positive pressure fit tests (See ANSI Z88.2 1980 A7).

5. The test subject shall enter the enclosure while wearing the respirator selected in section IB above. This respirator shall be properly adjusted and equipped with a particulate filter.

6. A second DeVilbiss Model 40 Inhalation Medication Nebulizer is used to spray the fit test solution into the enclosure. This nebulizer shall be clearly marked to distinguish it from the screening test solution nebulizer.

7. The fit test solution is prepared by adding 83 grams of sodium saccharin to 100 cc of warm water.

8. As before, the test subject shall breathe with mouth open and tongue extended.

9. The nebulizer is inserted into the hole in the front of the enclosure and the fit test solution is sprayed into the enclosure using the same technique as for the taste threshold screening and the same number of squeezes required to elicit a taste response in the screening. (See B8 through BIO above).

10. After generation of the aerosol read the following instructions to the test subject. The test subject shall perform the exercises for one minute each.

i. Breathe normally.

ii. Breathe deeply. Be certain breaths are *deep* and *regular*.

iii. Turn head all the way from one side to the other. Be certain movement is complete. Inhale on each side. Do not bump the respirator against the shoulders.

iv. Nod head up-and-down. Be certain motions are complete. Inhale when head is in the full up position (when looking toward the ceiling). Do not bump the respirator on the chest.

v. Talk. Talk aloud and slowly. The following paragraph is called the Rainbow Passage. Reading it will result in a wide range of facial movements, and thus be useful to satisfy this requirement.

vi. Jog in place.

vii. Breathe normally.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond his reach, his friends say he is looking for the pot of gold at the end of the rainbow.

11. At the beginning of each exercise, the aerosol concentration shall be replenished using one-half the number of squeezes as initially described in C9.

12. The test subject shall indicate to the test conductor if at any time during the fit test the taste of saccharin is detected.

13. If the saccharin is detected the fit is deemed unsatisfactory and a different respirator shall be tried.

14. Successful completion of the test protocol shall allow the use of the half mask tested respirator in contaminated atmospheres up to 10 times the PEL of MDA. In other words this protocol may be used to assign protection factors higher than ten.

15. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface.

16. If hair growth or apparel interfere with a satisfactory fit, then they shall be altered or removed so as to eliminate interference and allow a satisfactory fit. If a satisfactory fit is still not attained, the test subject must use a positive-pressure respirator such as powered air-purifying respirators, supplied air respirator, or self-contained breathing apparatus.

17. If a test subject exhibits difficulty in breathing during the tests, she or he shall be referred to a physician trained in respirator diseases or pulmonary medicine to determine whether the test subject can wear a respirator while performing her or his duties.

18. Qualitative fit testing shall be repeated at least every 12 months.

19. In addition, because the sealing of the respirator may be affected, qualitative fit testing shall be repeated immediately when the test subject has a:

(1) Weight change of 20 pounds or more.

(2) Significant facial scarring in the area of the facepiece seal,

(3) Significant dental changes; i.e.; multiple extractions without prothesis, or acquiring dentures,

(4) Reconstructive or cosmestic surgery, or

(5) Any other condition that may interfere with facepiece sealing.

D. Recordkeeping

A summary of all test results shall be maintained by the employer for 3 years. The summary shall include:

(1) Name of test subject.

(2) Date of testing.

(3) Name of test conductor.

(4) Respirators selected (indicate manufacturer, model, size and approval number).

(5) Testing agent.

III. Irritant Fume Protocol

A. Respirator selection

Respirators shall be selected as described in section IB above, except that each respirator shall be equipped with a combination of high-efficiency and acid-gas cartridges.

B. Fit Test

1. The test subject shall be allowed to smell a weak concentration of the irritant smoke to familiarize the subject with the characteristic odor.

2. The test subject shall properly don the respirator selected as above, and wear it for at least 10 minutes before starting the fit test.

3. The test conductor shall review this protocol with the test subject before testing.

4. The test subject shall perform the conventional positive pressure and negative pressure fit checks (see ANSI Z88.2 1980). Failure of either check shall be cause to select an alternate respirator.

5. Break both ends of a ventilation smoke tube containing stannic oxychloride, such as the MSA part #5645, or equivalent. Attach a short length of tubing to one end of the smoke tube. Attach the other end of the smoke tube to a low pressure air pump set to deliver 200 milliliters per minute.

6. Advise the test subject that the smoke can be irritating to the eyes and instruct the subject to keep the eyes closed while the test is performed.

7. The test conductor shall direct the stream of irritant smoke from the tube towards the faceseal area of the test subject. The person conducting the test shall begin with the tube at least 12 inches from the facepiece and gradually move to within one inch, moving around the whole perimeter of the mask.

8. The test subject shall be instructed to do the following exercises while the respirator is being challenged by the smoke. Each exercise shall be performed for one minute.

i. Breathe normally.

ii. Breathe deeply. Be certain breaths are deep and regular.

iii. Turn head all the way from one side to the other. Be certain movement is complete. Inhale on each side. Do not bump the respirator against the shoulders.

iv. Nod head up-and-down. Be certain motions are complete and made every second. Inhale when head is in the full up position (looking toward ceiling). Do not bump the respirator against the chest.

v. Talking. Talk aloud and slowly for several minutes. The following paragraph is called the Rainbow Passage. Reading it will result in a wide range of facial movements, and thus be useful to satisfy this requirement. Alternative passages which serve the same purpose may also be used.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two end apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond his reach, his friends say he is looking for the pot of gold at the end of the rainbow.

vi. Jogging in Place.

vii. Breathe normally.

9. The test subject shall indicate to the test conductor if the irritant smoke is detected. If smoke is detected, the test conductor shall stop the test. In this case, the test respirator is rejected and another respirator shall be selected.

10. Each test subject passing the smoke test (i.e. without detecting the smoke) shall be given a sensitivity check of smoke from the same tube to determine if the test subject reacts to the smoke. Failure to evoke a response shall void the fit test.

11. Steps B4, B9, B10 of this fit test protocol shall be performed in a location with exhaust ventilation sufficient to prevent general contamination of the testing area by the test agents.

12. Respirators successfully tested by the protocol may be used in contaminated atmospheres up to ten times the PEL of MDA.

13. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface.

14. If hair growth or apparel interfere with a satisfactory fit, then they shall be altered or removed so as to eliminate interference and allow a satisfactory fit. If a satisfactory fit is still not attained, the test subject must use a positive-pressure respirator such as powered air-purifying respirators, supplied air respirator, or self-contained breathing apparatus.

15. If a test subject exhibits difficulty in breathing during the test, she or he shall be referred to a physician trained in respirator diseases or pulmonary medicine to determine whether the test subject can wear a respirator while performing her or his duties.

16. Qualitative fit testing shall be repeated at least every 12 months.

17. In addition, because the sealing of the respirator may be affected, qualitative fit testing shall be repeated immediately when the test subject has a:

(1) Weight change of 20 pounds or more,

(2) Significant facial scarring in the area of the facepiece seal,

(3) Significant dental changes; i.e.; multiple extractions without prothesis, or acquiring dentures,

(4) Reconstructive or cosmestic surgery, or

(5) Any other condition that may interfere with facepeice sealing.

D. Recordkeeping

A summary of all test results shall be maintained by the employer for 3 years. The summary shall include:

(1) Name of test subject.

(2) Date of testing.

(3) Name of test conductor.

(4) Respirators selected (indicate manufacturer, model, size and approval number).

(5) Testing agent.

Quantitative Fit Test Procedures

1. General

a. The method applies to the negative-pressure nonpowered air-purifying respirators only.

b. The employer shall assign an individual (with help as needed) who shall assume the full responsibility for implementing the respirator quantitative fit test program.

2. Definition

a. "Quantitative Fit Test" means the measurement of the effectiveness of a respirator seal in excluding the ambient atmosphere. The test is performed by dividing the measured concentration of challenge agent in a test chamber by the measured concentration of the challenge agent inside the respirator facepiece when the normal air purifying element has been replaced by an essentially perfect purifying element.

b. "Challenge Agent" means the air contaminant introduced into a test chamber so that its concentration inside and outside the respiratory may be compared.

c. "Test Subject" means the person wearing the respirator for quantitative fit testing.

d. "Normal Standing Position" means standing erect and straight with arms down along the sides and looking straight ahead.

e. "Fit Factor" means the ratio of challenge agent concentration outside with respect to the inside of a respirator inlet covering (facepiece or enclosure).

3. Apparatus

a. *Instrumentation.* Corn oil, sodium chloride or other appropriate aerosol generation, dilution, and measurement systems shall be used for quantitative fit test.

b. *Test chamber.* The test chamber shall be large enough to permit all test subjects to freely perform all required exercises without distributing the challenge agent concentration or the measurement apparatus. The test chamber shall be equipped and constructed so that the challenge agent is effectively isolated from the ambient air yet uniform in concentration throughout the chamber.

c. When testing air-purifying respirators, the normal filter or cartridge element shall be replaced with a high-efficiency particulate filter supplied by the same manufacturer.

d. The sampling instrument shall be selected so that a strip chart may be made of the test showing the rise and fall of challenge agent concentration with each inspiration and expiration at fit factors of at least 2,000.

e. The combination of substitute air-purifying elements (if any), challenge agent, and challenge agent concentration in the test chamber shall be such that the test subject is not exposed in excess of PEL to the challenge agent at any time during the testing process.

f. The sampling port on the test specimen respirator shall be placed and constructed so that there is no detectable leak around the port, a free air flow is allowed into the sampling line at all times and so there is no interference with the fit or performance of the respirator.

g. The test chamber and test set-up shall permit the person administering the test to observe one test subject inside the chamber during the test.

h. The equipment generating the challenge atmosphere shall maintain the concentration of challenge agent constant within a 10 percent variation for the duration of the test.

i. The time lag (interval between an event and its being recorded on the strip chart) of the instrumentation may not exceed 2 seconds.

j. The tubing for the test chamber atmosphere and for the respirator sampling port shall be the same diameter, length and material. It shall be kept as short as possible. The smallest diameter tubing recommended by the manufacturer shall be used.

k. The exhaust flow from the test chamber shall pass through a high-efficiency filter before release to the room.

l. When sodium chloride aerosol is used, the relative humidity inside the test chamber shall not exceed 50 percent.

4. Procedural Requirements

a. The fitting of half-mask respirators should be started with those having multiple sizes and a variety of interchangeable cartridges and canisters such as the MSA Comfr II–M, Norton M, Survivair M A–O M or Scott–M. Use either of the tests outlined below to assure that the facepiece is properly adjusted.

(1) *Positive pressure test.* With the exhaust port(s) blocked the negative pressure of slight inhalation should remain constant for several seconds.

(2) *Negative pressure test.* With the intake port(s) blocked the negative pressure slight inhalation should remain constant for several seconds.

b. After a facepiece is adjusted, the test subject shall wear the facepiece for at least 5 minutes before conducting a qualitative test by using either of the methods described below and using the exercise regime described in 5.a., b., c., d. and e.

(1) *Isoamyl acetate test.* When using organic vapor cartridges, the test subject who can smell the odor should be unable to detect the odor of isoamyl acetate squirted into the air near the most vulnerable portions of the facepiece seal. In a location which is separated from the test area, the test subject shall be instructed to close her/his eyes during the test period. A combination cartridge or canister with organic vapor and high-efficiency filters shall be used when available for the particular mask being tested. The test subject shall be given an opportunity to smell the odor of isoamyl acetate before the test is conducted.

(2) *Irritant fume test.* When using high-efficiency filters, the test subject should be unable to detect the odor of irritant fume (stannic chloride or titanium tetrachloride ventilation smoke tubes) squirted into the air near the most vulnerable portions of the facepiece seal. The test subject shall be instructed to close her/his eyes during the test period.

c. The test subject may enter the quantitative testing chamber only if she or he has obtained a satisfactory fit by as stated in 4.b. of this Appendix.

d. Before the subject enters the test chamber, a reasonably stable challenge agent concentration shall be measured in the test chamber.

e. Immediately after the subject enters the test chamber, the challenge agent concentration inside the respirator shall be measured to ensure that the peak penetration does not exceed 5 percent for a half-mask and 1 percent for a full facepiece.

f. A stable challenge agent concentration shall be obtained prior to the actual start of testing.

g. Respirator restraining straps may not be overtightened for testing. The straps shall be adjusted by the wearer to give a reasonably comfortable fit typical of normal use.

5. *Exercise Regime.* Prior to entering the test chamber, the test subject shall be given complete instructions as to her/his part in the test procedures. The test subject shall perform the following exercises, in the order given, for each independent test.

a. *Normal breathing (NB).* In the normal standing position, without talking, the subject shall breathe normally for at least one minute.

b. *Deep breathing (DB).* In the normal standing position the subject shall do deep breathing for at least one minute pausing so as not to hyperventilate.

c. *Turning head side to side (SS).* Standing in place the subject shall slowly turn his head from side between the extreme positions to each side. The head shall be held at each extreme position for at least 5 seconds. Perform for at least five complete cycles.

d. *Moving head up and down (UD).* Standing in place, the subject shall slowly move his head up and down between the extreme position straight up and the extreme position straight down. The head shall be held at each extreme position for at least 5 seconds. Perform for at least five complete cycles.

e. *Reading (R).* The subject shall read out slowly and loud so as to be heard clearly by the test conductor or monitor. The test subject shall read the "rainbow passage" at the end of this section.

f. *Grimace (G).* The test subject shall grimace, smile, frown, and generally contort the face using the facial muscles. Continue for at least 15 seconds.

g. *Bend over and touch toes (B).* The test subject shall bend at the waist and touch toes and return to upright position. Repeat for at least one minute.

h. *Jogging in place (J).* The test subject shall perform jog in place for at least one minute.

i. *Normal breathing (NB).* In the normal standing position, without talking, the subject shall breathe normally for at least one minute.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond reach, his friends say he is looking for the pot of gold at the end of the rainbow.

6. Termination of Tests

The test shall be terminated whenever any single peak penetration exceeds 5 percent for half-masks and 1 percent for full facepieces. The test subject may be refitted and retested. If two of the three required tests are terminated, the fit shall be deemed inadequate. (See paragraph 4.h.).

7. Calculation of Fit Factors

a. The fit factor determined by the quantitative fit test equals the average concentration inside the respirator.

b. The average test chamber concentration is the arithmetic average of the test chamber concentration at the beginning and of the end of the test.

c. The average peak concentration of the challenge agent inside the respirator shall be the arithmetic average peak concentrations for each of the nine exercises of the test which are computed as the arithmetic average of the peak concentrations found for each breath during the exercise.

d. The average peak concentration for an exercise may be determined graphically if there is not a great variation in the peak concentrations during a single exercise.

8. Interpretation of Test Results

The fit factor measured by the quantitative fit testing shall be the lowest of the three protection factors resulting from three independent tests.

9. Other Requirements

a. The test subject shall not be permitted to wear a half-mask or full facepiece if the minimum fit factor of 250 or 1,250, respectively, cannot be obtained. If hair growth or apparel interfere with a satisfactory fit, then they shall be altered or removed so as to eliminate interference and allow a satisfactory fit. If a satisfactory fit is still not attained, the test subject must use a positive-pressure respirator such as powered air-purifying respirators, supplied air respirator, or self-contained breathing apparatus.

b. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface.

c. If a test subject exhibits difficulty in breathing during the tests, she or he shall be referred to a physician to determine whether the test subject can wear a respirator while performing her or his duties.

d. The test subject shall be given the opportunity to wear the assigned respirator for one week. If the respirator does not provide a satisfactory fit during actual use, the test subject may request another QNFT which shall be performed immediately.

e. A respirator fit factor card shall be issued to these subjects with the following information:

(1) Name.

(2) Date of fit test.

(3) Protection factors obtained through each manufacturer, model and approval number of respirator tested.

(4) Name and signature of the person that conducted the test.

f. Filters used for qualitative or quantitative fit testing shall be replaced weekly, whenever increased breathing resistance is encountered, or when the test agent has altered the integrity of the filter media.

Organic vapor cartridges/canisters shall be replaced daily or sooner if there is any indication of breakthrough by the test agent.

10. Retesting

In addition, because the sealing of the respirator may be affected, quantitative fit testing shall be repeated immediately when the test subject has a:

(1) Weight change of 20 pounds or more,

(2) Significant facial scarring in the area of the facepiece seal,

(3) Significant dental changes; i.e.; multiple extractions without prothesis, or acquiring dentures,

(4) Reconstructive or cosmetic surgery, or

(5) Any other condition that may interfere with facepiece sealing.

11. Recordkeeping

a. A summary of all test results shall be maintained for three years. The summary shall include:

(1) Name of test subject.

(2) Date of testing.

(3) Name of the test conductor.

(4) Fit factors obtained from every respirator tested (indicate manufacturer, model, size and approval number).

b. A copy of all test data including the strip chart and results shall be kept for at least five years.

Construction Standard

PART 1926—[AMENDED]

5. The authority citation for Part 1926 would continue to read as follows:

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Standards Act) (Construction Safety Act) (40 U.S.C. 333); secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), or 9-83 (48 FR 35736), as applicable; and 29 CFR Part 1911.

6. By adding a new § 1926.60 to read as follows:

§ 1926.60 Methylenedianiline.

(a) *Scope and application.* This section applies to all construction work as defined in 29 CFR 1910.12(b), in which there is exposure to MDA, including but not limited to the following:

(1) Construction, alteration, repair, maintenance, or renovation of structures, substrates, or portions thereof, that contain MDA;

(2) Installation or the finishing of surfaces with products containing MDA;

(3) MDA spill/emergency cleanup at construction sites; and

(4) Transportation, disposal, storage, or containment of MDA or products containing MDA on the site or location at which construction activities are performed.

(b) *Definitions.* For the purpose of this section, the following definitions shall apply:

"Action level" means a concentration of airborne MDA of 5 ppb as an eight (8)-hour time-weighted average.

"Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor; or designee.

"Authorized person" means any person specifically authorized by the employer whose duties require the person to enter a regulated area, or any person entering such an area as a designated representative of employees for the purpose of exercising the right to observe monitoring and measuring procedures under paragraph ( ) of this section, or any other person authorized by the Act or regulations issued under the Act.

"Container" means any barrel, bottle, can, cylinder, drum, reaction vessel, storage tank, commercial packaging or the like, but does not include piping systems.

"Decontamination area" means an area outside of but as near as practical to the regulated area, consisting of an equipment storage area, wash area, and clean change area, which is used for the decontamination of workers, materials, and equipment contaminated with MDA.

"Director" means the Director of the National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

"Emergency" means any occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which results in an unexpected and potentially hazardous release of MDA.

"Employee exposure" means exposure to MDA which would occur if the employee were not using personal protective equipment and clothing.

"Equipment area (change area)" means an area located within the decontamination area that is supplied with impermeable bags or containers for the disposal of contaminated protective clothing and equipment.

4,4'-Methylenedianiline or "MDA" means the chemical, 4,4'-diaminodiphenylmethane, having a Chemical Abstracts Service number of 101-77-9, in gaseous, liquid, or solid form. The definition also includes the salts of MDA. The definition includes MDA contained in liquid mixtures and the MDA vapors released by these liquids. The definition does not include unreacted MDA, physically bound, such that it is incapable of releasing MDA into the workplace or posing a dermal absorption hazard.

"Objective and historical data" means monitoring data for construction jobs that are substantially similar. The data must be scientifically sound, the characteristics of the MDA containing material must be similar and the environmental conditions comparable.

"Regulated area" means an area where airborne concentrations of MDA exceed, or can reasonably be expected to exceed, the permissible exposure limit or where the potential for dermal exposure exists.

"STEL" means short term exposure limit of 100 ppb as determined by any 15-minute sample period.

(c) *Permissible exposure limits.* The employer shall assure that no employee is exposed to an airborne concentration of MDA in excess of ten parts per billion (10 ppb) as an 8-hour time-weighted average and a STEL of one hundred parts per billion (100 ppb).

(d) *Communication among employers.* On multi-employer worksites, an employer performing work involving the application of MDA or materials containing MDA for which establishment of one or more regulated areas is required shall inform other employers on the site of the nature of the employer's work with MDA and of the existence of, and requirements pertaining to, regulated areas.

(e) *Emergency situations*—(1) *Written plan.* (i) A written plan for emergency situations shall be developed for each workplace where there is a possibility of an emergency. Appropriate portions of the plan shall be implemented in the event of an emergency.

(ii) The plan shall specifically provide that employees engaged in correcting emergency conditions shall be equipped with the appropriate personal protective equipment and clothing as required in paragraph (j) of this section until the emergency is abated.

(iii) The plan shall specifically include provisions for alerting and evacuating affected employees as well as the elements prescribed in 29 CFR 1910.38, "Employee emergency plans and fire prevention plans."

(2) *Alerting employees.* Where there is the possibility of employee exposure to MDA due to an emergency, means shall be developed to promptly alert employees who have the potential to be directly exposed. Affected employees not engaged in correcting emergency conditions shall be evacuated immediately in the event that an emergency occurs. Means shall also be developed for alerting other employees who may be exposed as a result of the emergency.

(f) *Exposure monitoring*—(1) *General.* (i) Determinations of employee exposure shall be made from breathing zone air samples that are representative of each employee's exposure to airborne MDA over an eight (8) hour period.

Determination of employee exposure to the STEL shall be made from breathing zone air samples collected over a 15 minute sampling period.

(ii) Representative employee exposure shall be determined on the basis of one or more samples representing full shift exposure for each shift for each job classification in each work area where exposure to MDA may occur.

(iii) Where the employer can document that exposure levels are equivalent for similar operations in different work shifts, the employer shall only be required to determine representative employee exposure for that operation during one shift.

(2) *Initial monitoring.* Each employer who has a workplace or work operation covered by this standard shall perform initial monitoring to determine accurately the airborne concentrations of MDA to which employees may be exposed except where the employer relies on objective or historical data in lieu of the results obtained from initial monitoring to determine employee exposure.

(3) *Periodic monitoring and monitoring frequency.* (i) If the monitoring required by paragraph (f)(2) of this section reveals employee exposure at or above the action level, but at or below the PELs, the employer shall repeat such monitoring for each such employee at least every six (6) months.

(ii) If the monitoring required by paragraph (f)(2) of this section reveals employee exposure above the PELs, the employer shall repeat such monitoring for each such employee at least every three (3) months.

(iii) The employer may alter the monitoring schedule from every three months to every six months for any employee for whom two consecutive measurements taken at least 7 days apart indicate that the employee exposure has decreased to below the PELs but above the action level.

(4) *Termination of monitoring.* (i) If the initial monitoring required by paragraph (f)(2) of this section reveals employee exposure to be below the action level, the employer may discontinue the monitoring for that employee, except as otherwise required by paragraph (f)(5) of this section.

(ii) If the periodic monitoring required by paragraph (f)(3) of this section reveals that employee exposures, as indicated by at least two consecutive measurements taken at least 7 days apart, are below the action level the employer may discontinue the monitoring for that employee, except as otherwise required by paragraph (f)(5) of this section.

(5) *Additional monitoring.* The employer shall institute the exposure monitoring required under paragraphs (f)(2) and (f)(3) of this section when there has been a change in production process, chemicals present, control equipment, personnel, or work practices which may result in new or additional exposures to MDA, or when the employer has any reason to suspect a change which may result in new or additional exposures.

(6) *Accuracy of monitoring.* Monitoring shall be accurate, to a confidence level of 95 percent, to within plus or minus 25 percent for airborne concentrations of MDA.

(7) *Employee notification of monitoring results.* (i) The employer shall, within 15 working days after the receipt of the results of any monitoring performed under this standard, notify each employee of these results, in writing, either individually or by posting of results in an appropriate location that is accessible to affected employees.

(ii) The written notification required by paragraph (f)(7)(i) of this section shall contain the corrective action being taken by the employer or any other protective measures which have been implemented to reduce the employee exposure to or below the PELs, wherever the PELs are exceeded.

(8) *Visual monitoring.* The empoyer shall make routine inspections of employee dermal areas potentially exposed to MDA. If the employer determines that the employee has been exposed to MDA, the employer shall:

(i) Determine the source of exposure;

(ii) Implement protective measures to correct the hazard; and

(iii) Maintain records of the corrective actions in accordance with paragraph (n) of this section.

(g) *Regulated areas*—(1) *Establishment*—(i) *Airborne exposures.* The employer shall establish regulated areas where the potential exists for exposure to airborne concentrations of MDA in excess of the permissible exposure limits.

(ii) *Dermal exposures.* Where employees are engaged in the handling, application, or use of non-airborne MDA liquids or mixtures the employer shall establish those work areas as regulated areas.

(2) *Demarcation.* Regulated areas shall be demarcated from the rest of the workplace in a manner that minimizes the number of persons potentially exposed.

(3) *Access.* Access to regulated areas shall be limited to authorized persons.

(4) *Personal protective equipment and clothing.* Each person entering a regulated area shall be supplied with, and required to use, the appropriate personal protective clothing and equipment in accordance with paragraphs (h) and (i) of this section.

(5) *Prohibited activities.* The employer shall ensure that employees do not eat, drink, smoke, chew tobacco or gum, or apply cosmetics in regulated areas.

(h) *Methods of compliance*—(1) *Engineering controls and work practices and respirators.* (i) The employer shall use one or any combination of the following control methods to achieve compliance with the permissible exposure limits prescribed by paragraph (c) of this section:

(A) Local exhaust ventilation equipped with HEPA filter dust collection systems;

(B) General ventilation systems;

(C) Use of work practices or other engineering controls such as isolation and enclosure that the Assistant Secretary can show to be feasible.

(ii) Wherever the feasible engineering controls and work practices which can be instituted are not sufficient to reduce employee exposure to or below the PELs, the employer shall use them to reduce employee exposure to the lowest levels achievable by these controls and shall supplement them by the use of respiratory protective devices which comply with the requirements of paragraph (i) of this section.

(2) *Special provisions.* For workers engaged in spray application methods, respiratory protection must be used in addition to feasible engineering controls and work practices to reduce employee exposure at or below the TWA and the STEL.

(3) *Prohibitions.* Compressed air shall not be used to remove MDA, unless the compressed air is used in conjunction with an enclosed ventilation system designed to capture the dust cloud created by the compressed air.

(4) *Employee rotation.* The employer shall not use employee rotation as a means of compliance with the exposure limits prescribed in paragraph (c) of this section.

(5) *Compliance program.* (i) The employer shall establish and implement a written program to reduce employee exposure to or below the PELs by means of engineering and work practice controls, as required by paragraph (i)(1) of this section, and by use of respiratory protection where permitted under this section.

(ii) Upon request this written program shall be furnished for examination and

copying to the Assistant Secretary, the Director, affected employees and designated employee representatives. The employer shall review such plans at least once every 12 months in order to reflect the current status of the program.

(i) *Respiratory protection.* (1) *General.* The employer shall provide respirators and ensure that they are used, where required by this section. Respirator's shall be used in the following circumstances.

(i) During the time period necessary to install or implement feasible engineering and work practice controls;

(ii) In work operations such as maintenance and repair activities and spray application processes for which engineering and work practice controls are not feasible;

(iii) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the PELs; and

(iv) In emergencies.

(2) *Respirator selection.* (i) Where respirators are required or allowed under this section, the employer shall select and provide, at no cost to the employee, the appropriate respirators as specified in table I, and shall assure that the employee uses the respirator provided.

(ii) The employer shall select respirators from among those jointly approved by the Mine Safety and Health Administration and the National Institute for Occupational Safety and Health under the provisions of 30 CFR Part 11.

(iii) Any employee who cannot wear a negative pressure respirator shall be given the option of wearing a positive pressure respirator or any supplied-air respirator operated in the continuous flow or pressure demand mode.

(3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with 29 CFR 1910.134 (b), (d), (e), and (f).

(4) *Respirator use.* (i) Where air-purifying respirators (cartridge or canister) are used, the employer shall replace the air purifying element as needed to maintain the effectiveness of the respirator. The employer shall ensure that each cartridge is dated at the beginning of use.

(ii) Employees who wear respirators shall be allowed to leave the regulated area to readjust the facepiece or to wash their face and to wipe clean the facepieces on their respirators in order to minimize potential skin irritation associated with respirator use.

TABLE I.—RESPIRATORY PROTECTION FOR MDA

Airborne concentration of MDA or condition of use	Respirator type
(a) Less than or equal to 10 × PEL.	(1) Half-mask respirator with HEPA [1] cartridge. [2]
(b) Less than or equal to 50 × PEL.	(1) Full facepiece respirator with HEPA [1] cartridge or canister. [2]
(c) Less than or equal to 1000 × PEL.	(1) Full facepiece powered air-purifying respirator with HEPA [1] cartridge. [2]
(d) Greater than 1000 × PEL or.	(1) Self-contained breathing unknown concentration apparatus with full facepiece in positive pressure mode. (2) Full facepiece positive pressure demand supplied-air respirator with auxiliary self-contained air supply.
(e) Escape	(1) Any full facepiece air-purifying respirator with HEPA [1] cartridges. [2] (2) Any positive pressure or continuous flow self-contained breathing apparatus with full facepiece or hood.
(f) Firefighting	(1) Full facepiece self-contained breathing apparatus in positive pressure mode.

[1] High Efficiency Particulate in. Air filter (HEPA) means a filter that is at least 99.97 percent efficient against mono-dispersed particles of 0.3 micrometers or larger.

[2] Combination HEPA/Organic Vapor Cartridges shall be used whenever MDA in liquid form or a process requiring heat is used.

NOTE—Respirators assigned for higher environmental concentrations may be used at lower concentrations.

(5) *Respirator fit testing.* (i) The employer shall perform and record the results of either quantitative or qualitative fit tests at the time of initial fitting and at least annually thereafter for each employee wearing a negative pressure respirator. The test shall be used to select a respirator facepiece which provides the required protection as prescribed in Table 1.

(ii) The employer shall follow the test protocols outlined in Appendix E of this standard for whichever type of fit testing the employer chooses.

(j) *Protective work clothing and equipment*—(1) *Provision and use.* Where the likelihood for dermal contact or eye irritation resulting from MDA exposure exists, the employer shall provide, at no cost to the employee, and ensure that the employee uses, appropriate protective work clothing and equipment which prevent contact with MDA such as, but not limited to:

(i) Aprons, coveralls or other full-body work clothing;

(ii) Gloves, head coverings, and foot coverings; and

(iii) Face shields, chemical goggles, or

(iv) Other appropriate protective equipment which comply with § 1910.133 of this part.

(2) *Removal and storage.* (i) The employer shall ensure that employees remove MDA-contaminated protective work clothing and equipment at the end of the work shift only in areas designated as decontamination areas.

(ii) The employer shall ensure that employees remove MDA-contaminated protective work clothing or equipment before eating, drinking, smoking, chewing gum or tobacco, taking breaks or applying cosmetics.

(iii) The employer shall ensure that no employee takes MDA-contaminated work clothing or equipment out of the decontamination areas, except those employees authorized to do so for the purpose of laundering, maintenance, or disposal.

(iv) MDA-contaminated work clothing or equipment shall be placed and stored and transported in sealed, impermeable bags, or other closed impermeable containers.

(v) Containers of MDA-contaminated protective work clothing or equipment which are to be taken out of decontamination areas or the workplace for cleaning, maintenance, or disposal, shall bear labels in accordance with § 1910.1200 of this part.

(3) *Cleaning and replacement.* (i) The employer shall provide the employee with clean protective clothing and equipment. The employer shall ensure that protective work clothing or equipment required by this paragraph is cleaned, laundered, repaired, or replaced at intervals appropriate to maintain its effectiveness.

(ii) The employer shall prohibit the removal of MDA from protective work clothing or equipment by blowing, shaking, or any methods which allow MDA to re-enter the workplace.

(iii) The employer shall ensure that laundering of MDA-contaminated clothing shall be done so as to prevent the release of MDA in the workplace.

(iv) Any employer who gives MDA-contaminated clothing to another person for laundering shall inform such person of the requirement to prevent the release of MDA.

(v) The employer shall inform any person who launders or cleans protective clothing or equipment contaminated with MDA of the potentially harmful effects of exposure.

(4) *Visual examination.* (i) The employer shall ensure that employees' work clothing is examined periodically for rips or tears that may occur during performance of work.

(ii) When rips or tears are detected, the protective equipment or clothing shall be repaired and replaced immediately.

(k) *Hygiene facilities and practices*—(1) *General.* (i) The employer shall provide clean change areas for employees required to work in regulated areas or required by paragraph (j)(1) of this section to wear protective clothing. *Exception:* In lieu of the change area requirement specified in paragraph (k)(1)(i), the employer may permit employees engaged in small scale, short duration operations, to clean their protective clothing or dispose of the protective clothing before such employees leave the area where the work was performed.

(ii) *Change areas.* The employer shall ensure that change areas are equipped with separate storage facilities for protective clothing and street clothing, in accordance with § 1910.141(e).

(iii) *Equipment area.* The equipment area shall be supplied with impermeable, labeled bags and containers for the containment and disposal of contaminated protective clothing and equipment.

(2) *Shower area.* (i) Shower facilities shall be provided which comply with 29 CFR 1910.141(d)(3) wherever the possibility of employee exposure to airborne levels of MDA in excess of the action level.

(ii) Where the employee is exposed only to non-airborne liquid mixtures containing MDA, the employer shall ensure that materials spilled on the skin are removed as soon as possible by methods which do not facilitate the dermal absorption of MDA.

(3) *Lunch areas.* (i) Whenever food or beverages are consumed at the workplace and employees are exposed to MDA the employer shall provide lunch areas where MDA levels are below the action level and where eating surfaces are free of MDA accumulations.

(ii) The employer shall ensure that employees wash their hands and faces with soap and water prior to eating, drinking, smoking, or applying cosmetics.

(iii) The employer shall ensure that employees do not enter lunch facilities with contaminated protective work clothing or equipment.

(l) *Communication of hazards to employees*—(1) *Signs and labels:* (i) The employer shall post and maintain legible signs demarcating regulated areas and entrances of accessways to regulated areas that bear the following legend:

DANGER

MDA

MAY CAUSE CANCER

LIVER TOXIN

AUTHORIZED PERSONNEL ONLY

RESPIRATORS AND PROTECTIVE CLOTHING MAY BE REQUIRED TO BE WORN IN THIS AREA

(ii) The employer shall ensure that labels or other appropriate forms of warning are provided for containers of MDA within the workplace. The labels shall comply with the requirements of 29 CFR 1910.1200(f) and shall include one of the following legends:

(A) For pure MDA

DANGER

CONTAINS MDA

MAY CAUSE CANCER

LIVER TOXIN

(B) For mixtures containing MDA

DANGER

CONTAINS MDA

CONTAINS MATERIALS WHICH MAY CAUSE CANCER

LIVER TOXIN

(2) *Material safety data sheets* (MSDS). Employers shall obtain or develop, and shall provide access to their employees, to a material safety data sheet (MSDS) for MDA.

(3) *Information and training.* (i) The employer shall provide employees with information and training on MDA, in accordance with 29 CFR 1910.1200(h), at the time of initial assignment and at least annually thereafter.

(ii) In addition to the information required under 29 CFR 1910.1200, the employer shall:

(A) Provide an explanation of the contents of this section, including appendices A and B, and indicate to employees where a copy of the standard is available.

(B) Describe the medical surveillance program required under paragraph (n) of this section, and explain the information contained in Appendix C, and

(C) Describe the medical removal provision required under paragraph (n) of this section.

(4) *Access to training materials.* (i) The employer shall make readily available to all affected employees, without cost, all written materials relating to the employee training program, including a copy of this regulation.

(ii) The employer shall provide to the Assistant Secretary and the Director, upon request, all information and training materials relating to the employee information and training program.

(m) *Housekeeping.* (1) All surfaces shall be maintained as free as practicable of visible accumulations of MDA.

(2) The employer shall institute a program for detecting MDA leaks, spills, and discharges, including regular visual inspections of operations involving liquid or solid MDA.

(3) All leaks shall be repaired and liquid or dust spills cleaned up promptly.

(4) Surfaces contaminated with MDA may not be cleaned by the use of compressed air.

(5) Shoveling, dry sweeping, and other methods of dry clean-up of MDA may be used where HEPA filtered vacuuming and/or wet cleaning are not feasible or practical.

(6) *Waste disposal.* Waste, scrap, debris, bags, containers, equipment, and clothing contaminated with MDA shall be collected and disposed of in a manner to prevent the re-entry of MDA into the workplace.

(n) *Medical surveillance*—(1) *General.* (i) The employer shall make available a medical surveillance program for employees exposed to MDA accordingly:

(A) Employees exposed at or above the action level for 30 or more days per year;

(B) Employees who have the likelihood of dermal exposure for more than 15 days per year;

(C) Employees who have been exposed to an emergency situation; and

(D) Employees whom the employer has reason to believe are being dermally exposed in accordance with paragraph (g)(8) of this section.

(ii) The employer shall ensure that all medical examinations and procedures are performed by or under the supervision of a licensed physician at a reasonable time and place, and provided without cost to the employee.

(2) *Initial examinations.* (i) Within 60 days of the effective date of this standard, or before the time of initial assignment, the employer shall provide each employee covered by paragraph (n)(1)(i) of this section with a medical examination including the following elements:

(A) A detailed history which includes: (*1*) past work exposure to MDA or any other toxic substances; (*2*) a history of drugs, alcohol, tobacco, and medication routinely taken (duration and quantity); and (*3*) a history of dermatitis, chemical

skin sensitization, or previous hepatic disease.

(B) A physicial examination which includes all routine physicial examination parameters, skin examination, and examination for signs of liver disease.

(C) Laboratory tests including liver function tests and urinalysis.

(D) Additional tests as necessary in the opinion of the physician.

(ii) No initial medical examination is required if adequate records show that the employee has been examined in accordance with the requirements of this section within the previous six months prior to the effective date of this standard or prior to the date of initial assignment.

(3) *Periodic examinations.* (i) The employer shall provide each employee covered by this section with a medical examination at least annually following the initial examination. These periodic examinations shall include at least the following elements:

(A) A brief history regarding any new exposure to potential liver toxins, changes in drug, tobacco, and alcohol intake, and the appearance of physical signs relating to the liver, and the skin;

(B) The appropriate tests and examinations including liver function tests and skin examinations;

(C) Appropriate additional tests or examinations as deemed necessary by the physician.

(ii) If in the physician's opinion the results of liver function tests indicate an abnormality, the employee shall be removed from further MDA exposure in accordance with paragraph (o)(9) of this section. Repeat liver function tests shall be conducted on advice of the physician.

(4) *Emergency examinations.* If the employer determines that the employee has been exposed to a potentially hazardous amount of MDA in an emergency situation under paragraph (d) of this section, the employer shall provide medical examinations in accordance with paragraph (h)(3) (i) and (ii) of this section. If the results of liver function testing indicate an abnormality, the employee shall be removed in accordance with paragraph (o)(9) of this section. Repeat liver function tests shall be conducted on the advice of the physician. If the results of the tests are normal, tests must be repeated two to three weeks from the initial testing. If the results of the second set of tests are normal and on the advice of the physician, no additional testing is required.

(5) *Additional examinations.* Where the employee develops signs and symptoms associated with exposure to MDA, the employer shall provide the employee with an additional medical examination including liver function tests. If the results of liver function tests indicate an abnormality, the employee shall be removed in accordance with paragraph (n)(9) of this section. Repeat liver function tests shall be conducted on the advice of the physician. If the results of the tests are normal, tests must be repeated two to three weeks from the initial testing. If the results of the second set of tests are normal and on the advice of the physician, no additional testing is required.

(6) *Multiple physician review mechanism.* (i) If the employer selects the initial physician who conducts any medical examination or consultation provided to an employee under this section, and the employee has signs or symptoms which could include an abnormal liver function test, and the employee disagrees with the opinion of the examining physician, and this opinion could affect the employee's job status, he may designate a mutually acceptable internist as a second physician, accordingly:

(A) To review any findings, determinations or recommendations of the initial physician; and

(B) To conduct such examinations, consultations, and laboratory tests as the second physician deems necessary to facilitate this review.

(ii) The employer shall promptly notify an employee of the right to seek a second medical opinion after each occasion that an initial physician conducts a medical examination or consultation pursuant to this section. The employer may condition its participation in, and payment for, the multiple physician review mechanism upon the employee doing the following within fifteen (15) days after receipt of the foregoing notification, or receipt of the initial physician's written opinion, whichever is later:

(A) The employee informing the employer that he or she intends to seek a second medical opinion, and

(B) The employee initiating steps to make an appointment with a second physician.

(iii) If the findings, determinations, or recommendations of the second physician differ from those of the initial physician, then the employer and the employee shall assure that efforts are made for the two physicians to resolve any disagreement.

(iv) If the two physicians have been unable to quickly resolve their disagreement, then the employer and the employee through their respective physicians shall designate a third physician:

(A) To review any findings, determinations, or recommendations of the prior physicians; and

(B) To conduct such examinations, consultations, laboratory tests, and discussions with the prior physicians as the third physician deems necessary to resolve the disagreement of the prior physicians.

(v) The employer shall act consistent with the findings, determinations, and recommendations of the second physician, unless the employer and the employee reach a mutually acceptable agreement.

(7) *Information provided to the examining physician.* (i) The employer shall provide the following information to the examining physician:

(A) A copy of this regulation and its appendices;

(B) A description of the affected employee's duties as they relate to the employee's potential exposure to MDA;

(C) The employee's current actual or representative MDA exposure level;

(D) A description of any personal protective equipment used or to be used; and

(E) Information from previous employment related medical examinations of the affected employee.

(ii) The employer shall provide the foregoing information to a second physician under this section upon request either by the second physician, or by the employee.

(8) *Physician's written opinion.* (i) For each examination under this section, the employer shall obtain, and provide the employee with a copy of, the examining physician's written opinion within 15 days of its receipt. The written opinion shall include the following:

(A) The occupationally pertinent results of the medical examination and tests;

(B) The physician's opinion concerning whether the employee has any detected medical conditions which would place the employee at increased risk of material impairment of health from exposure to MDA;

(C) The physician's recommended limitations upon the employee's exposure to MDA or upon the employee's use of protective clothing or equipment and respirators.

(D) A statement that the employee has been informed by the physician of the results of the medical examination and any medical conditions resulting from MDA exposure which require further explanation or treatment.

(ii) The written opinion obtained by the employer shall not reveal specific findings or diagnoses unrelated to occupational exposures.

(9) *Medical removal*—(i) *Temporary medical removal of an employee*—(A) *Temporary removal resulting from occupational exposure.* The employee shall be removed from exposure to MDA following an initial examination (paragraph (n)(2)), periodic examination (paragraph (n)(3)), an additional examination (paragraph (n)(5)), or an emergency situation (paragraph (e)) accordingly:

(*1*) When the employee exhibits signs and/or symptoms indicative of acute exposure to MDA, the employer shall remove the employee from exposure to MDA and provide the employee with medical surveillance in accordance with paragraph (o)(5) of this section. Liver function tests and physical examinations shall be provided in accordance with the provisions set forth in the medical surveillance paragraphs (n) (2) through (5) of this section.

(*2*) When the examining physician determines that an employee's abnormal liver function tests are not associated with MDA exposure but that the abnormalities may be exacerbated as a result of occupational exposure to MDA.

(B) *Temporary removal due to a final medical determination.* (*1*) The employer shall remove an employee from work having an exposure to MDA at or above the action level or where the potential for dermal exposure exists on each occasion that a final medical determination results in a medical finding, determination, or opinion that the employee has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to MDA.

(*2*) For the purposes of this section, the phrase "final medical determination" shall mean the outcome of the physician review mechanism or alternate medical determination mechanism used pursuant to the medical surveillance provisions of this section.

(*3*) Where a final medical determination results in any recommended special protective measures for an employee, or limitations on an employee's exposure to MDA, the employer shall implement and act consistent with the recommendation.

(ii) *Return of the employee to former job status.* (A) The employer shall return an employee to his or her former job status:

(*1*) When the employee no longer shows signs or symptoms of exposure to MDA, or upon the advice of the physician.

(*2*) When a subsequent final medical determination results in a medical finding, determination, or opinion that the employee no longer has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to MDA.

(B) For the purposes of this section, the requirement that an employer return an employee to his or her former job status is not intended to expand upon or restrict any rights an employee has or would have had, absent temporary medical removal, to a specific job classification or position under the terms of a collective bargaining agreement.

(iii) *Removal of other employee special protective measure or limitations.* The employer shall remove any limitations placed on an employee or end any special protective measures provided to an employee pursuant to a final medical determination when a subsequent final medical determination indicates that the limitations or special protective measures are no longer necessary.

(iv) *Employer options pending a final medical determination.* Where the physician review mechanism, or alternate medical determination mechanism used pursuant to the medical surveillance provisions of this section, has not yet resulted in a final medical determination with respect to an employee, the employer shall act as follows:

(A) *Removal.* The employer may remove the employee from exposure to MDA, provide special protective measures to the employee, or place limitations upon the employee, consistent with the medical findings, determinations, or recommendations of the physician who has reviewed the employee's health status.

(B) *Return.* The employer may return the employee to his or her former job status, and end any special protective measures provided to the employee, consistent with the medical findings, determinations, or recommendations of any of the physicians who have reviewed the employee's health status, with two exceptions:

(*1*) If the initial removal, special protection, or limitation of the employee resulted from a final medical determination which differed from the findings, determinations, or recommendations of the initial physician or

(*2*) The employee has been on removal status for the preceding six months as a result of exposure to MDA, then the employer shall await a final medical determination.

(v) *Medical removal protection benefits*—(A) *Provisions of medical removal protection benefits.* The employer shall provide to an employee up to six (6) months of medical removal protection benefits on each occasion that an employee is removed from exposure to MDA or otherwise limited pursuant to this section.

(B) *Definition of medical removal protection benefits.* For the purposes of this section, the requirement that an employer provide medical removal protection benefits means that the employer shall maintain the earnings, seniority, and other employment rights and benefits of an employee as though the employee had not been removed from normal exposure to MDA or otherwise limited.

(C) *Follow-up medical surveillance during the period of employee removal or limitations.* During the period of time that an employee is removed from normal exposure to MDA or otherwise limited, the employer may condition the provision of medical removal protection benefits upon the employee's participation in follow-up medical surveillance made available pursuant to this section.

(D) *Workers' compensation claims.* If a removed employee files a claim for workers' compensation payments for a MDA-related disability, then the employer shall continue to provide medical removal protection benefits pending disposition of the claim. To the extent that an award is made to the employee for earnings lost during the period of removal, the employer's medical removal protection obligation shall be reduced by such amount. The employer shall receive no credit for workers' compensation payments received by the employee for treatment-related expenses.

(E) *Other credits.* The employer's obligation to provide medical removal protection benefits to a removed employee shall be reduced to the extent that the employee receives compensation for earnings lost during the period of removal either from a publicly or employer-funded compensation program, or receives income from employment with any employer made possible by virtue of the employee's removal.

(F) *Employees who do not recover within the 6 months of removal.* The employer shall take the following measures with respect to any employee removed from exposure to MDA:

(*1*) The employer shall make available to the employee a medical examination pursuant to this section to obtain a final medical determination with respect to the employee;

(*2*) The employer shall assure that the final medical determination obtained indicates whether or not the employee may be returned to his or her former job

status, and, if not, what steps should be taken to protect the employee's health;

(3) Where the final medical determination has not yet been obtained, or once obtained indicates that the employee may not yet be returned to his or her former job status, the employer shall continue to provide medical removal protection benefits to the employee until either the employee is returned to former job status, or a final medical determination is made that the employee is incapable of ever safely returning to his or her former job status; and

(4) Where the employer acts pursuant to a final medical determination which permits the return of the employee to his or her former job status despite what would otherwise to be an unacceptable liver function test, later questions concerning removing the employee again shall be decided by a final medical determination. The employer need not automatically remove such an employee pursuant to the MDA removal criteria provided by this section.

(vi) *Voluntary removal or restriction of an employee.* Where an employer, although not required by this section to do so, removes an employee from exposure to MDA or otherwise places limitations on an employee due to the effects of MDA exposure on the employee's medical condition, the employer shall provide medical removal protection benefits to the employee equal to that required by paragraph (o)(9)(v) of this section.

(o) *Recordkeeping*—(1) *Objective data for exempted operations.* (i) Where the employer has relied on objective data that demonstrate that products made from or containing MDA are not capable of releasing MDA or do not present a dermal exposure problem under the expected conditions of processing, use, or handling to exempt such operations from the initial monitoring requirements under paragraph (f)(2) of this section, the employer shall establish and maintain an accurate record of objective data reasonably relied upon in support of the exemption.

(ii) The record shall include at least the following information:

(A) The produce qualifying for exemption;

(B) The source of the objective data;

(C) The testing protocol, results of testing, and/or analysis of the material for the release of MDA;

(D) A description of the operation exempted and how the data support the exemption; and

(E) Other data relevant to the operations, materials, processing, or employee exposures covered by the exemption.

(iii) The employer shall maintain this record for the duration of the employer's reliance upon such objective data.

(2) The employer may utilize the services of competent organizations such as industry trade associations and employee associations to maintain the records required in this section.

(3) *Exposure measurements.* (i) The employer shall keep an accurate record of all measurements taken to monitor employee exposure to MDA.

(ii) This record shall include at least the following information:

(A) The date of measurement;

(B) The operation involving exposure to MDA;

(C) Sampling and analytical methods used and evidence of their accuracy;

(D) Number, duration, and results of samples taken;

(E) Type of protective devices worn, if any; and

(F) Name, social security number, and exposure of the employees whose exposures are represented.

(iii) The employer shall maintain this record for at least thirty (30) years, in accordance with 29 CFR 1910.20.

(4) *Medical surveillance.* (i) The employer shall establish and maintain an accurate record for each employee subject to medical surveillance by paragraph (n) of this section, in accordance with 29 CFR 1910.20.

(ii) The record shall include at least the following information:

(A) The name and social security number of the employee;

(B) A copy of the employee's medical examination results, including the medical history, questionnaire responses, results of any tests, and physician's recommendations.

(C) Physician's written opinions;

(D) Any employee medical complaints related to exposure to MDA; and

(E) A copy of the information provided to the physician as required by paragraph (n) of this section.

(iii) The employer shall ensure that this record is maintained for the duration of employment plus thirty (30) years, in accordance with 29 CFR 1910.20.

(5) *Training records.* The employer shall maintain all employee training records for one (1) year beyond the last date of employment.

(6) *Availability.* (i) The employer, upon written request, shall make all records required to be maintained by this section available to the Assistant Secretary and the Director for examination and copying.

(ii) The employer, upon request, shall make any exposure records required by paragraphs (f) and (o) of this section available for examination and copying to affected employees, former employees, designated representatives, and the Assistant Secretary, in accordance with 29 CFR 1910.20(a)–(e) and (g)–(i).

(iii) The employer, upon request, shall make employee medical records required by paragraphs (n) and (o) of this section available for examination and copying to the subject employee, anyone having the specific written consent of the subject employee, and the Assistant Secretary, in accordance with 29 CFR 1910.20.

(7) *Transfer of records.* (i) The employer shall comply with the requirements concerning transfer of records set forth in 29 CFR 1910.20(h).

(ii) Whenever the employer ceases to do business and there is no successor employer to receive and retain the records for the prescribed period, the employer shall notify the Director at least 90 days prior to disposal and, upon request, transmit them to the Director.

(p) *Observation of monitoring*—(1) *Employee observation.* The employer shall provide affected employees, or their designated representatives, an opportunity to observe the measuring or monitoring of employee exposure to MDA conducted pursuant to paragraph (f) of this section.

(2) *Observation procedures.* When observation of the measuring or monitoring of employee exposure to MDA requires entry into areas where the use of protective clothing and equipment or respirators is required, the employer shall provide the observer with personal protective clothing and equipment or respirators required to be worn by employees working in the area, assure the use of such clothing and equipment or respirators, and require the observer to comply with all other applicable safety and health procedures.

(q) *Effective date.* This standard shall become effective [insert date 30 days after publication of the final rule].

(r) *Appendices.* The information contained in the appendices to this section is not intended by itself, to create any additional obligations not otherwise imposed by this standard nor detract from any existing obligation.

(s) *Startup dates.* All obligations of this standard commence on the effective date except as follows:

(1) Initial monitoring under paragraph (f)(2) of this section shall be completed as soon as possible but not later than 90 days from the effective date.

(2) Medical examinations under paragraph (n) of this section shall be completed as soon as possible but no later than 60 days from the effective date.

(3) Emergency plans required by paragraph (e) of this section shall be provided and available for inspection and copying as soon as possible but no later than 30 days from the effective date.

(4) Initial training and education shall be completed as soon as possible but no later than 30 days from the effective date.

(5) Hygiene and lunchroom facilities under paragraph (k) of this section shall be in operation as soon a possible but no later than 1 year from the effective date.

(6) Respiratory Protection required by paragraph (i) of this section shall be provided as soon as possible but no later than 30 days from the effective date.

(7) Written compliance plans required by paragraph (h)(5) of this section shall be completed and available for inspection and copying as soon as possible but no later than 30 days from the effective date.

(8) The permissible exposure limits in paragraph (c) of this section shall become effective 90 days from the effective date.

(9) Engineering controls needed to achieve the PELs must be in place one year from the effective date.

(10) Personal protective clothing required by paragraph (j) of this section shall be available 30 days from the effective date.

Appendix A to § 1925.60—Substance Data Sheet, for 4-4'-Methylenedianiline

I. Substance Identification

A. Substance: Methylenedianiline (MDA)

B. Permissible Exposure:

1. Airborne: Ten parts per billion parts of air (10 ppb), time-weighted average (TWA) for an 8-hour workday and an action level of five parts per billion parts of air (5 ppb).

2. Dermal: Eye contact and skin contact with MDA are not permitted.

C. Appearance and odor: White to tan solid; amine odor.

II. Health Hazard Data

A. Ways in which MDA affects your health. MDA can affect your health if you inhale it, or if it comes in contact with your skin or eyes. MDA is also harmful if you happen to swallow it. Do not get MDA in eyes, on skin, or on clothing.

B. Effects of overexposure. 1. *Short-term (acute) overexposure:* Overexposure to MDA produce fever, chills, loss of appetite, vomiting, jaundice. Contact may irritate skin, eyes and mucous membranes. Sensitization may occur.

2. *Long-term (chronic) exposure:* Repeated or prolonged exposure to MDA, even at relatively low concentrations, may cause cancer. In addition, damage to the liver, kidneys, blood, and spleen may occur with long-term exposure.

3. Reporting signs and symptoms: You should inform your employer if you develop any signs or symptoms which you suspect are caused by exposure to MDA including yellow staining of the skin.

III. Protective Clothing and Equipment

A. Respirators

Respirators are required for those operations in which engineering controls or work practice controls are not adequate or feasible to reduce exposure to the permissible limit. If respirators are worn, they must have the joint Mine Safety and Health Administration and National Institute for Occupational Safety and Health (NIOSH) seal of approval, and cartridges or canisters must be replaced as necessary to maintain the effectiveness of the respirator. If you experience difficulty breathing while wearing a respirator, you may request a positive pressure respirator from your employer. You must be thoroughly trained to use the assigned respirator, and the training will be provided by your employer.

MDA does not have a detectable odor except at levels well above the permissible exposure limits. Do not depend on odor to warn you when a respirator canister is exhausted. If you can smell MDA while wearing a respirator, proceed immediately to fresh air. If you experience difficulty breathing while wearing a respirator, tell your employer.

B. Protective Clothing

You may be required to wear coveralls, aprons, gloves, face shields, or other appropriate protective clothing to prevent skin contact with MDA. Where protective clothing is required, your employer is required to provide clean garments to you, as necessary, to assure that the clothing protects you adequately. Replace or repair impervious clothing that has developed leaks.

MDA should never be allowed to remain on the skin. Clothing and shoes which are not impervious to MDA should not be allowed to become contaminated with MDA, and if they do, the clothing and shoes should be promptly removed and decontaminated. The clothing should be laundered to remove MDA or discarded. Once MDA penetrates shoes or other leather articles, they should not be worn again.

C. Eye Protection

You must wear splashproof safety goggles in areas where liquid MDA may contact your eyes. Contact lenses should not be worn in areas where eye contact with MDA can occur. In addition, you must wear a face shield if your face could be splashed with MDA liquid.

IV. Emergency and First Aid Procedures

A. Eye and Face Exposure

If MDA is splashed into the eyes, wash the eyes for at least 15 minutes. See a doctor as soon as possible.

B. Skin Exposure

If MDA is spilled on your clothing or skin, remove the contaminated clothing and wash the exposed skin with large amounts of soap and water immediately. Wash contaminated clothing before you wear it again.

C. Breathing

If you or any other person breathes in large amounts of MDA, get the exposed person to fresh air at once. Apply artificial respiration if breathing has stopped. Call for medical assistance or a doctor as soon as possible. Never enter any vessel or confined space where the MDA concentration might be high without proper safety equipment and at least one other person present who will stay outside. A life line should be used.

D. Swallowing

If MDA has been swallowed and the patient is conscious, do not induce vomiting. Call for medical assistance or a doctor immediately.

V. Medical Requirements

If you are exposed to MDA at a concentration at or above the action level for more than 30 days per year, or exposed to liquid mixtures more than 15 days per year, your employer is required to provide a medical examination, including a medical history and laboratory tests, within 60 days of the effective date of this standard and annually thereafter. These tests shall be provided without cost to you. In addition, if you are accidentally exposed to MDA (either by ingestion, inhalation, or skin/eye contact) under conditions known or suspected to constitute toxic exposure to MDA, your employer is required to make special examinations and tests available to you.

VI. Observation of Monitoring

Your employer is required to perform measurements that are representative of your exposure to MDA and you or your designated representative are entitled to observe the monitoring procedure. You are entitled to observe the steps taken in the measurement procedure and to record the results obtained. When the monitoring procedure is taking place in an area where respirators or personal protective clothing and equipment are required to be worn, you and your representative must also be provided with, and must wear, the protective clothing and equipment.

VII. Access to Records

You or your representative are entitled to see the records of measurements of your exposure to MDA upon written request to your employer. Your medical examination records can be furnished to your physician or designated representative upon request by you to your employer.

VIII. Precautions for Safe Use, Handling and Storage

A. Material is Combustible

Avoid strong acids and their anhydrides. Avoid strong oxidants. Consult supervisor for disposal requirements.

B. Emergency Clean-up

Wear self-contained breathing apparatus and fully clothe the body in the appropriate personal protective clothing and equipment.

Appendix B to § 1926.60—Substance Technical Guidelines, MDA

I. Identification

A. Substance Identification

1. *Synonyms:* CAS No. 101-77-9. 4,4'-methylenedianiline; 4,4'-methylenebisaniline; methylenedianiline; dianilinomethane.

2. *Formula:* $C_{13}H_{14}N_2$.

II. Physical Data

1. *Appearance and Odor:* White to tan solid; amine odor.

2. *Molecular Weight:* 198.26.

3. *Boiling Point:* 398–399 degrees C at 760 mm Hg.

4. *Melting Point:* 88–93 degrees C (190–100 degrees F).

5. *Vapor Pressure:* 9 mmHg at 232 degrees C.

6. *Evaporation Rate (n-butyl acetate = 1):* Negligible.

7. *Vapor Density (Air = 1):* Not Applicable.

8. *Volatile Fraction by Weight:* Negligible.

9. *Specific Gravity (Water = 1):* Slight.

10. *Heat of Combustion:* −8.40 kcal/g.

11. *Solubility in Water:* Slightly soluble in cold water, very soluble in alcohol, benzene, ether, and many organic solvents.

III. Fire, Explosion, and Reactivity Hazard Data

1. *Flash Point:* 190 degrees C (374 degrees F) Setaflash closed cup.

2. *Flash Point:* 226 degrees C (439 degrees F) Cleveland open cup.

3. *Extinguishing Media:* Water spray; Dry Chemical; Carbon dioxide.

4. *Special Fire Fighting Procedures:* Wear self-contained breathing apparatus and protective clothing to prevent contact with skin and eyes.

5. *Unusual Fire and Explosion Hazards:* Fire or excessive heat may cause production of hazardous decomposition products.

IV. Reactivity Data

1. *Stability:* Stable.

2. *Incompatibility:* Strong oxidizers.

3. *Hazardous Decomposition Products:* As with any other organic material, combustion may produce carbon monoxide. Oxides of nitrogen may also be present.

4. *Hazardous Polymerization:* Will not occur.

V. Spill and Leak Procedures

1. Sweep material onto paper and place in fiber carton.

2. Package appropriately for safe feed to an incinerator or dissolve in compatible waste solvents prior to incineration.

3. Dispose of in an approved incinerator equipped with afterburner and scrubber or contract with licensed chemical waste disposal service.

4. Discharge treatment or disposal may be subject to federal, state, or local laws.

5. Wear appropriate personal protective equipment.

VI. Special Storage and Handling Precautions

A. High exposure to MDA can occur when transferring the substance from one container to another. Such operations should be well ventilated and good work practices must be established to avoid spills.

B. Pure MDA is a solid with a low vapor pressure. Grinding or heating operations increase the potential for exposure.

C. Store away from oxidizing materials.

D. Employers shall advise employees of all areas and operations where exposure to MDA could occur.

VII. Housekeeping and Hygiene Facilities

A. The workplace should be kept clean, orderly, and in a sanitary condition.

The employer should institute a leak and spill detection program for operations involving MDA in order to detect sources of fugitive MDA emissions.

B. Adequate washing facilities with hot and cold water are to be provided and maintained in a sanitary condition. Suitable cleansing agents should also be provided to assure the effective removal of MDA from the skin.

VIII. Common Operations

Common operations in which exposure to MDA is likely to occur include the following: Manufacture of MDA; Manufacture of Methylene diisocyanate; Curing agent for epoxy resin structures; Wire coating operations; and filament winding.

Appendix C to § 1926.60—Medical Surveillance Guidelines for MDA

I. Route of Entry

Inhalation; skin absorption; ingestion. MDA can be inhaled, absorbed through the skin, or ingested.

II. Toxicology

MDA is a suspect carcinogen in humans. There are several reports of liver disease in humans and animals resulting from acute exposure to MDA. A well documented case of an acute cardiomyopathy secondary to exposure to MDA is on record. Numerous human cases of hepatitis secondary to MDA are known. Upon direct contact MDA may also cause damage to the eyes. Dermatitis and skin sensitization have been observed.

Almost all forms of acute environmental hepatic injury in humans involve the hepatic parenchyma and produce hepatocellular jaundice. This agent produces intrahepatic cholestasis. The clinical picture consists of cholestatic jaundice, preceded or accompanied by abdominal pain, fever, and chills. Onset in about 60% of all observed cases is abrupt with severe abdominal pain. In about 30% of observed cases, the illness presented and evolved more slowly and less dramatically, with only slight abdominal pain. In about 10% of the cases only jaundice was evident. The cholestatic nature of the jaundice is evident in the prominence of itching, the histologic predominance of bile stasis, and portal inflammatory infiltration, accompanied by only slight parenchymal injury in most cases, and by the moderately elevated transaminase values. Acute, high doses, however, have been known to cause hepatocellular damage resulting in elevated SGPT, SGOT, alkaline phosphatase and bilirubin.

Absorption through the skin is rapid. MDA is metabolized and excreted over a 48-hour period. Direct contact may be irritating to the skin, causing dermatitis. Also MDA which is deposited on the skin is not thoroughly removed through washing.

MDA may cause bladder cancer in humans. Animal data supporting this assumption is not available nor is conclusive human data. However, human data collected on workers at a helicopter manufacturing facility where MDA is used suggests a higher incidence of bladder cancer among exposed workers.

III. Signs and Symptoms

Skin may become yellow from contact with MDA.

Repeated or prolonged contact with MDA may result in recurring dermatitis (red-itchy, cracked skin) and eye irritation. Inhalation, ingestion or absorption through the skin at high concentrations may result in hepatitis, causing symptoms such as fever and chills, nausea and vomiting, dark urine, anorexia, rash, right upper quadrant pain and jaundice. Corneal burns may occur when MDA is splashed in the eyes.

IV. Treatment of Acute Toxic Effects/ Emergency Situation

If MDA gets into the eyes, immediately wash eyes with large amounts of water. If MDA is splashed on the skin, immediately wash contaminated skin with mild soap or detergent. Employee should be removed from exposure and given proper medical treatment. Medical tests required under the emergency section of the medical surveillance section (m)(4) must be conducted.

If the chemical is swallowed do not induce vomiting but remove by gastric lavage.

Appendix D to § 1926.60—Sampling and Analytical Methods for MDA Monitoring and Measurement Procedures

Measurements taken for the purpose of determining employee exposure to MDA are best taken so that the representative average 8-hour exposure may be determined from a single 8-hour sample or two (2) 4-hour samples. Short-time interval samples (or grab samples) may also be used to determine average exposure level if a minimum of five measurements are taken in a random manner over the 8-hour work shift. Random sampling means that any portion of the work shift has the same chance of being sampled as any other. The arithmetic average of all such random samples taken on one work shift is an estimate of an employee's average level of exposure for that work shift. Air samples should be taken in the employee's breathing zone (air that would most nearly represent that inhaled by the employee).

There are a number of methods available for monitoring employee exposures to MDA. The method OSHA currently uses is included below.

The employer however has the obligation of selecting any monitoring method which meets the accuracy and precision requirements of the standard under his unique field conditions. The standard requires that the method of monitoring must have an accuracy, to a 95 percent confidence level, of not less than plus or minus 25 percent for the select PEL.

OSHA Methodology

Sampling Procedure

Apparatus

Samples are collected by use of a personal sampling pump that can be calibrated within ± 5% of the recommended flow rate with the sampling filter in line.

Samples are collected on 37 mm Gelman type A/E glass fiber filters treated with sulfuric acid. The filters are prepared by soaking each filter with 0.5 mL of 0.26N H_2SO_4. (0.26 N H_2SO_4 can be prepared by diluting 1.5 mL of 36N H_2SO_4 to 200 mL with deionized water.) The filters are dried in an oven at 100 degrees C for one hour and then assembled into two-piece 37 mm polystyrene cassettes with backup pads. The cassettes are sealed with shrink bands and the ends are plugged with plastic plugs.

After sampling, the filters are carefully removed from the cassettes and individually transferred to small vials containing approximately 2 mL deionized water. The vials must be tightly sealed. The water can be added before or after the filters are transferred. The vials must be sealable and capable of holding at least 7 mL of liquid. Small glass scintillation vials with caps containing Teflon liners are recommended.

Reagents

Deionized water is needed for addition to the vials.

Sampling Technique

Immediately before sampling, remove the plastic plugs from the filter cassettes.

Attach the cassette to the sampling pump with flexible tubing and place the cassette in the employee's breathing zone.

After sampling, seal the cassettes with plastic plugs until the filters are transferred to the vials containing deionized water.

At some convenient time within 10 hours of sampling, transfer the sample filters to vials.

Seal the small vials lengthwise.

Submit at least one blank filter with each sample set. Blanks should be handled in the same manner as samples, but no air is drawn through them.

Record sample volumes (in L of air) for each sample, along with any potential interferences.

Retention Efficiency

A retention efficiency study was performed by drawing 100 L of air (80% relative humidity) at 1 L/min through sample filters that had been spiked with 0.814 ug MDA. Instead of using backup pads, blank acid-treated filters were used as backups in each cassette. Upon analysis, the top filters were found to have an average of 91.8% of the spiked amount. There was no MDA found on the bottom filters, so the amount lost was probably due to the slight instability of the MDA salt.

Extraction Efficiency

The average extraction efficiency for six filters spiked at the target concentration is 99.6%.

The stability of extracted and derivatized samples was verified by reanalyzing the above six samples the next day using fresh standards. The average extraction efficiency for the reanalyzed samples is 98.7%.

Recommended air volume and sampling rate

The recomended air volume is 100 L.

The recommended sampling rate i 1 L/min.

Interferences (Sampling)

MDI appears to be a positive interference. It was found that when MDI was spiked onto an acid-treated filter, the MDI converted to MDA after air was drawn through it.

Suspected interferences should be reported to the laboratory with submitted samples.

Safety Precautions (Sampling)

Attach the sampling equipment to the employees so that it will not interfere with work performance or safety.

Follow all safety procedures that apply to the work area being sampled.

Analytical Procedures

Apparatus: The following are required for analysis.

A GC equipped with an electron capture detector. For this evaluation a Tracor 222 Gas Chromatograph equipped with a Nickel 63 High Temperature Electron Capture Detector and a Linearizer was used.

A GC column capable of separating the MDA derivative from the solvent and interferences. A 6 ft × 2 mm ID glass column packed with 3% OV-101 coated on 100/120 Gas Chrom Q was used in this evaluation.

A electronic integrator or some other suitable means of measuring peak areas or heights.

Small resealable vials with Teflon-lined caps capable of holding 4 mL.

A dispenser or pipet for toluene capable of delivering 2.0 mL.

Pipets (or repipets with plastic or Teflon tips) capable of delivering 1 mL for the sodium hydroxide and buffer solutions.

A repipet capable of delivering 25 uL HFAA.

Syringes for preparation of standards and injection of standards and samples into a GC.

Volumetric flasks and pipets to dilute the pure MDA in preparation of standards.

Disposable pipets to transfer the toluene layers after the samples are extracted.

Reagents

0.5 NaOH prepared from reagent grade NaOH.

Toluene, pesticide grade. Burdick and Jackson distilled in glass toluene was used.

Heptafluorobutyric acid anhydride (HFAA). HFAA from Pierce Chemical Company was used.

pH 7.0 phosphate buffer, prepared from 136 g potassium dihydrogen phosphate and 1 L deionized water. The pH is adjusted to 7.0 with saturated sodium hydroxide solution.

4,4' -Methylenedianiline (MDA), reagent grade.

Standard Preparation

Concentrated stock standards are prepared by diluting pure MDA with toluene. Analytical standards are prepared by injecting uL amounts of diluted stock standards into vials that contain 2.0 mL toluene.

25 uL HFAA are added to each vial and the vials are capped and shaken for 10 seconds.

After 10 min, 1 mL of buffer is added to each vial.

The vials are recapped and shaken for 10 seconds.

After allowing the layers to separate, aliquots of the toluene (upper) layers are removed with a syringe and analyzed by GC.

Analytical standard concentrations should bracket sample concentrations. Thus, if samples fall out of the range of prepared standards, additional standards must be prepared to ascertain detector response.

Sample preparation

The sample filters are received in vials containing deionized water.

1 mL of 0.5N NaOH and 2.0 mL toluene are added to each vial.

The vials are recapped and shaken for 10 min.

After allowing the layers to separate, approximately 1 mL aliquots of the toluene (upper) layers are transferred to separate vials with clean disposable pipets.

The toluene layers are treated and analyzed.

Analysis

GC conditions Zone temperatures:
Column—220 degrees C
Injector—235 degrees C
Detector—335 degrees C
Gas flows, Ar/CH_4 (95/5)
Column—28mL/min
Purge—40 mL/min
Injection volume: 5.0 uL Column:
6 ft × ⅛ in ID glass, 3% OV-101 on 100/120 Gas Chrom Q
Retention time of MDA derivative:
3.5 min

Chromatogram

Peak areas or heights are measured by an integrator or other suitable means.

A calibration curve is constructed by plotting response (peak areas or heights) of standard injections versus ug of MDA per sample. Sample concentrations must be bracketed by standards.

Interferences (Analytical)

Any compound that gives an electron capture detector response and has the same general retention time as the HFAA derivative of MDA is a potential interference. Suspected interferences reported to the laboratory with submitted samples by the industrial hygienist must be considered before samples are derivatized.

GC parameters may be changed to possibly circumvent interferences.

Retention time on a single column is not considered proof of chemical identity. Analyte identity should be confirmed by GC/MS if possible.

Calculations

The analyte concentration for samples is obtained from the calibration curve in terms of ug MDA per sample. The extraction efficiency is 100%. If any MDA is found on the blank, that amount is subtracted from the sample amounts. The air concentrations are calculated using the following formulae.

$\mu g/m^3$=(μg MDA per sample) (1000)/(L of air sampled)

ppb=($\mu g/m^3$)(24.46)/(198.3)=($\mu g/m^3$)-(0.1233) where 24.46 is the molar volume at 25 degrees C and 760 mm Hg

Safety Precautions (Analytical)

Avoid skin contact and inhalation of all chemicals.

Restrict the use of all chemicals to a fume hood if possible.

Wear safety glasses and a lab coat at all times while in the lab area.

Appendix E to § 1926.60—Qualitative and Quantitative Fit Testing Procedures

Qualitative Fit Test Protocols

I. Isoamyl Acetate (banana oil) Protocol

A. Odor threshold screening

1. Three 1-liter glass jars with metal lids (e.g. Mason or Bell jars) are required.

2. Odor-free water (e.g. distilled or spring water) at approximately 25° C shall be used for the solutions.

3. The isoamyl acetate (IAA) (also known as isopentyl acetate) stock solution is prepared by adding 1 cc of pure IAA to 800 cc of odor free water in a 1-liter jar and shaking for 30 seconds. This solution shall be prepared new at least weekly.

4. The screening test shall be conducted in a room separate from the room used for actual fit testing. The two rooms shall be well ventilated so that circulation of the test solution does not occur and cross contaminate the testing different sites.

5. The odor test solution is prepared in a second jar by placing 0.4 cc of the stock solution into 500 cc of odor free water using a clean dropper or pipette. Shake for 30 seconds and allow to stand for two to three minutes so that the IAA concentration above the liquid may reach equilibrium. This solution may be used for only one day.

6. A test blank is prepared in a third jar by adding 500 cc of odor free water.

7. The odor test and test blank jars shall be labelled 1 and 2 for jar identification.

8. The following instructions shall be typed on a card and placed on the table in front of the two test jars (i.e. and 1 and 2): "The purpose of this test is to determine if you can smell banana oil at a low concentration. The two bottles in front of you contain water. One of these bottles also contains a small amount of banana oil. Be sure the covers are on tight, then shake each bottle for two seconds. Unscrew the lid of each bottle, one at a time, and sniff at the mouth of the bottle. Indicate to the test conductor which bottle contains banana oil."

9. The mixtures used in the IAA odor detection test shall be prepared in an area separate from where the test is performed, in order to prevent olfactory fatigue in the subject.

10. If the test subject is unable to correctly identify the jar containing the odor test solution, the IAA qualitative fit test may not be used.

11. If the test subject correctly identifies the jar containing the odor test solution, the test subject may proceed to respirator selection and fit testing.

Respirator Selection

1. The test subject shall be allowed to pick the most comfortable respirator from a selection including respirators of various sizes from different manufacturers. The selection shall include at least three sizes of elastomeric half facepieces, from at least two manufacturers.

2. The selection process shall be conducted in a room separate from the fit-test chamber to prevent odor fatigue. Prior to the selection process, the test subject shall be shown how to put on a respirator, how it should be positioned on the face, how to set strap tension and how to determine a "comfortable" respirator. A mirror shall be available to assist the subject in evaluating the fit and positioning of the respirator. This instruction may not constitute the subject's formal training on respirator use, as it is only a review.

3. The test subject should understand that the employee is being asked to select the respirator which provides the most comfortable fit.

4. The test subject holds each facepiece up to the face and eliminates those which obviously do not give a comfortable fit. Normally, selection will begin with a half-mask and if a comfortable fit cannot be found, the subject will be asked to test the full facepiece respirators. (A small percentage of users will not be able to wear any half-mask.)

5. The more comfortable facepieces are noted; the most comfortable mask is donned and worn at least five minutes to assess comfort. All donning and adjustments of the facepiece shall be performed by the test subject without assistance from the test conductor or other person. Assistance in assessing comfort can be given by discussing the points in #6 below. If the test subject is not familiar with using a particular respirator, the test subject shall be directed to don the mask several times and to adjust the straps each time to become adept at setting proper tension on the straps.

6. Assessment of comfort shall include reviewing the following points with the test subject and allowing the test subject adequate time to determine the comfort of the respirator after donning:

- Positioning of mask on nose.
- Room for eye protection.
- Room to talk.
- Positioning mask on face and cheeks.

7. The following criteria shall be used to help determine the adequacy of the respirator fit:

- Chin properly placed.
- Strap tension.
- Fit across nose bridge.
- Distance from nose to chin.
- Tendency to slip.
- Self-observation in mirror.

8. The test subject shall perform the conventional negative or positive-pressure fit checks (e.g., see ANSI Z88.2–1980A7). Before beginning the negative- or positive-pressure test, the subject shall be told to "seat" the mask by rapidly moving the head from side-to-side and up and down, while taking a few deep breaths.

9. The test subject is now ready for fit testing.

10. After passing the fit test, the test subject shall be questioned again regarding the comfort of the respirator. If the respirator has become uncomfortable, another model of respirator shall be tried.

11. The employee shall be given the opportunity to select a different facepiece and to be retested if the chosen facepiece becomes increasingly uncomfortable at any time.

C. Fit Test

1. The fit test chamber shall be similar to a clear 55 gallon drum liner suspended inverted over a 2-foot diameter frame, so that the top of chamber is about 6 inches above the test subject's head. The inside top center of the chamber shall have a small hook attached.

2. Each respirator used for the fitting and fit testing shall be equipped with organic vapor cartridges or offer protection against organic vapors. The cartridges or canisters shall be replaced as necessary to maintain the effectiveness of the respirator.

3. After selecting, donning, and properly adjusting a respirator, the test subject shall wear it to the fit testing room. This room shall be separate from the room used for odor threshold screening and respirator selection, and shall be well ventilated, as by an exhaust fan or lab hood, to prevent general room contamination.

4. A copy of the following test exercises and Rainbow Passage shall be taped to the inside of the test chamber:

Test Exercises

i. Breath normally.

ii. Breath deeply. Be certain breaths are *deep* and *regular*.

iii. Turn head all the way from one side to the other. Inhale on each side. Be certain movement is complete. Do not bump the respirator against the shoulders.

iv. Nod head up-and-down. Inhale when head is in the full up position (looking toward ceiling). Be certain motions are complete and made about every second. Do not bump the respirator on the chest.

v. Talking. Talk aloud and slowly for several minutes. The following paragraph is called the Rainbow Passage. Reading it aloud will result in a wide range of facial movements, and thus be useful to satisfy this requirement. Alternative passages which serve the same purpose may also be used.

vi. Jog in place.

vii. Breathe normally.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond reach, his friends say he is looking for the pot of gold at the end of the rainbow.

5. Each test subject shall wear the respirator for at least 10 minutes before starting the fit test.

6. Upon entering the test chamber, the test subject shall be given a 6 inch by 5 inch piece of paper towel or other porous absorbent single ply material, folded in half and wetted with three-quarters of one cc of pure IAA. The test subject shall hang the wet towel on the hook at the top of the chamber.

7. Allow two minutes for the IAA test concentration to be reached before starting the fit-test exercises.

8. Each exercise described in #4 above shall be performed for at least one minute.

9. If at any time during the test, the subject detects the banana-like odor of IAA, the test has failed. The subject shall quickly exit from the test chamber and leave the test area to avoid olfactory fatigue.

10. If the test is failed, the subject shall return to the selection room and remove the respirator, repeat the odor sensitivity test, select and put on another respirator, return to the test chamber, and again begin the procedure described in the (C)4 through (C)8 above. The process continues until a respirator that fits well has been found. Should the odor sensitivity test be failed, the subject shall wait about 5 minutes before retesting. Odor sensitivity will usually have returned by this time.

11. If a person cannot pass the fit test described above wearing a half-mask respirator from the available selection, full facepiece models must be used.

12. When a respirator is found that passes the test, the subject must break the faceseal and take a breath before exiting the chamber. This is to assure that the reason the test subject is not smelling the IAA is the good fit of the respirator facepiece seal and not olfactory fatigue.

13. When the test subject leaves the chamber, the subject shall remove the saturated towel and return it to the person conducting the test. To keep the area from becoming contaminated, the used towels shall be kept in an self-sealing bag so there is no significant IAA concentration buildup in the test chamber during subsequent tests.

14. Persons who have successfully passed this fit test with a half-mask respirator may be assigned the use of the test respirator in atmospheres with up to 10 times the PEL. In atmospheres greater than 10 times, and less than 50 times the PEL (up to 50 ppm), the subject must pass the IAA test using a full face negative pressure respirator. (The concentration of the IAA inside the test chamber must be increased by five times for QLFT of the full facepiece.)

15. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface.

16. If hair growth or apparel interfere with a satisfactory fit, then they shall be altered or removed so as to eliminate interference and allow a satisfactory fit. If a satisfactory fit is still not attained, the test subject must use a positive-pressure respirator such as a powered air-purifying respirator, supplied air respirator, or self-contained breathing apparatus.

17. If a test subject exhibits difficulty in breathing during the tests, she or he shall be referred to a physician trained in respiratory diseases or pulmonary medicine to determine whether the test subject can wear a respirator while performing her or his duties.

18. Qualitative fit testing shall be repeated at least every 12 months.

19. In addition, because the sealing of the respirator may be affected, qualitative fit testing shall be repeated immediately when the test subject has a:

(1) Weight change of 20 pounds or more,

(2) Significant facial scarring in the area of the facepiece seal,

(3) Significant dental changes; i.e.; multiple extractions without prothesis, or acquiring dentures,

(4) Reconstructive or cosmetic surgery, or

(5) Any other condition that may interfere with facepiece sealing.

D. Recordkeeping

A summary of all test results shall be maintained by the employer for 3 years. The summary shall include:

(1) Name of test subject.

(2) Date of testing.

(3) Name of the test conductor.

(4) Respirators selected (indicate manufacturer, model, size and approval number).

(5) Testing agent.

II. Saccharin Solution Aerosol Protocol

A. Respirator Selection

Respirators shall be selected as described in section IB (respirator selection) above, except that each respirator shall be equipped with a particulate filter.

B. Taste Threshold Screening

1. An enclosure placed over the head and shoulders shall be used for threshold screening (to determine if the individual can taste saccharin) and for fit testing. The enclosure shall be approximately 12 inches in diameter by 14 inches tall with at least the front clear to allow free movement of the head when a respirator is worn.

2. The test enclosure shall have a three-quarter inch hole in front of the test subject's nose and mouth area to accommodate the nebulizer nozzle.

3. The entire screening and testing procedure shall be explained to the test subject prior to conducting the screening test.

4. During the threshold screening test, the test subject shall don the test enclosure and breathe with open mouth with tongue extended.

5. Using a DeVilbiss Model 40 Inhalation Medication Nebulizer or equivalent, the test conductor shall spray the threshold check solution into the enclosure. This nebulizer shall be clearly marked to distinguish it from the fit test solution nebulizer.

6. The threshold check solution consists of 0.83 grams of sodium saccharin, USP in water. It can be prepared by putting 1 cc of the test solution (see C 7 below) in 100 cc of water.

7. To produce the aerosol, the nebulizer bulb is firmly squeezed so that it collapses completely, then is released and allowed to fully expand.

8. Ten squeezes of the nebulizer bulb are repeated rapidly and then the test subject is asked whether the saccharin can be tasted.

9. If the first response is negative, ten more squeezes of the nebulizer bulb are repeated rapidly and the test subject is again asked whether the saccharin can be tasted.

10. If the second response is negative ten more squeezes are repeated rapidly and the test subject is again asked whether the saccharin can be tasted.

11. The test conductor will take note of the number of squeezes required to elicit a taste response.

12. If the saccharin is not tasted after 30 squeezes (Step 10), the saccharin fit test cannot be performed on the test subject.

13. If a taste response is elicited, the test subject shall be asked to take note of the taste for reference in the fit test.

14. Correct use of the nebulizer means that approximately 1 cc of liquid is used at a time in the nebulizer body.

15. The nebulizer shall be thoroughly rinsed in water, shaken dry, and refilled at least every four hours.

C. Fit Test

1. The test subject may not eat, drink (except plain water), or chew gum for 15 minutes before the test.

2. The test subject shall don and adjust the respirator without assistance from any person.

3. The fit test uses the same enclosure described in IIB above.

4. Each test subject shall wear the respirator for at least 10 minutes before starting the fit test. (a) This would be an appropriate time to talk with the test subject; to explain the fit test, the importance of cooperation and, the purpose for the head exercises; or to demonstrate some of the exercises. (b) The test subject shall perform the conventional negative or positive pressure fit tests (See ANZI Z88.2 1980 A7).

5. The test subject shall enter the enclosure while wearing the respirator selected in section IB above. This respirator shall be properly adjusted and equipped with a particulate filter.

6. A second DeVilbiss Model 40 Inhalation Medication Nebulizer is used to spray the fit test solution into the enclosure. This nebulizer shall be clearly marked to distinguish it from the screening test solution nebulizer.

7. The fit test solution is prepared by adding 83 grams of sodium saccharin to 100 cc of warm water.

8. As before, the test subject shall breathe with mouth open and tongue extended.

9. The nebulizer is inserted into the hole in the front of the enclosure and the fit test solution is sprayed into the enclosure using the same technique as for the taste threshold screening and the same number of squeezes required to elicit a taste response in the screening. (See B8 through B10 above.)

10. After generation of the aerosol read the following instructions to the test subject. The test subject shall perform the exercises for one minute each.

i. Breathe normally.

ii. Breathe deeply. Be certain breaths are *deep* and *regular*.

iii. Turn head all the way from one side to the other. Be certain movement is complete. Inhale on each side. Do not bump the respirator against the shoulders.

iv. Nod head up-and-down. Be certain motions are complete. Inhale when head is in

the full up position (when looking toward the ceiling). Do not bump the respirator on the chest.

v. Talk. Talk aloud and slowly. The following paragraph is called the Rainbow Passage. Reading it will result in a wide range of facial movements, and thus be useful to satisfy this requirement.

vi. Jog in place.

vii. Breathe normally.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond his reach, his friends say he is looking for the pot of gold at the end of the rainbow.

11. At the beginning of each exercise, the aerosol concentration shall be replenished using one-half the number of squeezes as initially described in C9.

12. The test subject shall indicate to the test conductor if at any time during the fit test the taste of saccharin is detected.

13. If the saccharin is detected the fit is deemed unsatisfactory and a different respirator shall be tried.

14. Successful completion of the test protocol shall allow the use of the half mask tested respirator in contaminated atmospheres up to 10 times the PEL of MDA. In other words this protocol may be used to assign protection factors no higher than ten.

15. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface.

16. If hair growth or apparel interfere with a satisfactory fit, then they shall be altered or removed so as to eliminate interference and allow a satisfactory fit. If a satisfactory fit is still not attained, the test subject must use a positive-pressure respirator such as powered air-purifying respirators, supplied air respirator, or self-contained breathing apparatus.

17. If a test subject exhibits difficulty in breathing during the tests, she or he shall be referred to a physician trained in respirator diseases or pulmonary medicine to determine whether the test subject can wear a respirator while performing her or his duties.

18. Qualitative fit testing shall be repeated at least every 12 months.

19. In addition, because the sealing of the respirator may be affected, qualitative fit testing shall be repeated immediately when the test subject has a:

(1) Weight change of 20 pounds or more,

(2) Significant facial scarring in the area of the facepiece seal,

(3) Significant dental changes; i.e.; multiple extractions without prothesis, or acquiring dentures.

(4) Reconstructive or cosmetic surgery, or

(5) Any other condition that may interfere with facepiece sealing.

D. Recordkeeping

A summary of all test results shall be maintained by the employer for 3 years. The summary shall include:

(1) Name of test subject.

(2) Date of testing.

(3) Name of test conductor.

(4) Respirators selected (indicate manufacturer, model, size and approval number).

(5) Testing agent

III. Irritant Fume Protocol

A. Respirator Selection

Respirators shall be selected as described in section IB above, except that each respirator shall be equipped with a combination of high-efficiency and acid-gas cartridges.

B. Fit Test

1. The test subject shall be allowed to smell a weak concentration of the irritant smoke to familiarize the subject with the characteristic odor.

2. The test subject shall properly don the respirator selected as above, and wear it for at least 10 minutes before starting the fit test.

3. The test conductor shall review this protocol with the test subject before testing.

4. The test subject shall perform the conventional positive pressure and negative pressure fit checks (see ANSI Z88.2 1980). Failure of either check shall be cause to select an alternate respirator.

5. Break both ends of a ventilation smoke tube containing stannic oxychloride, such as the MSA part #5645, or equivalent. Attach a short length of tubing to one end of the smoke tube. Attach the other end of the smoke tube to a low pressure air pump set to deliver 200 milliliters per minute.

6. Advise the test subject that the smoke can be irritating to the eyes and instruct the subject to keep the eyes closed while the test is performed.

7. The test conductor shall direct the stream of irritant smoke from the tube towards the faceseal area of the test subject. The person conducting the test shall begin with the tube at least 12 inches from the facepiece and gradually move to within one inch, moving around the whole perimeter of the mask.

8. The test subject shall be instructed to do the following exercises while the respirator is being challenged by the smoke. Each exercise shall be performed for one minute.

i. Breathe normally.

ii. Breathe deeply. Be certain breaths are *deep* and *regular*.

iii. Turn head all the way from one side to the other. Be certain movement is complete. Inhale on each side. Do not bump the respirator against the shoulders.

iv. Nod head up-and-down. Be certain motions are complete and made every second. Inhale when head is in the full up position (looking toward ceiling). Do not bump the respirator against the chest.

v. Talking. Talk aloud and slowly for several minutes. The following paragraph is called the Rainbow Passage. Reading it will result in a wide range of facial movements, and thus be useful to satisfy this requirement. Alternative passages which serve the same purpose may also be used.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond his reach, his friends say he is looking for the pot of gold at the end of the rainbow.

vi. Jogging in Place.

vii. Breathe normally.

9. The test subject shall indicate to the test conductor if the irritant smoke is detected. If smoke is detected, the test conductor shall stop the test. In this case, the tested respirator is rejected and another respirator shall be selected.

10. Each test subject passing the smoke test (i.e. without detecting the smoke) shall be given a sensitivity check of smoke from the same tube to determine if the test subject reacts to the smoke. Failure to evoke a response shall void the fit test.

11. Steps B4, B9, B10 of this fit test protocol shall be performed in a location with exhaust ventilation sufficient to prevent general contamination of the testing area by the test agents.

12. Respirators successfully tested by the protocol may be used in contaminated atmospheres up to ten times the PEL of MDA.

13. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface.

14. If hair growth or apparel interfere with a satisfactory fit, then they shall be altered or removed so as to eliminate interference and allow a satisfactory fit. If a satisfactory fit is still not attained, the test subject must use a positive-pressure respirator such as powered air-purifying respirators, supplied air respirator, or self-contained breathing apparatus.

15. If a test subject exhibits difficulty in breathing during the tests, she or he shall be referred to a physician trained in respirator diseases or pulmonary medicine to determine whether the test subject can wear a respirator while performing her or his duties.

16. Qualitative fit testing shall be repeated at least every 12 months.

17. In addition, because the sealing of the respirator may be affected, qualitative fit testing shall be repeated immediately when the test subject has a:

(1) Weight change of 20 pounds or more.

(2) Significant facial scarring in the area of the facepiece seal.

(3) Significant dental changes; i.e.; multiple extractions without prothesis, or acquiring dentures.

(4) Reconstructive or cosmestic surgery, or

(5) Any other condition that may interfere with facepiece sealing.

D. Recordkeeping

A summary of all test results shall be maintained by the employer for 3 years. The summary shall include:

(1) Name of test subject.
(2) Date of testing.
(3) Name of test conductor.
(4) Respirators selected (indicate manufacturer, model, size and approval number).
(5) Testing agent.

Quantitative Fit Test Procedures

1. General

a. The method applies to the negative-pressure nonpowered air-purifying respirators only.

b. The employer shall assign an individual (with help as needed) who shall assume the full responsibility for implementing the respirator quantitative fit test program.

2. Definition

a. "Quantitative Fit Test" means the measurement of the effectiveness of a respirator seal in excluding the ambient atmosphere. The test is performed by dividing the measured concentration of challenge agent in a test chamber by the measured concentration of the challenge agent inside the respirator facepiece when the normal air purifying element has been replaced by an essentially perfect purifying element.

b. "Challenge Agent" means the air contaminant introduced into a test chamber so that its concentration inside and outside the respirator may be compared.

c. "Test Subject" means the person wearing the respirator for quantitative fit testing.

d. "Normal Standing Position" means standing erect and straight with arms down along the sides and looking straight ahead.

e. "Fit Factor" means the ratio of challenge agent concentration outside with respect to the inside of a respirator inlet covering (facepiece or enclosure).

3. Apparatus

a. *Instrumentation.* Corn oil, sodium chloride or other appropriate aerosol generation, dilution, and measurement systems shall be used for quantitative fit test.

b. *Test chamber.* The test chamber shall be large enough to permit all test subjects to freely perform all required exercises without distributing the challenge agent concentration or the measurement apparatus. The test chamber shall be equipped and constructed so that the challenge agent is effectively isolated from the ambient air yet uniform in concentration throughout the chamber.

c. When testing air-purifying respirators, the normal filter or cartridge element shall be replaced with a high-efficiency particular filter supplied by the same manufacturer.

d. The sampling instrument shall be selected so that a strip chart record may be made of the test showing the rise and fall of challenge agent concentration with each inspiration and expiration at fit factors of at least 2,000.

e. The combination of substitute air-purifying elements (if any), challenge agent, and challenge agent concentration in the test chamber shall be such that the test subject is not exposed in excess of PEL to the challenge agent at any time during the testing process.

f. The sampling port on the test specimen respirator shall be placed and constructed so that there is no detectable leak around the port, a free air flow is allowed into the sampling line at all times and so there is no interference with the fit or performance of the respirator.

g. The test chamber and test set-up shall permit the person administering the test to observe one test subject inside the chamber during the test.

h. The equipment generating the challenge atmosphere shall maintain the concentration of challenge agent constant within a 10 percent variation for the duration of the test.

i. The time lag (interval between an event and its being recorded on the strip chart) of the instrumentation may not exceed 2 seconds.

j. The tubing for the test chamber atmosphere and for the respirator sampling port shall be the same diameter, length and material. It shall be kept as short as possible. The smallest diameter tubing recommended by the manufacturer shall be used.

k. The exhaust flow from the test chamber shall pass through a high-efficiency filter before release to the room.

l. When sodium chloride aerosol is used, the relative humidity inside the test chamber shall not exceed 50 percent.

4. Procedural Requirements

a. The fitting of half-mask respirators should be started with those having multiple sizes and a variety of interchangeable cartridges and canisters such as the MSA Comfr II-M, Norton M, Survivair M A-O M or Scott-M. Use either of the tests outlined below to assure that the facepiece is properly adjusted.

(1) *Positive pressure test.* With the exhaust port(s) blocked the negative pressure of slight inhalation should remain constant for several seconds.

(2) *Negative pressure test.* With the intake port(s) blocked the negative pressure slight inhalation should remain constant for several seconds.

b. After a facepiece is adjusted, the test subject shall wear the facepiece for at least 5 minutes before conducting a qualitative test by using either of the methods described below and using the execise regime described in 5.a., b., c., d. and e.

(1) *Isoamyl acetate test.* When using organic vapor cartridges, the test subject who can smell the odor should be unable to detect the odor of isomyl acetate squirted into the air near the most vulnerable portions of the facepiece seal. In a location which is separated from the test area, the test subject shall be instructed to close her/his eyes during the test period. A combination cartridge or canister with organic vapor and high-efficiency filters shall be used when available for the particular mask being tested. The test subject shall be given an opportunity to smell the odor of isoamyl acetate before the test is conducted.

(2) *Irritant fume test.* When using high-efficiency filters, the test subject should be unable to detect the odor or irritant fume (stannic chloride or titanium tetrachloride ventilation smoke tubes) squirted into the air near the most vulnerable portions of the facepiece seal. The test subject shall be instructed to close her/his eyes during the test period.

c. The test subject may enter the quantitative testing chamber only if she or he has obtained a satisfactory fit by as stated in 4.b. of this Appendix.

d. Before the subject enters the test chamber, a reasonably stable challenge agent concentration shall be measured in the test chamber.

e. Immediately after the subject enters the test chamber, the challenge agent concentration inside the respirator shall be measured to ensure that the peak penetration does not exceed 5 percent for a half-mask and 1 percent for a full facepiece.

f. A stable challenge agent concentration shall be obtained prior to the actual start of testing.

g. Respirator restraining straps may not be overtightened for testing. The straps shall be adjusted by the wearer to give a reasonably comfortable fit typical of normal use.

5. *Exercise Regime.* Prior to entering the test chamber, the test subject shall be given complete instructions as to her/his part in the test procedures. The test subject shall perform the following exercises, in the order given, for each independent test.

a. *Normal Breathing (NB).* In the normal standing position, without talking, the subject shall breathe normally for at least one minute.

b. *Deep Breathing (DB).* In the normal standing position the subject shall do deep breathing for at least one minute pausing so as not to hyperventilate.

c. *Turning head side to side (SS).* Standing in place the subject shall slowly turn his head from side between the extreme positions to each side. The head shall be held at each extreme position for at least 5 seconds. Perform for at least five complete cycles.

d. *Moving head up and down (UD).* Standing in place, the subject shall slowly move his head up and down between the extreme position straight up and the extreme position straight down. The head shall be held at each extreme position for at least 5 seconds. Perform for at least five complete cycles.

e. *Reading (R).* The subject shall read out slowly and loud so as to be heard clearly by the test conductor or monitor. The test subject shall read the "rainbow passage" at the end of this section.

f. *Grimace (G).* The test subject shall grimace, smile, frown, and generally contort the face using the facial muscles. Continue for at least 15 seconds.

g. *Bend over and touch toes (B).* The test subject shall bend at the waist and touch toes and return to upright position. Repeat for at least one minute.

h. *Jogging in place (J).* The test subject shall perform jog in place for at least one minute.

i. *Normal Breathing (NB).* In the normal standing position, without talking, the subject shall breathe normally for at least one minute.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high

above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond reach, his friends say he is looking for the pot of gold at the end of the rainbow.

6. *Termination of Tests.* The test shall be terminated whenever any single peak penetration exceeds 5 percent for half-masks and 1 percent for full facepieces. The test subject may be refitted and retested. If two of the three required tests are terminated, the fit shall be deemed inadequate. (See paragraph 4.h.).

7. *Calculation of Fit Factors.*

a. The fit factor determined by the quantitative fit test equals the average concentration inside the respirator.

b. The average test chamber concentration is the arithmetic average of the test chamber concentration at the beginning and of the end of the test.

c. The average peak concentration of the challenge agent inside the respirator shall be the arithmetic average peak concentrations for each of the nine exercises of the test which are computed as the arithmetic average of the peak concentrations found for each breath during the exercise.

d. The average peak concentration for an exercise may be determined graphically if there is not a great variation in the peak concentrations during a single exercise.

8. *Interpretation of Test Results.* The fit factor measured by the quantitative fit testing shall be the lowest of the three protection factors resulting from three independent tests.

9. *Other Requirements.*

a. The test subject shall not be permitted to wear a half-mask or full facepiece if the minimum fit factor of 250 or 1,250, respectively, cannot be obtained. If hair growth or apparel interfere with a satisfactory fit, then they shall be altered or removed so as to eliminate interference and allow a satisfactory fit. If a satisfactory fit is still not attained, the test subject must use a positive-pressure respirator such as powered air-purifying respirators, supplied air respirator, or self-contained breathing apparatus.

b. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface.

c. If a test subject exhibits difficulty in breathing during the tests, she or he shall be referred to a physician to determine whether the test subject can wear a respirator while performing her or his duties.

d. The test subject shall be given the opportunity to wear the assigned respirator for one week. If the respirator does not provide a satisfactory fit during actual use, the test subject may request another QNFT which shall be performed immediately.

e. A respirator fit factor card shall be issued to the subject with the following information:

(1) Name.

(2) Date of fit test.

(3) Protection factors obtained through each manufacturer, model and approval number of respirator tested.

(4) Name and signature of the person that conducted the test.

f. Filters used for qualitative or quantitative fit testing shall be replaced weekly, whenever increased breathing resistance is encountered, or when the test agent has altered the integrity of the filter media.

Organic vapor cartridges/canisters shall be replaced daily or sooner if there is any indication of breakthrough by the test agent.

10. *Retesting.* In addition, because the sealing of the respirator may be affected, quantitative fit testing shall be repeated immediately when the test subject has a:

(1) Weight change of 20 pounds or more,

(2) Significant facial scarring in the area of the facepiece seal,

(3) Significant dental changes; i.e.; multiple extractions without prothesis, or acquiring dentures,

(4) Reconstructive or cosmetic surgery, or

(5) Any other condition that may interfere with facepiece sealing.

11. *Recordkeeping*

a. A summary of all test results shall be maintained for three years. The summary shall include:

(1) Name of test subject.

(2) Date of testing.

(3) Name of the test conductor.

(4) Fit factors obtained from every respirator tested (indicate manufacturer, model, size and approval number).

b. A copy of all test data including the strip chart and results shall be kept for at least five years.

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federal register

Friday
May 12, 1989

Part III

Department of Justice

Office of Juvenile Justice and Delinquency Prevention

Coordinating Council on Juvenile and Delinquency Prevention; Meeting; Notice

DEPARTMENT OF JUSTICE

Office of Justice Programs

Coordinating Council on Juvenile Justice and Delinquency Prevention

AGENCY: Office of Juvenile Justice and Delinquency Prevention.

ACTION: Notice of meeting.

The second quarterly meeting for the 1989 calendar year of the Coordinating Council on Juvenile Justice and Delinquency Prevention will be held on June 23, 1989, from 8:30 a.m. until 3:30 p.m. This meeting of the Council will take place in the Great Hall of the Charles Sumner School Museum and Archives, 1201 17th Street NW., Washington, DC, 20032.

The June 23, 1989, meeting will address the topic "The Prevention of Illegal Drug Use Among Youth: An Update." Federal officials and outside experts from across the nation will discuss the roles of schools, law enforcement, and the community in the prevention of drug abuse.

Individuals and organizations concerned with these issues are invited to attend this meeting. Because of limited seating, advanced reservations will be required. Please contact Roberta Dorn, Director, Concentration of Federal Effort Program, 633 Indiana Avenue NW., Washington, DC (202) 724-7655 to reserve seating. Requests will be received until space is filled, or until 4:00 p.m. on June 15, 1989, whichever occurs first.

Dated: May 8, 1989.

Approved:

Diane M. Munson,

Acting Administrator, Office of Juvenile Justice and Delinquency Prevention.

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federal register

Friday
May 12, 1989

Part IV

Department of Agriculture

Forest Service

Deferral of Payments on High-Priced Timber Sales; Adoption of Final Policy; Notice

DEPARTMENT OF AGRICULTURE

Forest Service

Deferral of Payments on High-Priced Timber Sales

AGENCY: Forest Service, USDA.

ACTION: Notice; adoption of final policy.

SUMMARY: The Forest Service hereby gives notice of adoption of a final policy on the modification of payment procedures for certain high-priced timber sales. Under this policy, the terms of payment on a qualifying timber sale may be modified to allow the purchaser to defer payments in an amount equal to the difference between the average current contract value and the value of sales at current average bid rates on that Forest at time of modification plus $50 per thousand board feet (MBF). The deferred amount will be paid with interest over a 5-year period under the terms of a fully secured promissory note. The procedure is authorized only for high-priced sales bid prior to January 1, 1982. The 5-year deferral period will allow purchasers an opportunity to improve their cash flow by deferring large immediate payment obligations and to mix a portion of their high-priced sales with lower-priced sales in their portfolios and, thus, obtain a more economical operating base. The intended effect is to encourage purchasers to perform high-priced sales rather than to default them.

EFFECTIVE DATE: This policy is effective May 12, 1989.

FOR FURTHER INFORMATION CONTACT: Questions about this policy should be addressed to Allan B. McCombie, Timber Management Staff, Forest Service, USDA, P.O. Box 96090, Washington, DC. 20090–6090, telephone (202) 447–6862.

SUPPLEMENTARY INFORMATION:

Background and Need for Policy

On August 22, 1988 (53 FR 31962) the Forest Service published an interim policy to allow holders of certain high-priced timber sales to defer payments to avoid sale defaults. Public comment was invited prior to adoption of the final policy on deferred payments. During the late 1970's, a combination of strong demand for timber, predicted price trends based on levels of inflation at that time, and predictions of a softwood timber supply shortage resulted in unprecedented prices for federal timber sales particularly in California, Oregon, and Washington. Before this timber could be harvested, lumber prices fell dramatically in response to a collapse in the housing market precipitated by a general economic recession.

The Government took a number of actions to alleviate the impact of the high-priced pre–1982 sales. Contract extension provided by the Forest Service from 1980 thru 1983, statutory relief provided by the Federal Timber Contract Payment Modification Act of 1984, and substantially improved forest products markets have all eased the financial burden of many timber purchasers and lessened the risk of default on remaining high-priced contracts.

However, some purchasers particularly in Forest Service Regions 5 (California) and 6 (Oregon and Washington) still hold substantial numbers of high-priced sales bid prior to 1982. As of November 1988 there was about 1.5 billion board feet of high-priced timber under contract in 256 sales. This volume remains under contract primarily because the amounts held by purchasers at the time of buy-out application exceeded the volume entitlement under the Federal Timber Contract Payment Modification Act. Purchasers have entended these sales under the Multi-Sale Extension Program and other extension authorizations. These sales are now scheduled to terminate between April 1, 1989, and December 31, 1992. The majority of the high-priced volume is contained in sales that are scheduled to terminate in 1989, and 1990. The Federal government's exposure to default on these sales will increase substantially if market conditions deteriorate. Forty percent of the high-priced sale value is held by purchasers considered to be in a high-risk situation. The Government could lose $70 million if the high-priced sales in these portfolios are defaulted.

It is important that the agency have procedures in place to try to avoid significant default, because default-delayed harvest results in many adverse economic, resource management, and environmental effects. The economies of many communities particularly in the West are heavily dependent upon the employment generated by the harvest and manufacture of timber from the National Forests. Timber sale defaults interrupt the flow of timber and, thereby, interrupt employment. Employment impacts of default affect not only loggers and mill workers, but also affect others dependent upon the income of timber workers. Defaults also reduce receipts to the Federal Treasury and, thus, the revenue sharing payments to local counties which are based on those receipts. County funding of roads and schools in the Far West is heavily dependent on these payments.

The liability for damages due the Government arising from default could result in a number of timber firms seeking bankruptcy. Under bankruptcy procedures, the United States would become an unsecured creditor. Usually little or no assets are available for payment after all the secured creditors are satisfied in the proceedings. Even if the firms do not declare bankruptcy, default collection activities are expensive and often result in small dollar returns compared to the amount of damage payments due the Government. In short, contract performance of these high-priced sales provides the best economic return and protection to Federal, State, and local governments as well as to timber dependent communities. Accordingly, the Forest Service is implementing a procedure to encourage holders of high-priced pre-1982 volume to perform contracts rather than to default them.

An interim policy to allow deferral of payments on these high-priced sales was published in the **Federal Register** on August 22, 1988; the policy was to be implemented on September 1, 1988. However, the modification of contracts was stayed until the comment period was completed on October 21, 1988. After review and analysis of the comments, the interim policy was fully implemented on November 10, 1988.

Response to Public Comments

The Forest Service received comments on the interim policy from 20 individuals and entities. Comments came from individual timber sale purchasers, consulting foresters, timber sale purchaser associations, attorneys, and local citizens of communities affected by the policy. Most of the responses came from the Pacific Northwest. Forty-five percent of the respondents supported the policy either in its entirety or with suggested modifications. Fifty-five percent of the respondents were not in favor of the policy. Most of those against the policy provided additional suggestions for consideration should the policy be finally adopted. Most of the comments against the policy rejected the idea that the Government should provide additional relief for purchasers who have not performed on the high-priced contracts.

The following summarizes the major comments and suggestions received and the agency's response to these in the final policy. The final policy reflects full consideration of all comments received.

General Comments

A major issue raised by many respondents was whether the proposal

provided additional contract relief. Those holding sales and in need of additional time to amortize the high values were in support of the procedures. Others felt that the relief afforded to purchasers from the 1984 buy-out legislation and the agency's 5-year extension program was sufficient and that holders of the remaining high-priced contracts should be required to complete them fully in the current contract term or default them and suffer the consequences. Many respondents felt that any change in contract terms at this date would not be fair to purchasers who did perform their high-priced contracts and would reward irresponsible bidding practices and erode the concept that contracts must be performed as specified under the terms and conditions prescribed in their making.

The Forest Service has given much consideration to whether this deferred payment policy rewards poor bidding practices or erodes the fundamental tenets of contracting. The agency is confident that the deferred payment policy does neither. Experience clearly demonstrates that default of sales leads to losses by the Government and economic disruption; avoiding default is clearly in the public interest. In the last 7 years, the Government has experienced default on approximately 2,000 contracts with default damages of $284 million. Collection efforts to date on the defaulted sales have resulted in deposits of only $20 million, less than 10 percent on the total claimed amount. Most of the funds have been collected from sureties or from cash deposited on the sales. The Government has lost approximately $50 million in default damages as a result of bankruptcy actions. Many cases are now before the courts and the Government expects lengthy delays and costly litigation before resolution. In summary, the Forest Service has decided that performance of the remaining high-priced sales provides the greatest benefit to the public. The policy requires purchasers to perform contracts removing the entire volume and paying the full contract price. There is no relief from payments due the United States granted under the policy. The policy changes only the schedule of when full payment will be received, requiring interest for any period the payment is delayed, and a fully secured promissory note.

Comments on Specific Features of the Policy

Promissory Note Procedures. The interim policy stated the deferred payment modification was to be authorized only after receipt of a properly prepared and executed promissory note, on a form provided by the Forest Service, for the total amount of the deferred stumpage value. The note must be fully secured by a form of security acceptable to the Forest Service and allow for unconditioned payment upon demand by the Forest Service. The note requires quarterly payments to amortize the amount of the note. Interest is assessed against the accrued amount of deferral or the remaining note balance whichever is less. The interest rate is equal to the average market yield of outstanding Treasury obligations with remaining years to maturity of 5 years. The note period is generally for 5 years.

The provision for selection of the Treasury rate of interest received the most comments of any feature of the interim policy. Most respondents indicated that the rate was too low and, thereby, was a subsidy to qualifying purchasers. This was stated to be particularly unfair to purchasers who had performed contracts and to competitors who must pay the commercial rate of interest to borrow current working funds. Eight respondents indicated that such a subsidy was not warranted and that rates for the program should be at the corporate borrowing rate, prime rate, or higher. The Forest Service has analyzed this issue and concurs that the interest rate should be increased. It was not the agency's intent to provide a low-cost borrowing alternative for firms that are capable of securing funds from commercial sources. The Forest Service surveyed banks in the Northwest and had discussions with Federal Reserve Bank representatives. Based on inputs received, the final policy raises the rate of interest charged under the promissory note to the prime rate of interest as determined by the Federal Reserve.

The prime rate of interest listed in the Federal Reserve Statistical Release H.15, Selected Interest Rates, Instrument, Bank Prime Loan will be used. The Selected Interest Rates (H.15) release for February, May, August, and November will be used as the basis for the promissory note quarterly interest charges. The rate used from the Selected Interest Rates sheet will be the average monthly rate listed respectively for the months of January, April, July, and October. This revised rate basis is determined to be at least equal to commercial bank rates for a fully secured loan. The prime rate requirement will be required as of the effective date of the final policy.

Six respondents indicated that the 10-year term for the promissory note was too long, that firms should be capable of amortizing the deferred amount in 5 years. There was further comment that the criteria for granting the additional term which was to be based on "compelling need" were not adequately specified. One respondent indicated that compelling need decisions for the additional note term could open the Regional Forester to charges of "cronyism." The Forest Service has established explicit criteria for the determination of compelling need. These criteria have been used since implementation of the interim policy and are being incorporated in the final policy.

The following information is needed to support the granting of additional promissory note term beyond 5 years: Purchaser must provide a financial projection for the deferral period beyond 5 years. The projection must be examined by an independent Certified Public Accountant (CPA), with an accompanying report in accordance with the agency's financial analysis standards and guidelines. The CPA's examination and report must comply with professional pronouncements issued by the AICPA-Auditing Standards Board "Statement On Standards For Accountants' Services On Prospective Financial Information"—specifically the 1985 pronouncement entitled "Financial Forecasts and Projections" and the related "Forecast/Projections Guide" and "Forecast/Projection Statement." The CPA will produce all reports referred to in the pronouncement including the Statement of Financial Position, Results of Operations, Statement of Cash Flows (in accordance with FASB 95 the Projected Financial Statements will include a "Statement of Cash Flows" (direct method) in place of the Statement of Changes In Financial Position") and Summaries of Significant Assumptions and Accounting Policies. This projection must disclose projected cash flow and working capital balances for the period requested. The deferral period beyond 5 years can only extend to the point where either the cumulative cash flow or working capital become positive, taking into account the deferral payments.

Two respondents indicated that the Forest Service should allow use only of corporate sureties, irrevocable letters of credit, or securities of the United States as security for bonding on the promissory note. The respondents felt the use of assets as security for the note could leave the Government with an asset that is subject to depreciation or a loss in value due to a change in market.

One of the respondents indicated that the Forest Service would not be able politically to foreclose due to community employment consideration.

The agency does not agree that forms of security should be limited. Accordingly, the final policy allows consideration of other security for the note. However, new forms of security would have to be approved by the Chief of the Forest Service after full analysis of their value and determination of collection potential. The Forest Service is not going to accept "at risk" security, but believes it reasonable to retain the capability to consider alternative forms of security, if such forms meet the test of securing the government's interests.

One respondent was concerned that the Forest Service was requiring the purchasers to maintain the sale performance bond until final payment of the promissory note. The Forest Service has not changed the performance bond requirements; the bond will be returned as currently prescribed in the contract.

One respondent wanted the Forest Service to require the use of the performance bond for the payment obligation under the promissory note. The Forest Service does not have the authority to unilaterally change the terms of the bonding obligation of the performance bond to cover the promissory note arrangement. The agency needs a clean statement of obligation for the payment obligations assumed by the note guarantor. This requires a separate bond and surety agreement.

Sales Eligible for Modification. Under the interim policy to be eligible for payment deferral, timber sales must meet the following criteria: (1) The bid date must be prior to January 1, 1982; (2) the remaining stumpage must have an average value per MBF that exceeds the average bid value for the previous 6-calender months on the National Forest where the sale is located by at least $50; and the contract must have sufficient contract period remaining to allow for removal of remaining timber prior to expiration of the contract.

Many of the respondents objected to the procedure of allowing sales to be deferred on a categorical basis. They agreed that the pre-1982 sales were uneconomic to harvest but disagreed that all purchasers holding pre-1982 inventories should be granted a modification for deferred payments. One respondent indicated that purchasers who recently acquired sales through third party agreements were aware of the potential losses resulting from the high-priced sales. The respondent stated that allowing a purchaser to defer payment on sales that were recently acquired would not be necessary because the liability of the high-priced timber was considered in the business transaction and compensated for in the price for the assumption of the contracts. Two respondents indicated that purchaser need, as well as sales criteria, should be considered in granting the deferral. These reviewers felt that only purchasers that had a financial necessity for the deferral should be allowed to defer payment. It was suggested that a case-by-case approach that looks at the total financial condition of the applicant would be fairer and more equitable to the responsible firms of the industry that have completed their high-priced sales. One respondent suggested that an impartial review board make the determination of need for the deferral procedure.

All of the programs to resolve the economic problems created by the high-priced bidding expectations of the late 1970's and early 1980's were categorical. The various extension procedures and the legislative initiative, the Federal Timber Contract Payment Modification Act were applied to selected sales; sales bid prior to January 1, 1982. All purchasers holding sales were allowed to participate. The Forest Service will continue to apply selection criteria in the same manner established for previous initiatives for resolving the high-priced sale situation. The primary reason the respondents requested additional purchaser selection criteria was to eliminate the perceived financial advantage afforded by the low cost borrowing rate in the interim policy. The decision to use the prime rate of interest in the promissory note for the final policy eliminates any financial advantage associated with borrowing funds at the lower Treasury obligations rate of interest. Therefore, there is no need for additional screening criteria for applicants. The final policy will continue to use only the categorical sales selection criteria.

A number of respondents suggested that the determination of high-priced sales using the average forest bid value plus $50 established a floor rate that was too low. There was concern that the prices currently paid for low value salvage material would produce an average bid value that was too low and allow sales that were not actually high-priced to qualify for deferral. Review of the pre-1982 sales data indicates that the average bid value floor rate is not significant in terms of sale qualification. Most of the remaining pre-1982 sales are very high priced. The average bid values are well in excess of the floor rates established under the interim policy. However, the average bid value determination is significant in establishing the amount that can be deferred on a qualifying sale. In response to this comment, the final policy provides that, in computing the 6-months average bid rate, the Forest Service will select sales that reflect regular sale program offerings, such as green sawlog sales. Sales consisting primarily of low value salvage material will not be included in the computation of the forest floor rates.

Two respondents requested that an additional criterion be established to allow no more than 50 percent of the bid value to be deferred. Adoption of the procedure to utilize only regular sale offerings in establishing the forest average bid values will increase the floor rates sufficiently to develop deferred amount totals that are less than 50 percent of the average bid value for most sales qualifying under the policy. Therefore, the final policy does not need to establish an additional requirement of a deferral ceiling of 50 percent of bid value.

A number of respondents indicated that purchasers should not be allowed to select individual sales for deferral but rather should be required to submit their entire high-priced portfolios for deferral. This suggestion was made to ensure that a purchaser did not elect for deferral on the more profitable sales and be allowed to default on the less profitable offerings. The Forest Service feels that the individual sale selection process should be allowed as indicated in the interim policy. Due to changing market demands, a purchaser has no way of determining whether sales can be logged in future markets. The decision to defer payment is market driven and is dependent on dollar margins resulting from prices received for lumber. It would be extremely difficult for a purchaser to make an aggregate decision affecting sales that will be logged in future years. Moreover, exposing sureties and banks to a purchaser's total liability for the entire high-priced sales portfolio would make it virtually impossible for a firm to get the needed security for the program.

Modification of Payments. Under the interim policy payment specifications for timber stumpage removed under the contract can be modified to allow payment deferral. The deferred payment rate per MBF is determined at the time of modification. The deferred value will be the difference between the average current contract value in MBF and the current average bid value of the Forest sales plus $50. The Contracting Officer determines the Forest sales average

value using sales sold in the 6-calendar months immediately prior to the request for modification. Modification of the contract is contingent on the prior execution of a promissory note for the estimated amount of payment to be deferred.

The comments from respondents on the procedures for modification of payments suggested the Forest Service should consider a species pricing criterion for determining high-priced sales rather than average tract value. The Forest Service intends to use the average remaining value in MBF and average bid value in MBF as criteria for determining both qualifying sales and the amount of the deferral. The actual deferral is accomplished on an individual species basis for those species groups that have rates per MBF above the forest floor rate. Species bids on individual sales result from a variety of purchaser bidding strategies; a wide range in values makes it very difficult to meaningfully determine an average species price. The Forest Service feels that an average tract value determination is more representative for the high-priced value determination and computation of the deferral amount.

One respondent suggested that rather than being $50 per MBF in all cases, the additional value to be added to the Forest average bid value should be determined on a percentage basis. The majority of the remaining pre-1982 sales are in northern California, western Oregon and western Washington. Review of the 6-month average bid rates for Region 6 indicates that a 10 percent add-on would produce a floor rate of $202 per MBF. The floor rate calculated with the $50 increment gives an average of $233 per MBF. The high-priced sale definition used by the agency for Region 6 sales has consistently been sales values in excess of $225 per MBF. This analysis indicates that the $50 add-on gives the better approximation of high-priced sales. Accordingly, the final policy retains the $50 add-on.

Modification of Payment Guarantee Requirements of the Contract. No comments were received from respondents on this section. However, the Forest Service has added a statement to the final policy to clarify that the advance deposit requirements remain in effect until the time of removal when the payment obligation is established.

Limitation on Application of Deferred Payment Modifications. Under the interim policy, retroactive payment deferral is not allowed for previously harvested volumes. Moreover, the performance bond cannot be reduced under the deferred payment procedures.

The use of the term "harvested" in the interim policy prompted one respondent to suggest that the Forest Service should consider that all timber cut but not yet removed should be eligible for inclusion in the payment deferral program. The respondent indicated that inclusion in the deferral program of as much eligible timber as possible can serve only to further the goal of encouraging contract performance. The final policy now specifies that payments cannot be retroactively modified for volumes harvested and removed from the sale area. The deferred rates will be effective for all applicable volume removed during the initial payment period. All volume reported on the timber sale statement of account for the month the modification becomes effective will be charged for under the deferred rate procedures.

Breach. No comments were receive on this section. Therefore, these provisions of the interim policy are adopted in the final without change.

Further Comments

Four respondents provided suggestions that the Forest Service provide relief for high-priced timber sales contracts by adopting a "test case" proposal offered by one of the lumber firms in southwest Oregon. The Secretary of Agriculture reviewed this proposal and decided that it should not be authorized. The proposal was declined on the basis of equity to those purchasers that have met their contractual obligations and the fair expectation of the Government to performance of valid contractual obligations.

Key Features of the Final Policy

Having considered the comments received, the Forest Service is adopting a final policy on modification of timber sale contracts to allow payment deferral on high-priced sales with the changes noted in the foregoing discussion of comments. The key features of the final policy are listed below.

Sales eligible for modification. To be eligible for payment deferral modifications, timber sale contracts must meet the following criteria:

1. The bid date must be prior to January 1, 1982;

2. The remaining stumpage must have an average value per MBF that exceeds, by $50 per MBF, the average bid value for the previous 6-calendar months on the National Forest where the sale is located.

3. The contract must have sufficient contract period remaining to allow for removal of the remaining timber prior to expiration of the contract.

To make a payment deferral modification, the Contracting Officer must find that such a modification to unexecuted portions of the contract will not be injurious to the United States.

The January 1, 1982, cutoff date was selected because, in the Federal Timber Contract Payment Modification Act, Congress has identified the period immediately prior to this date as a bidding period when cumulative market effects resulted in excessive bidding for Federal timber.

High-priced sales are defined as sales with an average current contract value per MBF, that exceeds the average bid value for sales sold in the previous 6-calendar months on the National Forest where the qualifying sale is located, plus $50 per MBF. The average bid value for the individual forest was selected because it reflects values for the market area where the sale is located.

Authorized officials of current holders of qualifying contracts must request payment deferral in writing. The current holder is the firm currently recognized by the Forest Service as being legally responsible for contract performance. Deferred payment is not limited to companies who bid the sales.

Requests for modification of a qualifying contract will be accepted at anytime during the sale period.

Modification of Payments. Under the final policy, the payments for stumpage will be reduced by a deferred amount covered by a promissory note. The deferred payment rate per MBF will be determined at the time of modification. The deferred value will be the difference between the current average bid value of the forest sales, plus $50 per MBF and the average current contract value in MBF. The average bid value of Forest sales, plus $50 per MBF is the floor rate for the procedure. In computing the 6-months average bid rate, the Forest Service will select sales that reflect regular sale program offerings, such as green sawlog sales. Sales consisting primarily of low value salvage material will not be included in calculating the forest floor rate. The Contracting Officer will use the average for the 6-calendar months immediately prior to the request for modification in determining the amount of the payment deferred. Only the species rates above the average bid rate plus $50 per MBF (the floor rate) would be subject to payment deferral. The amount of deferral of an individual species rate above the average bid value per MBF plus $50 will be weighted proportionally, using the ratio between the remaining value of the species and the total remaining value of all species with rates above the average bid rate

plus $50 per MBF. The weighting of species value above the floor rate to determine the amount of payment deferral by species will develop a payment rate that reflects original bid values. The determination of the amount subject to deferral will be calculated using advertised volumes at the time the sale was offered adjusted by any subsequent contract modification.

Modification of the contract will be contingent on the prior execution of a promissory note on a form provided by the Forest Service for the amount of the payment estimated by the Forest Service as being deferred. More than one note per sale, executed annually, may be considered for individual sales. The amount of harvest volume included in the note will be in accordance with the Forest Service approved plan of operation. The average current contract value for the combined total estimated volume to be removed will be used to determine the amount of payment deferral for the multiple notes. The multiple note procedure will allow the note and interest amount to reflect estimated seasonal removal volumes. This will preclude having to charge for the principal on large volumes that have to be scheduled for logging in successive years. The multiple notes may be consolidated for billing and payment purposes.

These modifications will not change current contract rates which are used for determining Removal Schedule Payments established pursuant to the Multi-Site Extension Policy of 1983. Purchaser credit effectiveness will be calculated using current contract rates under the terms of the contract.

Modification of the payment guarantee requirements of the contract. The requirements of the contract related to advance deposits and payment guarantees in lieu of deposits will remain unchanged until title passes pursuant to contract standard provision B8.11. After removal, deposits will be satisfied by deposits equal to the revised current payment amounts as established under the formula for calculating deferred payments. The Government is protected as to the amount of the deferred payment by the fully secured promissory note. In the event of an overcut, an advance cash deposit or payment guarantee in lieu of deposit must equal the total stumpage value for cut timber that is not covered by the promissory note. This requirement will ensure that the value of the volume harvested above the estimated volumes is covered by payment guarantee. Full payment or revision of the promissory note must be made for the deferred value associated with the overcut.

Limitation on application of deferred payment modifications. Retroactive payment deferrals will not be allowed for volumes previously harvested and removed from the sale area. All applicable volume reported on the timber sale statement of account for the month the modification becomes effective will be charged for using the deferred rate procedures. The performance bond amount will not be reduced under the deferred payment procedures.

Breach. Failure to make a note payment will result in suspension of operations and breach of the provision for deferred payment. A defaulted note could result in contract termination.

Promissory Note Procedures. The promissory note will be for the amount of the payment deferred, as estimated by the Forest Service. The contract holder may select the promissory note term, generally up to 5 years. Regional Forester authorization will be required for note periods in excess of 5 years. The maximum note period is 10 years. Authorization for the additional period will be based on a determination that the purchaser has a compelling need. Purchasers must provide Regional Foresters a financial projection to support the need for a promissory note term beyond 5 years. The projection must be examined by an independent CPA, with an accompanying report in accordance with the Agency's financial analysis standards and guidelines.

The CPA examination and report must comply with professional pronouncements issued by the AICPA-Auditing Standards Board "Statement On Standards For Accountants' Services On Prospective Financial Information"—specifically the 1985 pronouncement entitled "Financial Forecasts and Projections" and the related "Forecast/Projections Guide" and "Forecast/Projection Statement". A CPA must produce all reports referred to in the pronouncement including the Statement of Financial Position, Results of Operations, Statement of Cash Flows (in accordance with FASB 95 the Projected Financial Statements will include a "Statement of Cash Flows" (direct method) in place of the Statement of Changes In Financial Position") and Summaries of Significant Assumptions and Accounting Policies. This projection must disclose projected cash flow and working capital balances for the period requested. The deferral period beyond 5 years can only extend to the point where either the cumulative cash flow or working capital become positive, taking into account the deferral payments.

The Regional Forester will coordinate the granting of the additional note term with the State Director of the Bureau of Land Management if the purchaser has BLM sales that meet qualifications for deferral under the BLM policy for deferred payments.

The note principal amount will be due in equal quarterly payments. The initial principal payment will be due on January 1 of the year following the date of note execution. The remaining payments will be due April 1, July 1, October 1, and January 1. Interest will begin to accrue on the amount of deferral at the time stumpage payment for deferred timber is due. Interest will be calculated on the accrued amount of the deferral or the outstanding remainder of the note, whichever is less. Interest will be billed quarterly. The note must be executed and presented to the Forest Service prior to modification of contract terms. The interest rate will be adjusted at each payment and will be equal to the prime rate of interest listed in the Federal Reserve Statistical Release H. 15, Selected Interest Rates, Instrument, Bank Prime Loan. The Selected Interest Rates (H. 15) release for February, May, August, and November will be used as the basis for the promissory note interest charges. The rate used from the Selected Interest Rates sheet will be the average monthly rate listed respectively for the months of January, April, July, and October.

Payment of the note must be secured by an acceptable form of security as specified in the Forest Service Finance and Accounting Handbook (FSH 6509.11k, Chapter 80), available at all Forest Supervisor Offices. Examples of acceptable forms of security include bonds by an acceptable surety, irrevocable letters of credit, or securities of the United States. Additional forms of security may be utilized if after analysis they are deemed acceptable by the Chief of the Forest Service. The security amount must be sufficient to cover the entire amount of the note. The contract holder or surety, where applicable, may make pre-payment of all or a portion of the outstanding remainder of the note on the date of any quarterly payment.

The amount of the deferred payment value used for the note will be initially calculated using the original advertised contract volumes as adjusted by any subsequent contract modification. The actual principal amount will be recalculated at the completion of harvest of the volume covered by the note, when the exact amount of the deferred value is known. The note will

be revised to reflect actual obligations. Actual Forest Service scaled or payment unit volume will be used to determine the note value.

The amount of the bond security may be reduced to reflect the current amount of the promissory note obligation during the note period.

The note payments may be assumed by the surety if the principal is unable to make the quarterly payments.

If contract term adjustment for 30 days or more is granted, after the contract modification, the note obligation will be revised to reflect adjusted harvest volumes resulting from approved delays.

Implementation of Final Policy. The key change between the interim and final policy is the use of the prime rate of interest for the promissory note interest requirement. To effect the transition between the interim policy and the final policy on interest rate requirements for promissory notes, the date of postmark of the purchaser's request for modification of a sale will be used to determine the interest rate basis to be used in the promissory note. Requests postmarked on or after the effective date of the final policy will be subject to promissory note charges at the prime rate of interest as provided in the final policy. Sales modifications requested under the interim policy will be subject to promissory note charges equal to the average market yield of outstanding Treasury obligations with remaining years to maturity of 5 years.

However, to receive notes with the interest rate provided in the interim policy, purchasers must execute the modifications requested under the interim policy and applicable promissory notes prior to December 31, 1989. All promissory notes executed after December 31, 1989, will require note interest charges at the prime rate of interest. These limitations are necessary to avoid negating the higher interest requirements of the final policy.

This policy is being issued as an Interim Directive to Forest Service Handbook 2409.15 Chapter 30.

Regulatory Impact

This action has been reviewed under U.S. Department of Agriculture policy and procedures as well as submitted to the Office of Management and Budget for review pursuant to Executive Order (E.O.) 12291. It has been determined that this policy does not have the effects of a major rule as defined in E.O. 12291. The procedure implemented by this policy will not have an annual effect on the economy of $100 million or more will not result in major increases in costs for consumers, individual industries, Federal, State, or local government agencies or geographic regions, and will not have significant adverse effects on the ability of United States-based industries to compete with foreign-based enterprises in domestic or export markets. It does not change the amount a purchaser contracted to pay for National Forest timber, although it will affect the timing of when a purchaser will have to pay the full price for stumpage under a Forest Service contract. The deferred payment will be made under the terms of a fully secured promissory note. The note will require interest charges as consideration for payment deferral.

The timing of payments to the Government will be delayed but the note interest will compensate for the deferral. The risk of nonpayment will be avoided by requiring a fully secured promissory note. Counties who in the areas with high-priced sales who share in revenues generated from Federal timber sales will experience a short-term deferral in receipts. However, the short-term effects are likely to have far less adverse impact than if these sales were defaulted. Since purchasers will eventually pay the full contract value, the long term receipts to affected counties will be far greater than would be received if the sales were defaulted and resold. The procedures will contribute to the economic well-being of timber-dependent communities, the orderly flow of timber to market and receipts to Treasury, strengthen the orderly accomplishment of resource management objectives, and reduce administrative costs associated with collection of claims against defaulting purchasers.

It has also been determined that this policy will not have significant economic impact on a substantial number of small entities. The policy works to preserve the long range revenues to affected counties and to maintain employment in the area and, thus, reduces the certain adverse economic impacts these entities would experience in the event of default and bankruptcy of purchasers of these high-priced sales.

Based on both experience and environmental analysis, this policy will have no significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4). Furthermore, utilization of this policy is at a qualifying purchase's discretion and a written request is not required in any specified format. The policy would not result in additional procedures or paperwork as defined in the Paperwork Reduction Act and 5 CFR Part 1320.

Date: April 19, 1989.

George M. Leonard,

Associate Chief.

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Friday
May 12, 1989

Part V

Department of Housing and Urban Development

24 CFR Parts 905 and 960

Preference for Elderly Families and Discretionary Preference for Near Elderly Families in Public Housing Projects for Elderly Families; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Parts 905 and 960

[Docket No. 89-R-1417; FR-2505]

RIN 2577-AA69

Preference for Elderly Families and Discretionary Preference for Near Elderly Families in Public Housing Projects for Elderly Families

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This rule implements section 111 of the Housing and Community Development Act of 1987 by (1) codifying the existing practice of providing elderly families a tenant selection preference for admission to public housing projects for elderly families and (2) permitting a public housing agency (PHA) to give "near elderly" families a tenant selection preference for admission to public housing projects for elderly families when the PHA determines that there are not enough eligible families to fill all the units that are currently vacant or expected to become vacant in the next 12 months.

EFFECTIVE DATE: June 20, 1989.

FOR FURTHER INFORMATION CONTACT: Edward Whipple, Rental and Occupancy Branch, Office of Public and Indian Housing, Room 4206, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 426-0744; TDD number for hearing and speech impaired persons (202) 426-0015. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. Overview

Section 111 of the Housing and Community Development Act of 1987 (1987 Act) amended section 3(b)(3) of the U.S. Housing Act of 1937 (42 U.S.C. 1437a) (1937 Act) to establish a preference for elderly families for admission to public housing projects for elderly families. This amendment gave statutory recognition and affirmation to a longstanding policy of HUD.

Section 111 also created a discretionary selection preference for "near elderly" families in projects for elderly families when the PHA determines that there are not enough eligible elderly families to fill all the units that are currently vacant or expected to become vacant in the next 12 months. Whether or not to provide a preference for the "near elderly" is discretionary with the PHA. The statute permits a PHA to admit otherwise qualified near elderly families to a project for elderly families ahead of other non-elderly families when the statutory standard is met. (As used in this document, the term PHA includes an Indian Housing Authority.)

On October 14, 1988, HUD proposed a rule to implement section 111 (53 FR 40240). The rule defined an "elderly family" as a family whose head or spouse (or sole member) is at least 62 years of age, or is a disabled or a handicapped person, and a "project for elderly families" as any public housing project or portion of a project assisted under the 1937 Act (other than under section 8 or 17) that was designated for occupancy by elderly families at its inception or for which the PHA gives a preference to elderly families in tenant selection (with HUD approval) to the entire project or a portion of the project. A "near elderly family" was defined as a family whose head or spouse (or sole member) is at least 50 years old but under the age of 62 years.

The proposed rule provided that, before exercising the discretionary preference for near elderly families, a PHA must make reasonable efforts to attract eligible elderly families not currently being assisted, as well as, where appropriate, eligible elderly families currently residing in general occupancy projects. These outreach efforts were designed to enable the PHA to determine whether the statutory standard—an insufficient number of eligible elderly families to fill all the units currently vacant or expected to become vacant in the next 12 months—has been met.

II. Public Comments

HUD received a total of 16 comments on the proposed rule from nine housing authorities, five advocacy groups for the elderly and handicapped, a legal assistant orgnization, and an association of housing officials. The commenters generally supported the proposed rule, and focused on specific provisions that are discussed below.

Discretionary Preference for Near Elderly Families

One commenter addressed the discretionary preference for near elderly families, stating that the rule should clarify that the discretionary preference does not mean that any PHA that allows near elderly families must also allow non-elderly families if there are not enough elderly and near elderly families to fill all vacant units. The commenter expressed concern over the safety and welfare of elderly families if non-elderly families are allowed to move into projects designed for the elderly, especially since many of these projects have inadequate facilities for non-elderly families with small children.

PHAs must make every effort to keep vacancies to a minimum. If a PHA has insufficient demand from elderly families to fill all units in its projects for the elderly, and the PHA elects to adopt the near elderly preference, the PHA would admit near elderly families first, then other non-elderly families. Section 111 does not provide a PHA a basis to stop filling vacancies simply because the pool of near elderly applicants may be exhausted.

The size of units available in projects for the elderly could, of course, restrict which non-elderly families could be served there. Normally, the PHA would not be able to accommodate larger families in those projects. All applicants for public housing must be evaluated to determine that they will not reasonably be expected to have a detrimental effect on other tenants or on the project environment.

Definition of Elderly Family

Two commenters expressed the concern that the inclusion of the handicapped and the disabled in the definition of an elderly family has created a stressful living environment within elderly projects for persons over 62 years of age. According to one commenter, the deinstitutionalization of the developmentally disabled has created problems in many elderly projects. Because the developmentally disabled meet the definition of an elderly family, their admission to elderly projects has changed the character of some of the projects. This commenter asked that the rule give a priority to persons over 62 years of age or persons who are physically handicapped when a vacancy occurs in projects for elderly families.

The definition of an elderly family (§§ 905.315(c)(1) and 960.405 of the proposed rule), which includes persons at least 62 years of age, disabled persons, or handicapped persons, is the same definition that appears in 24 CFR Part 912—Definition of Family and Other Related Terms; Occupancy by Single Persons. It is taken from the statutory definition in section 3(b)(3) of the 1937 Act. HUD is preparing a report to Congress concerning the challenges of housing seniors and physically, mentally, and developmentally disabled persons, as well as other single persons.

in projects which previously housed mostly seniors. Although HUD recognizes that this is an area that needs special attention, we do not believe this rule, which is limited to implementing the provisions of section 111, is the place to address the issue.

There is no statutory basis in the definition of elderly family, or in the preference given to elderly families in projects for the elderly, to give applicants who are 62 years or older or are physically disabled a preference over applicants who are mentally or developmentally disabled. Such disparate treatment would be an apparent violation of section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on handicap, or type of handicap, among otherwise qualified individuals in programs receiving Federal financial assistance.

Outreach Efforts

Sections 905.315(d)(3) and 960.407(c) of the proposed rule required that, before electing the discretionary preference for near elderly families, a PHA must conduct outreach to attract eligible elderly families, including those groups that historically have been least likely to apply and, where appropriate, elderly families residing in general occupancy projects. HUD received the most comments on this provision of the rule. One commenter believed the rule should define the term "outreach" to include one-on-one contact and house-to-house activity, with explicit requirements to contact those with language/communication difficulties and the functionally illiterate. This commenter also asked that PHAs be required to relate actively and continually to advocacy groups for the disabled and the elderly the availability of units.

One commenter believed the rule should require PHAs to file with HUD an outreach plan detailing efforts to be used to attract eligible elderly family applicants, while another thought the discretionary preference for the near elderly should only be instituted where the PHA furnishes HUD ample documentation proving there are no elderly families wishing to be admitted. According to the latter, the PHA should submit its waiting list to HUD and, where there are no elderly families on the list, demonstrate that news of the vacancies had been circulated among the elderly community.

The PHA, not HUD, is in the best position to determine which methods of outreach would be most appropriate in attracting the elderly families needed to fill its vacant units. "The Public Housing Occupancy Handbook," 7465.1 REV-2, provides suggestions on conducting outreach in paragraph 2-3, "Maintaining a Well-Balanced Application Pool." Depending on the locality, some methods would work better than others. There is insufficient basis for HUD to infringe on the PHA's discretion in this area unless the PHA fails to carry out its outreach responsibilities.

Another commenter suggested that the rule establish the right of the public to review information from the PHA used to justify its position that there are no eligible elderly families to fill current or expected vacancies. HUD believes this would be an inappropriate intrusion, since state privacy laws and state freedom of information laws govern the rights of the public to view PHA records.

According to one commenter, the need of near elderly families is sometimes much greater, and, therefore, should be given preference. Section 111, however, gives elderly families priority for projects for the elderly. Elderly applicants interested in living in that type of project would have to be offered assistance before near elderly families could be served, even if the need of some near elderly families may seem greater.

A comment from a housing authority questioned the usefulness of requiring PHAs to conduct outreach in situations where there is a history of underutilization of units in specific elderly projects, since this would only serve to place an unnecessary administrative burden on PHAs. However, HUD believes it is appropriate for the PHA to conduct outreach to attract elderly families before adopting the discretionary preference for near elderly families.

Admission of Elderly Families to General Occupancy Projects

One commenter stated that the rule should clarify that elderly residents of general occupancy projects are under no obligation to move to elderly projects and that elderly residents of general occupancy projects who are currently overhoused may transfer to an appropriately sized unit within an existing or other general occupancy project rather than be required to move to an elderly project. While the rule would require a PHA to conduct outreach efforts among elderly family residents of general occupancy projects, it would not require that those residents move to projects for the elderly. If an elderly family is properly housed in a general occupancy project, the PHA would not be in a position to compel that family to transfer to a project for the elderly. If the elderly family is overhoused, however, the PHA's transfer policy and the availability of appropriate size unit would determine where the elderly family would need to move.

Another commenter was concerned that the preference for elderly families will eliminate the possibility of housing handicapped and disabled families in general occupancy projects, since the proposed rule would permit a PHA to give a preference to near elderly families in elderly projects only when there has been underutilization by elderly families.

The rule requires that elderly families, which includes disabled and handicapped persons, be given a preference for units in projects for the elderly. HUD does not intend, however, to preclude elderly families, including disabled and handicapped persons, from being admitted to general occupancy projects. HUD agrees that, in some circumstances, it may benefit a young handicapped or disabled person to be housed in a general occupancy project, and HUD does not want to limit this option. Since the wording of the last sentence in §§ 905.315(d)(2) and 960.407(b) could be misinterpreted, HUD is clarifying the wording in the final rule. The PHA may admit eligible near elderly families to projects for the elderly if there are elderly families on the waiting list but none of them is interested in moving into the project that has the vacancy.

Other Occupancy Preference and Restrictions

In §§ 905.315(e)(3) and 960.409(c), the proposed rule provides that the 10 percent limitation on admission of families without a Federal preference over families with a Federal preference that may initially receive assistance in any one-year period will not apply in the following situations: (1) Elderly families without a Federal preference who are given preference for admission over non-elderly families with a Federal preference; and (2) nearly elderly families without a Federal preference who are given preference for admission over other non-elderly families with a Federal preference. Although supporting this provision of the rule as a benefit for PHAs, one commenter believed that it would be difficult and costly to modify current computer programs so that proper selection can be followed and documented.

HUD has attempted to implement section 111 in as simple and straightforward a manner as possible. The near elderly preference is optional. PHAs will have to determine whether

the benefits of implementing this preference according to the provisions of the rule outweigh any difficulties they foresee in modifying their selection procedures or computer programs.

Under this rule (§§ 905.315(e)(4) and 960.409(d)), a near elderly applicant who is a single person, as that term is defined in § 912.2, may be given a preference for admission over other single person applicants to projects for the elderly. However, the admission of near elderly single persons is subject to the 15 percent single person occupancy limitation fescribed in § 912.3.

One commenter addressed this issue, stating that the purpose of the rule is not served if a PHA must count near elderly single persons toward its single person occupancy limitation, which requires HUD approval before filling any units with single persons. The commenter wrote that, if a PHA has already reached the limit allowed for single persons, the PHA is precluded from using the discretionary preference for near elderly single persons.

Section 111 does not increase the number of persons who are eligible for public housing or change the limitations on the percentage of single persons that can be admitted. Section 111 deals with the order in which applicants are selected. It permits PHAs to maintain the character of projects for the elderly by giving near elderly families a preference over other non-elderly families when there are not enough elderly families available to fill current or expected vacancies.

HUD regulations required that a HUD Field Office limit the number of units within the jurisdiction of a PHA that can be occupied by single persons to not more than 15 percent of the units in the public housing and Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation programs within that jurisdiction. The 15 percent limit applies to all units under the jurisdiction of a PHA and does not impose a limit on the number of units occupied by single persons that can be authorized for any particular project or program.

Section 3(b)(3) of the 1937 Act, as amended, provides that the 15 percent limitation on the housing of single persons can be exceeded, up to 30 percent, if the vacant dwelling units are not otherwise likely to be occupied within the next 12 months because of their condition or location. This provision is not yet reflected in HUD regulations, which still refer to the 15 percent limitation. HUD is preparing a rule for proposal in the near future to implement the increase in the single person occupancy limitation.

Applicability of the Rule

Two commenters believed the rule should be expanded to include the Section 8 Housing Assistance Payments programs for New Construction, Substantial Rehabilitation, and Moderate Rehabilitation, because many PHAs combine the waiting lists for those programs with public housing waiting lists. HUD does not believe that the rule should be broadened to cover Section 8 programs. Section 111, which is explicit in its application to public housing projects, is directed toward helping PHAs reduce public housing vacancies. It will not be difficult for PHAs with a combined waiting list to apply the near elderly preference only in selecting applicants for public housing projects for the elderly and not for Section 8 projects.

III. Other Matters

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street SW., Washington, DC 20410.

This rule does not constitute a "major rule" as that term is defined in section 1(d) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it would not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Undersigned hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities because administering the preference for elderly families and the discretionary preference for near elderly families in projects for elderly families should not entail significantly greater expense to the PHA than the PHA would normally incur in carrying out its tenant selection process.

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that the policies contained in this rule do not have a potential significant impact on family formation, maintenance, and general well-being and, thus, are not subject to review under the Order. The rule would assist PHAs to provide housing to a broader range of tenants, especially in projects that have experienced vacancy problems, which will assist families to afford decent, safe, and sanitary housing of their choice. The General Counsel has also determined, as the Designated Official for HUD under section 6(a) of Executive Order 12612, *Federalism*, that the policies contained in this rule do not have federalism implications and, therefore, are not subject to review under that Order. The rule is only a procedural change to a program with a history of Federal and local cooperation. The voluntary nature of the program is fully consistent with the concept of federalism.

This rule was listed as item 1030 in the Department's Semiannual Agenda of Regulations published at 54 FR 16708 on April 24, 1989, under Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance Program number is 14.850.

List of Subjects

24 CFR Part 905

Grant programs—Indians, Low and moderate income housing, Homeownership, Public housing.

24 CFR Part 960

Public housing.

Accordingly, 24 CFR Parts 905 and 960 are amended as follows:

PART 905—INDIAN HOUSING

1. The authority citation for Part 905 continues to read as follows:

Authority: Secs. 201, 202, 203, 205, United States Housing Act of 1937, as added by the Indian Housing Act of 1988 (Pub. L. 100–358, 42 U.S.C. 1437aa, 1437bb, 1437cc, 1437ee); secs. 3, 4, 5, 6, 9, 11, 12, 16, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437b, 1437c, 1437d, 1437g, 1437i, 1437j, 1437n); sec. 7(b), Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Part 905, Subpart C, is amended by adding § 905.315 to read as follows:

§ 905.315 Preference for elderly families and discretionary preference for near elderly families in projects for the elderly.

(a) *Purpose.* The purpose of this section is:

(1) To establish a preference for Elderly Families for admission to projects for Elderly Families; and

(2) To permit an IHA to give a preference to Near Elderly Families for admission to projects for Elderly Families when the IHA determines, in accordance with paragraphs (d)(2) and (3) of this section, that there are not enough eligible Elderly Families to fill all the units that are currently vacant or expected to be vacant in the next 12 months.

(b) *Applicability.* This section applies to all dwelling units in rental projects or portions of rental projects for the elderly assisted under the U.S. Housing Act of 1937 where the projects are owned by or leased to IHAs and leased or subleased by IHAs to tenants. It does not apply to Section 23 and Section 10(c) leased housing projects or the Section 23 Housing Assistance Payments Program where the owners enter into leases directly with the tenants, or to the Section 8 Housing Assistance Payments Program, the Low-Rent Housing Homeownership Opportunities Program (Turnkey III), or the Mutual Help Homeownership Opportunities Program.

(c) *Definitions.*—(1) *Elderly Family.* A Family whose head or spouse (or sole member) is at least sixty-two years of age, or a Disabled Person or a Handicapped Person (as those terms are defined in 24 CFR 912.2). An Elderly Family may include two or more elderly, Disabled or Handicapped Persons living together, or one or more of these persons living with one or more Live-in Aides (as defined in 24 CFR 912.2).

(2) *Near Elderly Family.* A Family whose head or spouse (or sole member) is at least 50 years of age but below the age of 62 years.

(3) *Project for Elderly Families.* As used in this section, a project for Elderly Families is a project or portion of a project to which this section is applicable under paragraph (b) that was designated for occupancy by the elderly at its inception (and that has retained that character) or, although not so designated, for which the IHA gives preference in tenant selection (with HUD approval) for all units in the project (or for a portion of the units in the project) to Elderly Families.

(d) *Selection preferences.* (1) An IHA must give a preference to Elderly Families in determining priority for admission to projects for Elderly Families.

(2) An IHA may give a preference to Near Elderly Families in determining priority for admission to projects for Elderly Families when the IHA determines that there are not enough eligible Elderly Families to fill all the units that are currently vacant or expected to become vacant in the next 12 months. In no event may an IHA admit a Near Elderly Family if there are eligible Elderly Families on the IHA's waiting list that would be willing to accept an offer for a suitable vacant unit in that project.

(3) Before electing the discretionary preference in paragraph (d)(2) of this section, an IHA must conduct outreach to attract eligible Elderly Families, including, where appropriate, Elderly Families residing in general occupancy projects.

(e) *Other preferences; single person occupancy.* (1) An IHA must follow its policies and procedures for applying the Federal preferences contained in § 905.313 when selecting applicants for admission from among Elderly Families.

(2) If an IHA elects the discretionary preference in paragraph (d)(2)of this section, the IHA must follow its policies and procedures for applying the Federal preferences contained in § 905.313 when selecting applicants for admission from among Near Elderly Families.

(3) Elderly Families that do not qualify for a Federal preference contained in § 905.313 and that are given preference for admission under this section over non-elderly families that qualify for such a Federal preference are not subject to the 10 percent limitation on admission of families without a Federal preference over families with such a Federal preference that may initially receive assistance in any one-year period, as set out in § 905.313(b)(2)(ii).

(4) Near Elderly Families that do not qualify for a Federal preference contained in § 905.313 and that are given preference for admission under this section over other non-elderly families that qualify for such a Federal preference are not subject to the 10 percent limitation on admission of families without a Federal preference over families with such a Federal preference that may initially receive assistance in any one-year period, as set out in § 905.313(b)(2)(ii).

(5) If a Near Elderly applicant is a Single Person, as that term is defined in § 912.2 of this chapter, the Near Elderly Single Person may be given a preference for admission over other Single Persons to projects for the elderly. Notwithstanding any preference over other Single Persons, a Near Elderly Single Person's selection for admission is subject to the single person occupancy limitation rule contained in § 912.3, including provisions for HUD approval.

PART 960—ADMISSION TO, AND OCCUPANCY OF, PUBLIC HOUSING

1. The authority citation for Part 960 is revised to read as follows:

Authority: Secs. 3, 5, 6, 16, United States Housing Act of 1937 (42 U.S.C. 1437a; 1437c, 1437d, and 1437n); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. Part 960 is amended by adding Subpart D, to read as follows:

Subpart D—Preference for Elderly Families and Discretionary Preference for Near Elderly Families in Public Housing Projects for the Elderly

Sec.
960.401 Purpose.
960.403 Applicability.
960.405 Definitions
960.407 Selection preference.
960.409 Other preferences; single person occupancy.

Subpart D—Preference for Elderly Families and Discretionary Preference for Near Elderly Families in Public Housing Projects for the Elderly

§ 960.401 Purpose.

The purpose of this subpart is to establish a preference for Elderly Families for admission to public housing projects for Elderly Families, and to permit a PHA to give preference to Near Elderly Families for admission to public housing projects for Elderly Families when the PHA determines, in accordance with § 960.407(b) and (c), that there are not enough eligible Elderly Families to fill all the units that are currently vacant or expected to be vacant in the next 12 months.

§ 960.403 Applicability.

This subpart applies to all dwelling units in public housing projects or portions of projects for the elderly assisted under the U.S. Housing Act of 1937 where the projects are owned by or leased to PHAs and leased or subleased by PHAs to tenants. It does not apply to Section 23 and Section 10(c) leased housing projects or the section 23 Housing Assistance Payments Program where the owners enter into leases directly with the tenants, or to the Section 8 Housing Assistance Payments Program, the Low-Rent Housing Homeownership Opportunities Program (Turnkey III), the Mutual Help Homeownership Opportunities Program, or to Indian Housing Authorities. (For applicability to Indian Housing Authorities, see Part 905 of this chapter.)

§ 960.405 Definitions.

Elderly Family. A Family whose head or spouse (or sole member) is at least

sixty-two years of age, or a Disabled Person or a Handicapped Person (as those terms are defined in 24 CFR 912.2). An Elderly Family may include two or more elderly, Disabled or Handicapped Persons living together, or one or more of these persons living with one or more Live-in Aides (as defined in 24 CFR 912.2).

Near Elderly Family. A Family whose head or spouse (or sole member) is at least 50 years of age but below the age of 62 years.

Project for Elderly Families. As used in this subpart, a project for Elderly Families is a project or portion of a project to which this subpart is applicable under § 960.403 that was designated for occupancy by the elderly at its inception (and that has retained that character) or, although not so designated, for which the PHA gives preference in tenant selection (with HUD approval) for all units in the project (or for a portion of the units in the project) to Elderly Families.

§ 960.407 Selection preference.

(a) A PHA must give a preference to Elderly Families in determining priority for admission to projects for Elderly Families.

(b) A PHA may give a preference to Near Elderly Families in determining priority for admission to projects for Elderly Families when the PHA determines that there are not enough eligible Elderly Families to fill all the units that are currently vacant or expected to become vacant in the next 12 months. In no event may a PHA admit a Near Elderly Family if there are eligible Elderly Families on the PHA's waiting list that would be willing to accept an offer for a suitable vacant unit in that project.

(c) Before electing the discretionary preference in paragraph (b) of this section, a PHA must conduct outreach to attract eligible Elderly Families, including:

(1) Those groups that historically have been least likely to apply; and,

(2) Where appropriate, Elderly Families residing in general occupancy projects.

§ 960.409 Other preferences; single person occupancy.

(a) A PHA must follow its policies and procedures for applying the Federal preferences contained in Subpart B of this Part when selecting applicants for admission from among Elderly Families.

(b) If a PHA elects the discretionary preference in § 960.407(b), the PHA must follow its policies and procedures for applying the Federal preferences contained in Subpart B of this part when selecting applicants for admission from among Near Elderly Families.

(c) Elderly Families that do not qualify for a Federal preference contained in Subpart B of this Part and that are given preference for admission under § 960.407(a) over non-elderly families that qualify for such a Federal preference are not subject to the 10 percent limitation on admission of families without a Federal preference over families with such a Federal preference that may initially receive assistance in any one-year period, as set out in § 960.211(b)(2)(ii).

(d) Near Elderly Families that do not qualify for a Federal preference contained in Subpart B of this Part and that are given preference for admission under § 960.407(b) over other non-elderly families that qualify for such a Federal preference are not subject to the 10 percent limitation on admission of families without a Federal preference over families with such a Federal preference that may initially receive assistance in any one-year period, as set out in § 960.211(b)(2)(ii).

(e) If a Near Elderly applicant is a Single Person, as that term is defined in § 912.2 of this chapter, the Near Elderly Single Person may be given a preference for admission over other Single Persons to projects for the elderly. Notwithstanding any preference over other Single Persons, a Near Elderly Single Person's selection for admission is subject to the single person occupancy limitation rule contained in § 912.3, including provisions for HUD approval.

Dated: May 5, 1989.

Thomas Sherman,

Acting General Deputy, Assistant Secretary for Public and Indian Housing.

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federal register

Friday
May 12, 1989

Part VI

State Justice Institute

Proposed Policy Statement; Notice

STATE JUSTICE INSTITUTE

Policy Statement

AGENCY: State Justice Institute.

ACTION: Proposed policy statement.

SUMMARY: This statement sets forth the Institute's proposed plan for allocating funds in FY 1990 and subsequent years to projects providing education and training for judges and court personnel.

DATE: The Institute invites public comment on the statement until June 12, 1989.

ADDRESS: Comments should be sent to: State Justice Institute, 120 S. Fairfax St., Alexandria, Va. 22314.

FOR FURTHER INFORMATION CONTACT: David I. Tevelin, Executive Director, or Catherine Pierce, Deputy Chief, Program Division, at the above address, or at (703) 684-6100.

SUPPLEMENTARY INFORMATION: This Statement sets forth the State Justice Institute's proposed long-range plan to support projects to educate judges and other key court personnel. The Statement is divided into three sections: *Background; Goals;* and *Funding Strategy.*

The *Background* section describes the Institute's statutory mission and its experience in judicial education to date; the *Goals* section presents the Board of Directors' assessment of that experience and its statement of SJI's fundamental goals in the area; and the *Strategy* section explains how the Institute plans to work toward those goals in the future.

The proposed funding strategy is premised on the Institute's experience and goals as set forth below. On the basis of the comment received, the Strategy will be revised as appropriate and included in the Institute's proposed FY 1990 Grant Guideline for further comment. The final Strategy will be incorporated in the final 1990 Guideline.

I. Background

The State Justice Institute Act of 1984, as amended, 42 U.S.C. 10701, et seq., accords the education of judges and key court personnel a high priority in the allocation of SJI grant funds. One of the Institute's four principal statutory duties is to "encourage education for judges and support personnel of State court systems through national and State organizations, including universities." 42 U.S.C. 10702(b)(4). A similar purpose is stated in the list of authorized funding areas. See 42 U.S.C. 10705(a)(5). Section 10705(c)(2) of the statute provides further direction by authorizing awards "to support education and training programs for judges and other court personnel, for the performance of their general duties and for specialized functions, and to support national and regional conferences and seminars for the dissemination of information on new developments and innovative techniques."

The importance of judicial education to Congress has been matched by its importance to the Institute's applicants and grantees since the time the Institute received its first concept papers in April, 1987. Nearly one-third of the almost 800 concept papers SJI has received since its establishment have proposed a judicial education project. (As used in this Statement, "judicial education" means education and training for judges and for court personnel.)

Because so many of the papers received in the first round of FY 1987 funding proposed similar projects, particularly those submitted by the major national judicial education providers, and because it was apparent that there has been little communication or coordination among them in formulating their proposals, the Board invited representatives of five providers—the National Center for State Courts, the National Judicial College, the National Council of Juvenile and Family Court Judges, the National Association of State Judicial Educators, and the American Academy of Judicial Education—to meet with Institute staff in June, 1987. The purpose of the meeting was to determine whether their proposals, and the educational benefits to be provided, might be improved by greater cooperation and sharing of resources.

The meeting produced short-term success and raised the prospect of significant long-term cooperation for the benefit of State court judges and court staff nationwide. Several proposals funded by the Board in FY 1987 were joint projects between national providers, including a grant to maintain a Judicial Education Network comprised of the organizations listed above and others, including the Federal Judicial Center and the Association of American Law Schools. Other cooperative projects were funded in FY 1988.

In 1988, the Institute took another important step to inform its judgment about how best to use its resources to provide more effective judicial education around the country. SJI commissioned a panel of individuals from a variety of disciplines to reflect on judicial education and provide the Institute with their views about the most prudent use of its judicial education funds. The members of the panel were Justice Christine Durham of the Utah Supreme Court, Dennis Catlin, Director of the Michigan Judicial Institute; Frederick Lawrence, a professor of ethics and law at Boston College; Charles Claxton, a professor of education at Memphis State University; and David Schultz, a professor of law at the University of Wisconsin. The study was coordinated by Thomas Hodson, a lawyer, journalist, and former Ohio municipal court judge and U.S. Supreme Court Fellow. Copies of the panelists' papers are available from SJI upon request.

In October, 1988, the Board held a public forum at which national and State judicial educators presented their views on SJI's role in judicial education. On the basis of the panelists' papers and observations, the views of the judicial education providers, and its own insights and experiences, the Board revised the judicial education Special Interest category in the FY 1989 Grant Guideline to include new emphasis on the development of in-State education programs, technical assistance support to State judicial educators, and the use of effective adult education principles in delivering judicial education.

Specifically, the category included:

i. Development by a State of minimum standards for its court education programs;

ii. Preparation by a State of long range plans to ensure a comprehensive training program and the effective allocation of limited court education resources;

iii. Development of an organization to plan and implement education programs for judges and court personnel in those States which currently have little or no capacity to develop a State court education program. Applicant States must demonstrate a commitment to maintain and enhance their court education program after the grant period; and

iv. Development of innovative continuing education and career development programs for all court personnel, including but not limited to programs that emphasize "team," training.

The Board expressed particular interest in supporting projects providing "technical assistance to State and national judicial educators for the transfer of educational curricula and resources, faculty development techniques, delivery techniques, evaluation methods, and plans for the development and administration of judicial education programs."

Applicants were also asked to assure that faculty "understand and apply adult education techniques and teaching methods; provide opportunities for structured interaction among participants; develop tangible products and materials for use by the faculty, participants, and other judicial educators; employ a process for the recruitment of qualified and effective

faculty; and develop sound methods for evaluating the impact of the training."

Although the FY 1989 funding decisions have yet to be made, the Board was encouraged by the substantial number of provocative concept papers that responded to each of the issues noted in the Guideline.

II. Goals

In reflecting on the more than 200 judicial education concept papers it has reviewed over the past two years, the Board of Directors found that the Institute has been asked to support a diverse range of important projects. The needs described by the papers have been corroborated and supplemented by more than 500 concept papers responding to other Institute Special Interest areas; by information provided by judges, court personnel and judicial educators in different forums around the country; and by the experiences of the members of the Board themselves. In the Board's judgment, the convincing demonstration of a broad variety of needs requires the Institute to be receptive to an equally broad array of education projects that promise to meet those needs.

The educational projects proposed to SJI are diverse in their goals, objectives, approaches, and sources.

Goals and Objectives. The Board recognizes that judicial education has a number of diverse, but equally important and interrelated goals. Some projectes are designed to orient or educate the individual judge, others to improve court management, and still others to broaden judicial perspectives and attitudes about justice.

Within each of those goals is a variety of objectives. For example, within the category of projects aimed at helping the individual judge are projects that orient new judges, provide continuing education about legal subjects and procedures, and promote personal enrichment or effective methods of managing stress. Projects directed at effective court management might address court administration issues, technological developments, problem-solving techniques, or human relations topics. Programs that seek to broaden judicial perspectives include courses probing the philosophy of justice; the personal decisionmaking process; the humanities; and legal, ethical, and moral dilemmas.

Approaches. Education of judges and court personnel can be provided effectively in a variety of ways. Classroom settings can be useful, especially when the instructor is skilled at drawing out the experiences and reflections of his or her students, but quality education can also be imparted by other methods. Individualized instruction through benchbooks or home study materials (such as video tapes or interactive computer software) can be effective and sometimes necessary, particularly for judges and court officials in rural areas or in States lacking formal judicial education programs or adequate travel budgets.

At the other end of the spectrum, national or regional conferences, seminars, and symposia can often provide uniquely valuable education. Such conferences often are able to attract leading speakers and experts otherwise unavailable to State court audiences. These events also offer participants the chance to meet and exchange experiences with their colleagues from around the nation, both formally and informally. SJI's experience in co-sponsoring three successful national conferences (on "State of the art" criminal court issues, dispute resolution, and AIDS) has confirmed the Board's belief in the value of such meetings.

Another valuable educational tool is technical assistance delivered by experts to jurisdictions needing "hands-on" help in dealing with a problem. Because many of these problems have been successfully confronted by other courts across the nation, an already existing group of experts—judges, court personnel, researchers, and others—is often available to help resolve seemingly intractable issues. The impact of technical assistance is most effective when its recipients can be educated to share their experiences with, and teach, others.

Sources of Education. A wide variety of educational services are available through national and State judicial education providers, as well as other non-profit organizations and universities. National judicial education providers can offer support and guidance to State programs and, like national conferences, can provide experiences unavailable at the State level. National organizations also can provide important services and products with nationwide impact.

SJI grants have helped national providers enhance their own curriculum; present their courses off-site; develop new resources, such as electronic bulletin boards and data bases; subsidize participants' costs through scholarships; and offer services such as curriculum modules, faculty development workshops, and technical assistance to State educators. Although the Institute has refrained from providing "organizational maintenance" grants to national providers, on-going support for activities such as those listed above is available under the Grant Guideline (see section IX of the FY 1989 Guideline).

State judicial education programs vary widely in their scope and size. SJI funds can help States diversify and expand their own programs, as well as promote the transfer of effective in-State training programs and products to other jurisdictions. As noted above in the discussion of the judicial education category in the FY 1989 Grant Guideline, the Institute also recognizes that some State programs need SJI, or another outside source of support, to provide "seed money" for an in-State judicial education program. Such initial funding is often critical to demonstrating the project's benefits to State legislators and judicial leaders whose support is needed to assure a commitment of continued State funding after the SJI grant ends. The Institute accordingly invited Fiscal Year 1989 applications from each of the seven States that submitted concept papers demonstrating the need for seed money to support judicial education initiatives in their States.

Finally, two general SJI policies are of special relevance to projects proposing to educate judges and court personnel. The first is the Board's belief that the Institute's grant program should be "field-driven" rather than "Board-driven". Both in fashioning this Statement and in making individual funding decisions, the Board seeks to be responsive to the most important education and training needs articulated by judges and court personnel.

The second is the Board's strong interest in providing useful *products* to its audience nationally. SJI grants typically include funds to produce and disseminate final reports, training materials, video tapes, software, and other practical items that can actually be used by the interested audience. Except for those grants aimed at providing seed money to in-State programs, the national utility of grant products will continue to be an expectation in the judicial education area in particular.

After considering the Institute's statutory mission and experience, the Board has concluded that the role of the State Justice Institute in judicial education is to provide financial assistance to the States and other organizations providing quality education for judicial personnel; promote cooperation and collaboration among all judicial education providers; and stimulate new ideas and new programs in the field of judicial education.

To implement those principles, the Board believes it is SJI's role to:

(1) Promote the sharing and exchange of products, information, and ideas between and among the States and national providers;

(2) Document what is effective and ineffective by demonstration and evaluation;

(3) Assure that judges and court personnel are trained in the areas most important to them, as identified by the Guideline's Special Interest categories or otherwise; and

(4) Support the development and use of educational techniques that assure that what is taught will be learned and applied.

In seeking to reach these objectives, the Institute's goal is *not* to control judicial education or even to draw a blueprint for the future of judicial education but only to assure the most effective use of its funds.

III. Funding Strategy

In the future, the SJI Board anticipates funding judicial education projects which fall within one of the five areas set forth below.

A. Ongoing Programs of Proven Merit
B. State Initiatives
C. National and Regional Training Programs
D. Technical Assistance
E. Conferences.

The Board recognizes that important judicial education programs fall within each of the above areas and that funding priorities may shift from year to year depending on the needs of the State judiciaries and the availability of funds. The Board anticipates setting annual funding "targets" for each area in the Judicial Education special interest category of each year's Grant Guideline. The target amounts are not intended to be fixed allocations, but rather a statement of the Board's interests and expectations for the year. If the Board determines that the number or quality of the proposals submitted in a given area does not warrant the expenditure of the target amount, the funds may be reallocated to other areas or other Special Interest categories.

During Fiscal Years 1987 and 1988, a total of approximately $6.1 million of SJI funds was awarded to support judicial education projects (including conferences and educational projects funded under Special Interest categories other than "judicial education"). During FY 1987, judicial education grants totalled approximatley $2.9 million, or 44 percent of all grant funds awarded. During FY 1988, approximately $3.2 million was awarded for judicial education (about 34 percent of all grant funds awarded).

If the Institute's appropriation for FY 1990 remains at the same level as FY 1988 and 1989 ($10.98 million), approximately $9.8 million would be available for grant awards. The Board anticipates allocating up to $3,350,000 (approximately one-third of available grant funds) for the support of judicial education programs in FY 1990, distributing that sum among the five areas noted above. The Board expressly invites comment on the Strategy set forth below, as well as the amounts to be allocated to each area in FY 1990.

A. On-going Programs of Proven Merit

This category would include support for established exemplary programs that provide direct training to State trial court judges, State appellate court judges, and State court personnel. The Board has adopted criteria for On-going Support Grants in Section IX.B. of the FY 1989 SJI Grant Guideline. Pursuant to those criteria, an SJI project is eligible for on-going support if:

A. The project has been supported by a grant from the Institute and has been evaluated as a success;

B. The project is national in scope and provides a significant benefit to the State courts;

C. There is a continuing important need for the services, programs or products provided by the project as indicated by the level of use and support by members of the court community;

D. The project is accomplishing its objectives in an effective and efficient manner; and

E. It is likely that the service or program provided by the project would be curtailed or significantly reduced without Institute support.

On-going support grants are awarded for periods of up to 36 months, and the total amount of the grant is fixed at the time of the award. Each project receiving on-going support must include an independent program evaluation component assessing its effectiveness and operation throughout the grant period. The Board may also request that on-going support applicants set forth a plan for obtaining support from other funding sources. Maximum periods of support may also be established.

Allocation of Funds: It is anticipated that, in FY 1990, the Board would set aside of up to $750,000 of the $3,350,000 allocated for judicial education grants (approximately 22%) for on-going support grants to judicial education programs of proven merit.

B. State Initiatives

This category would include support for State-based training projects developed or endorsed by the State courts for the benefit of judges and other court personnel in a particular State. Funding of these initiatives would *not* include support for training programs conducted by national providers of judicial education unless such a program were designed specifically for a particular State and had the express support of the State Chief Justice, State Court Administrator, or State Judicial Educator.

The kinds of programs to be supported within this category would be defined by individual State need but could include:

1. The development of State-determined standards for judicial education;

2. The preparation of State plans for judicial education, including model plans for career-long education for the judiciary (e.g., new judge training and orientation followed by continuing education and career development);

3. Seed money for the creation of an ongoing State-based entity for planning, developing and administering judicial education programs;

4. The development of a pre-bench orientation program and other training for new judges;

5. The development of benchbooks and other educational materials; and

6. Seed money for innovative continuing education and career development programs, including training which brings teams of judges, court managers and other court personnel together to address topics of mutual interest and concern.

Allocation of Funds: During FY 1987, 9% of the grant funds awarded for judicial education went to State courts or other entities for State-based training projects. During FY 1988, only 3% of all grant funds for judicial education were awarded for this purpose. These low figures are, in part, reflective of the small number of papers that SJI received from State educators in FY 1987 and 1988. In FY 1989, however, a substantially larger number of State-based concept papers was received, and a high proportion of those States submitting papers were invited to submit formal applications.

On the basis of its experience in FY 1989, SJI expects to attract more concept papers and applications from the State courts and other units of State government which train State court judges and other personnel, and to award a greater number of grants to

such applicants in the future. Accordingly, in FY 1990, the Board would allocate up to $750,000 (or approximately 22%) of the $3,350,000 available for judicial education for this purpose.

C. National and Regional Training Programs

This category would include support for national or regional training programs developed by any provider, e.g., national organizations, State courts, universities, or public interest groups. Within this category, priority would be given to training projects which address SJI Special Interest categories or other issues of major concern to the State judiciary and other court personnel. Programs to be supported would include:

1. Training programs or seminars on topics of interest and concern that transcend State lines;
2. Multi-State or regional training programs sponsored by national organizations, State courts or universities; and
3. Specialized training programs for trial court judges, appellate judges, court administrators, bailiffs, or other court personnel.

Allocation of Funds: During FY 1987, the Institute awarded approximately 29% of judicial education grants for national training programs of this nature. During FY 1988, the Institute awarded approximately 39% of its judicial education grants for such programs. In FY 1990, up to $750,000 (or approximately 22% of judicial awards) would be allocated for this purpose.

D. Technical Assistance

Unlike the preceding categories which support direct training, "Technical Assistance" refers to coordination, support services, information dissemination and other activities necessary for the development of effective educational projects for judges and other court personnel. Projects in this category would focus primarily on the needs of the States and applicants would need to demonstrate clearly their ability to work effectively with State judicial educators.

Within this category, priority would be given to the support of projects focused on State-to-State, State-to-national, and national-to-State transfer of ideas and information. Support and assistance to be provided by such projects would include:

1. Development of educational curriculum and support materials;
2. Training faculty in adult education theory and practice;
3. Consultation on planning, developing and administering State judicial education programs;
4. Coordination and exchange of information among judicial education providers;
5. Collection and dissemination of information about exemplary adult and continuing judicial education programs;
6. Development of improved methods of evaluating court education programs; and
7. On-site assistance in any of the areas listed above.

Allocation of Funds: In FY 1987, the Institute spent approximately 18% of its judicial education grants on technical assistance. In FY 1988, SJI spent 12% of its judicial education funds on technical assistance. In FY 1990, up to $600,000 (or approximately 18%) of judicial education funds would be allocated for this purpose.

E. Conferences

This category would include support for regional or national conferences on topics of major concern to the State judiciary and other court personnel.

Allocation of Funds: During FY 1987, the Institute awarded approximately 11% of judicial education grants for conferences; in FY 1988, 20%. In FY 1990, the Board would allocate up to 15% (or approximately $500,000) for regional or national conferences.

Summary

The SJI Board of Directors proposes to allocate up to $3,350,000 for judicial education programs in FY 1990, including funding for technical assistance and conferences. The funds would be targeted for allocation as follows:

Ongoing Programs of Proven Merit	$750,000
State Initiatives	750,000
National/Regional Training Programs	750,000
Technical Assistance	600,000
Conferences	500,000
Total	3,350,000

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David I. Tevelin,
Executive Director.

[FR Doc. 89-11485 Filed 5-11-89; 8:45 am]
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federal register

Friday
May 12, 1989

Part VII

Environmental Protection Agency

40 CFR Part 135

Notice Requirements for Citizen Suits Under the Safe Drinking Water Act; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 135

[FRL-3458-5]

Notice Requirements for Citizen Suits Under the Safe Drinking Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Safe Drinking Water Act (SDWA) authorizes any person to sue an alleged violator of any requirement of the SDWA or its regulations or to sue the Administrator for failure to perform any non-discretionary duty. Before filing the suit, the person must give sixty days notice to various parties. The Act also directs the Administrator to develop regulations for this required notice. EPA is today publishing final regulations governing such notice. The regulations are similar to those implementing the notice of citizen suit provisions of the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA).

DATES: This regulation will become effective on June 12, 1989. For the purpose of judicial review this rule will be considered final agency action at 1:00 p.m. eastern time on May 26, 1989.

FOR FURTHER INFORMATION CONTACT: Randolph L. Hill, Office of General Counsel (LE-132W), U.S. EPA, 401 M Street SW., Washington, DC 20460. (202) 382-7700.

SUPPLEMENTARY INFORMATION:

Introduction

The Safe Drinking Water Act (SDWA) (42 U.S.C. 300f, et seq.) authorizes persons to commence a civil action against any person who is alleged to be in violation of any requirement prescribed by or under the statute, or against the Administrator for failure to perform any act which is not discretionary. SDWA section 1449(a); 42 U.S.C. 300j-8(a). These "citizen suits" must be preceded by notice of the intent to sue (to the Administrator, the alleged violator, and the State in which the alleged violation occurred) at least sixty days before the suit is filed. SDWA section 1449(b); 42 U.S.C. 300j-8(b). The SDWA directs the Administrator to promulgate regulations for this required notice. Id. EPA is promulgating such regulations by today's action. This rule applies to citizen suits concerning all programs under the SDWA. This rule was proposed on August 15, 1986 (51 FR 29426).

Prior notice of a citizen suit serves several purposes. Prior notice of an action alleging violations of the SDWA is intended to allow EPA or a State time to respond to the allegations with enforcement or other action. It is also intended to help eliminate duplicative actions. The SDWA precludes a citizen suit if "the Administrator, the Attorney General, or the State has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance. . . ." SDWA section 1449(b)(1)(B); 42 U.S.C. 300j-8(b)(1)(B). If EPA or the State is already prosecuting the alleged violator, the prior notice permits EPA to inform potential litigants that an action has been brought. Notice of alleged failure to perform a non-discretionary duty allows the Agency to avert litigation by performing the requested act, or by explaining why the act is discretionary or cannot be performed within the time allotted.

The citizen suit provision of the SDWA is similar to those in the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). Therefore, the regulations are similar to those already promulgated for RCRA at 40 CFR Part 254 and for the CWA at 40 CFR Part 135.

The SDWA notice regulation is straightforward and self-explanatory, except in one respect. Hazardous waste injection wells are jointly authorized by the SDWA and RCRA. RCRA, unlike the SDWA, does not require a sixty-day waiting period after notice of an alleged violation of Subtitle C of RCRA respecting hazardous waste. RCRA section 7002(c); 42 U.S.C. 6972. For citizen suits concerning injection wells, the Agency believes that the need for the waiting period turns on whether the citizen invokes jurisdiction under RCRA section 7002 or SDWA section 1449. Actions brought for alleged violations of Subtitle C of RCRA asserting jurisdiction under section 7002 are not subject to the waiting period, but actions for alleged violations of the SDWA relying on section 1449 for jurisdiction must be preceded by the sixty-day waiting period. The Agency believes that this interpretation is consistent with and properly implements the provisions in RCRA section 7002 and SDWA section 1449. The proposed version of this rule originally cited to RCRA section 1006, 42 U.S.C. 6905, as support for this conclusion; however, EPA believes that an interpretation of section 1006 and its applicability to SDWA procedural matters is not necessary to reach this conclusion.

Comments and Changes

EPA received only minor comments on the proposed rule. EPA summarizes those comments and its responses below.

One commenter suggested that the notice period begin when the last person receives notice. This seems to be the intent of the statute: every person is entitled to at least 60 days notice. EPA has reworded §§ 135.11 and 135.13 to clarify this intent.

The same commenter suggested that either the timing of the notice section (§ 135.13) refer to RCRA 7002(c) or that the RCRA citizen suit regulation at 40 CFR Part 254 be amended to clarify EPA's position on when the waiting period may be skipped. EPA added a sentence to § 135.13 codifying the position discussed in the preamble to the proposed rule and endorsed by this and other commenters.

Another commenter noted that it is confusing to have different waiting periods for RCRA and the SDWA, and urged us to resolve the difference. However, the difference is statutory and the Agency cannot change it by regulation. Another commenter urged EPA to treat the sixty-day delay as a non-jurisdictional requirement. Again, this is beyond the power of the Agency.

Another commenter said that notice ought to be given to the responsible state agency instead of the state attorney general, thereby ensuring direct notice to the state program office. EPA has been persuaded of the benefits of direct notice to the state agency. Consequently, EPA has changed the final rule to provide that in all cases when the state is entitled to notice, the responsible state agency will be notified. This parallels the citizen suit regulations for CWA and RCRA. EPA also believes that notice to the state attorney general is beneficial and therefore has decided to retain that notice provision in the regulation.

One commenter wanted plaintiffs to describe the source of information concerning the violation they allege. EPA believes this to be unnecessary and inappropriate at this stage of litigation. There are opportunities to learn the source of information either during pretrail discovery or settlement negotiations.

Office of Management and Budget Review

Executive Order 12291

EPA has determined that this regulation does not meet any of the criteria of a "major rule" as defined by Executive Order 12291, and therefore

does not require a regulatory impact analysis.

This rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

Paperwork Reduction Act

EPA has not prepared an information collection request under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) for the reporting requirements contained in this rule. EPA has received a total of ten or fewer notices of citizen suits under the SDWA in the past four years, three of which came from the same individual. In addition, the public reporting burden for individuals complying with this rule is estimated to average one hour or less. If the number of notices received by EPA substantially increases in succeeding years, EPA will prepare and solicit comment on an information collection request for today's rule, in accordance with 5 CFR 1320.14. In the meantime, any comments on the estimate of burden or any other aspect of the information collection requirements contained in this rule, including suggestions which may reduce the burden, should be sent to: Chief, Information Policy Branch (PM-223), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 or Director, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Regulatory Flexibility Act

EPA did not prepare a Regulatory Flexibility Analysis under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* I certify that this regulation will not impose significant impacts on a substantial number of small entities.

List of Subjects in 40 CFR Part 135

Public participation, Drinking water, Litigation notices.

Date: May 8, 1989.

William K. Reilly,

Administrator.

For the reasons set out in the preamble, Part 135 of Title 40 of the Code of Federal Regulations is amended as set forth below:

PART 135—PRIOR NOTICE OF CITIZEN SUITS

1. The authority citation for Part 135 is revised to read as follows:

Authority: Subpart A, issued under Sec. 505, Clean Water Act (33 U.S.C. 1365); Subpart B, issued under Sec. 1449, Safe Drinking Water Act (42 U.S.C. 300j-8).

2. Part 135 is amended by designating §§ 135.1 through 135.3 as Subpart A and by adding a new subpart heading, to read as follows:

Subpart A—Prior Notice Under the Clean Water Act

* * * * *

3. In Part 135, Subpart A, all references to "part" throughout Subpart A are revised to read "subpart."

4. Part 135 is amended by adding a new Subpart B, consisting of §§ 135.10 through 135.13 to read as follows:

Subpart B—Prior Notice Under the Safe Drinking Water Act

Sec.
135.10 Purpose.
135.11 Service of notice.
135.12 Contents of notice.
135.13 Timing of notice.

Subpart B—Prior Notice Under the Safe Drinking Water Act

§ 135.10 Purpose.

Section 1449 of the Safe Drinking Water Act (the Act) authorizes any person to commence a civil action to enforce the Act against an alleged violator of any requirements prescribed by or under the Act, or against the Administrator for failure to perform any duty which is not discretionary under the Act. No citizen suit may be commenced prior to sixty days after giving notice of the alleged violation to the Administrator, any alleged violator, and to the State. The purpose of this subpart is to prescribe procedures for giving the notice required by section 1449(b).

§ 135.11 Service of notice.

(a) Notice of intent to file suit pursuant to section 1449(a)(1) of the Act shall be served in the following manner upon an alleged violator of any requirement prescribed by or under the Act:

(1) If the alleged violator is an individual or corporation, service of notice shall be accomplished by certified mail, return receipt requested, addressed to, or by personal service upon, such individual or corporation. If a public water system or underground injection well is alleged to be in violation, service shall be upon the owner or operator. A copy of the notice shall be sent by certified mail, return receipt requested, to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which such violation is alleged to have occurred, the chief administrative officer of the responsible state agency (if any), and the Attorney General for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of the notice shall also be sent by certified mail, return receipt requested, to the registered agent (if any) of the corporation in the State in which the violation is alleged to have occurred.

(2) If the alleged violator is a State or local agency, service of notice shall be accomplished by certified mail, return receipt requested, addressed to, or by personal service upon, the head of such agency. A copy of the notice shall be sent by certified mail, return receipt requested, to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the chief administrative officer of the responsible state agency (if any), and the Attorney General for the State in which the violation is alleged to have occurred.

(3) If the alleged violator is a Federal agency, service of notice shall be accomplished by certified mail, return receipt requested, addressed to, or by personal service upon, the head of the Federal agency. A copy of the notice shall be sent by certified mail, return receipt requested, to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the Attorney General of the United States, the chief administrative officer of the responsible state agency (if any), and the Attorney General for the State in which the violation is alleged to have occurred.

(b) Service of notice of intent to file suit pursuant to section 1449(a)(2) of the Act shall be accomplished by certified mail, return receipt requested, addressed to, or by personal service upon, the Administrator of the Environmental Protection Agency, Washington, DC 20460. A copy of the notice shall be sent by certified mail to the Attorney General of the United States.

(c) Notice given in accordance with the provisions of this subpart shall be deemed to have been given on the date of receipt of service, if served personally. If service was accomplished by mail, the date of receipt will be considered to be the date noted on the return receipt card.

§ 135.12 Contents of notice.

(a) *Violation of standard or requirement.* Notice regarding an alleged violation of any requirement prescribed by or under the Act shall include sufficient information to permit the recipient to identify the specific

requirement alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of the alleged violation, and the full name, address, and telephone number of the person giving notice.

(b) *Failure to act.* Notice regarding an alleged failure of the Administrator to perform any act or duty under the Act which is not discretionary with the Administrator shall identify the provision of the Act which requires the act or creates the duty, and shall describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty, and shall state the full name, address, and telephone number of the person giving notice.

(c) *Identification of counsel.* All notices shall include the name, address, and telephone number of the legal counsel, if any, representing the person giving notice.

§ 135.13 Timing of notice.

No action may be commenced under section 1449(a)(1) or (a)(2) until the plaintiff has given each of the appropriate parties sixty days notice of intent to file such an action. Actions concerning injection wells disposing of hazardous waste which allege jurisdiction solely under section 7002(c) of the Resource Conservation and Recovery Act may proceed immediately after notice to the appropriate parties.

[FR Doc. 89-11479 Filed 5-11-89; 8:45 am]
BILLING CODE 6560-50-M

federal register

Friday
May 12, 1989

Part VIII

Office of Management and Budget

Cumulative Report on Rescissions and Deferrals; Notice

OFFICE OF MANAGEMENT AND BUDGET

Cumulative Report on Rescissions and Deferrals

May 1, 1989.

This report is submitted in fulfillment of the requirement of Section 1014(e) of the Impoundment Control Act of 1974 (Pub. L. 93-344). Section 1014(e) provides for a monthly report listing all budget authority for this fiscal year for which, as of the first day of the month, a special message has been transmitted to the Congress.

This report gives the status as of May 1, 1989 of six rescission proposals and 14 deferrals contained in the first four special messages of FY 1989. These messages were transmitted to the Congress on September 30 and November 29, 1988, and January 9 and April 18, 1989.

Rescissions (Table A and Attachment A)

As of May 1, 1989, there are no funds being withheld related to rescission proposals. Two of the six rescission proposals made by the prior Administration (R89-5 and R89-6, as described in Attachment A) continue to be supported by President Bush as offsets to supplemental requests.

Deferrals (Table B and Attachment B)

As of May 1, 1989, $5,960.8 million in budget authority was being deferred from obligation. Attachment B shows the history and status of each deferral reported during FY 1989.

Information from Special Messages

The special messages containing information on the rescission proposals and deferrals covered by this cumulative report are printed in the Federal Registers listed below:

Vol. 53, FR p. 39879, Wednesday, October 12, 1988

Vol. 53, FR p. 49530, Wednesday, December 7, 1988

Vol. 54, FR p. 1650, Friday, January 13, 1989

Vol. 54, FR p. 18234, Thursday, April 27, 1989

Richard G. Darman,

Director.

BILLING CODE 3110-01-M

TABLE A

STATUS OF 1989 RESCISSIONS

	Amount (In millions of dollars)
Rescissions proposed by President Reagan.....	143.1
Accepted by the Congress as of May 1, 1989.....	0
Funding made available.....	123.1
Funding never withheld.....	20.0

NOTE: President Bush continues to support two rescission proposals (identified as R89-5 and R89-6 in Attachment A) as offsets to pending supplemental requests, even though the related funds have been made available. They total $6.4 million.

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TABLE B

STATUS OF 1989 DEFERRALS

	Amount (In millions of dollars)
Deferrals proposed by the President.....	9,156.2
Routine Executive releases through April 1, 1989.. (OMB/Agency releases of $3,201.4 million and cumulative adjustments of $6.0 million)	-3,195.4
Overturned by the Congress.....	0
Currently before the Congress.....	5,960.8

Attachments

Attachment A - Status of Rescissions - Fiscal Year 1989

As of May 1, 1989 Amounts in Thousands of Dollars Agency/Bureau/Account	Rescission Number	Amount Previously Considered by Congress	Amount Currently before Congress	Date of Message	Amount Rescinded	Amount Made Available	Date Made Available	Congressional Action
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT								
Housing Programs:								
Subsidized housing programs.....	R89-1	20,000		1-9-89		(See note below.)		
Community Planning and Development:								
Urban development action grants.....	R89-2	51,651		1-9-89		51,651	2-28-89	
DEPARTMENT OF THE INTERIOR								
Fish and Wildlife Service:								
Land acquisition.....	R89-3	30,000		1-9-89		30,000	2-28-89	
National Park Service:								
Land acquisition and State assistance.....	R89-4	35,000		1-9-89		35,000	2-28-89	
DEPARTMENT OF JUSTICE								
Office of Justice Programs:								
Justice assistance.....	R89-5	5,000		1-9-89		5,000	3-16-89	
DEPARTMENT OF LABOR								
Employment Standards Administration:								
Black lung disability trust fund.....	R89-6	1,445		1-9-89		1,445	3-16-89	
TOTAL, RESCISSIONS.....		143,096	0			123,096		

NOTE. - The $20 million proposed for rescission in Rescission Proposal No. 89-1 was never withheld from obligation. Therefore, there was no need to release the funds.

Attachment B - Status of Deferrals - Fiscal Year 1989

As of May 1, 1989 Amounts in Thousands of Dollars Agency/Bureau/Account	Deferral Number	Amount Transmitted Original Request	Amount Transmitted Subsequent Change (+)	Date of Message	Cumulative OMB/Agency Releases (-)	Congressionally Required Releases (-)	Congressional Action	Cumulative Adjustments (+)	Amount Deferred as of 5-1-89
FUNDS APPROPRIATED TO THE PRESIDENT									
International Security Assistance									
Foreign military sales credit.....	D89-11	4,122,750		11-29-88	1,267,000				2,855,750
Economic support fund.....	D89-01	592,760		09-30-88					
	D89-01A		2,054,000	11-29-88	1,207,054				1,439,706
Military assistance.....	D89-12	457,000		11-29-88	141,500				315,500
International military education and training.....	D89-13	37,400		11-29-88	37,400				0
Agency for International Development									
International disaster assistance.....	D89-14	18,125		11-29-88	15,164				2,961
Special Assistance for Central America									
Promotion of stability and security in Central America.....	D89-2	1,000		09-30-88	1,000				0
DEPARTMENT OF AGRICULTURE									
Forest Service									
Expenses, brush disposal.....	D89-3	144,649		09-30-88	751				143,898
Cooperative work.....	D89-4	335,263		09-30-88					
	D89-4A		172,737	04-18-89	508,000				0
DEPARTMENT OF DEFENSE - CIVIL									
Wildlife Conservation, Military Reservations									
Wildlife conservation, Defense.....	D89-5	1,212		09-30-88					
	D89-5A		227	04-18-89					1,439
DEPARTMENT OF ENERGY									
Power Marketing Administration									
Southwestern Power Administration, Operation and maintenance.....	D89-6	2,800		09-30-88					
	D89-6A		5,600	04-18-89					8,400

Attachment B - Status of Deferrals - Fiscal Year 1989

As of May 1, 1989 Amounts in Thousands of Dollars Agency/Bureau/Account	Deferral Number	Amount Transmitted Original Request	Amount Transmitted Subsequent Change (+)	Date of Message	Cumulative OMB/Agency Releases (-)	Congressionally Required Releases (-)	Congressional Action	Cumulative Adjustments (+)	Amount Deferred as of 5-1-89
DEPARTMENT OF HEALTH AND HUMAN SERVICES									
Social Security Administration									
Limitation on administrative expenses (construction).....	D89-7	6,745		09-30-88					
	D89-7A		80	04-18-89					6,824
DEPARTMENT OF JUSTICE									
Office of Justice Programs									
Crime victims fund.....	D89-8	90,000		09-30-88					
	D89-8A		35,000	04-18-89					125,000
DEPARTMENT OF STATE									
Bureau for Refugee Programs									
United States emergency refugee and migration assistance fund, executive.....	D89-9	26,135		09-30-88					
	D89-9A		27,000	11-29-88	23,492			6,001	35,644
DEPARTMENT OF TRANSPORTATION									
Federal Aviation Administration									
Facilities and equipment (Airport and airway trust fund).....	D89-10	823,608		09-30-88					
	D89-10A		202,084	11-29-88					1,025,692
TOTAL, DEFERRALS.....		6,659,446	2,496,728		3,201,361	0		6,001	5,960,814

[FR Doc. 89-11548 Filed 5-11-89; 8:45 am]

BILLING CODE 3110-01-C

federal register

Friday
May 12, 1989

Part IX

The President

Proclamation 5974—Mother's Day, 1989

Federal Register
Vol. 54, No. 91
Friday, May 12, 1989

Presidential Documents

Title 3—

The President

Proclamation 5974 of May 10, 1989

Mother's Day, 1989

By the President of the United States of America

A Proclamation

On Mother's Day, Americans of all ages pause to express their deep gratitude and love for their mothers. Whether we do so in person, over the phone, or by honoring her memory, expressions of affection and appreciation for our mother are but a small reflection of the love and generosity she has bestowed on us.

A mother's love, while demonstrated daily in acts of tenderness and generosity, is always a source of wonder. Who can fathom the quiet thoughts of one who keeps in her heart a constant vigil over the child she has carried in her womb, rocked in her arms, and watched grow, with eyes full of worry, joy, and pride? Her devotion never fails to fill us with gratitude and awe.

Our mother is our first teacher and greatest advocate. In her voice, we hear the reassurance or gentle reproach that helps to guide us through times of doubt and decision. In her example, we discover the meaning of unconditional love.

A mother bears her child's pains and disappointments as if they were her own and celebrates every accomplishment as if no other child could achieve the same. She delights in every drawing of purple trees and lopsided houses fashioned in crayon by her child's small, uncertain hand because she knows that each one reveals his blossoming awareness of the world around him. A mother also rejoices as her child grows in wisdom and responsibility, is firm in instilling moral values, yet pardons every failure along the way. Selfless and forgiving, maternal love is the closest thing on earth to the perfect love of our Creator.

Today, we honor all those women who, by virtue of giving birth, or through adoption or marriage, are mothers. Each of us should let our mother know that she is ever close in our hearts, and that her many gifts to us are cherished and remembered—not only on Mother's Day, but throughout the year.

In recognition of the contributions of all mothers to their families and to the Nation, the Congress, by a joint resolution approved May 8, 1914 (38 Stat. 770), has designated the second Sunday in May each year as Mother's Day and requested the President to call for its appropriate observance.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim that Sunday, May 14, 1989, be observed as Mother's Day. I urge all Americans to express their love and respect for their mothers and to reflect on the importance of motherhood to the well-being of our country. I direct Federal officials to display the flag of the United States on all Federal buildings, and I urge all citizens to display the flag at their homes and other suitable places on that day.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of May, in the year of our Lord nineteen hundred and eighty-nine, and of the Independence of the United States of America the two hundred and thirteenth.

George Bush

[FR Doc. 89-11698
Filed 5-11-89; 12:14 pm]
Billing code 3195-01-M

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